

**Post-Hearing Submission by the Department of Trade,
Industry and Competition (the dtic) on Behalf of the Government of the Republic of South
Africa**

**Concerning the Annual Review of Country Eligibility for Benefits Under the African Growth
and Opportunity Act for Calendar Year 2025 (Docket No. USTR–2024–0006)**

1. Introduction

The Government of South Africa through the Department of Trade, Industry and Competition would like to take this opportunity to make a submission in response to the Federal Register Vol. 89, No. 94 calling for Submission of Post-Hearing Comments: Annual Review of Country Eligibility for Benefits Under the African Growth and Opportunity Act for Calendar Year 2025 under Docket Number USTR–2024–0006.

Prior to responding to the public comments by the International Intellectual Property Alliance (IIPA) made on 5 June 2024; and the National Pork Producers Council (NPPC) concerning South Africa’s eligibility for AGOA benefits as submitted on 31 May 2024, South Africa would first highlight the importance of the relationship that the country has with the United States, as well as the role of our country in regional value chains that are forming in the continent underpinned by AGOA.

2. Importance of the Relationship between South Africa and the United States

- In 2023, the US ranked as the 2nd largest destination for SA’s exports. As a source of imports, the US ranked as the 3rd largest. In the Americas region, the US ranks 1st as both an import and export partner for South Africa.
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- According to the US Bureau of Economic Analysis, South Africa was the largest investor from Africa into the United States, accounting for about 41% of Africa’s direct investment in the US. South Africa was the 2nd largest destination for US direct investment after Egypt, in 2023.
- Bilateral direct investment between SA and the US stood at US\$11.7 billion in 2023, a slight increase from US\$11.6 billion in 2021. SA direct investment in the United States was US\$4,5

billion in 2023, up from US\$4.1 billion in 2021. In the same period, US direct investment decreased to US\$7.4 billion, from US\$7.5 billion.

3. South Africa Anchoring Regional Value Chains in the continent

- In November 2023, South Africa hosted the 20th AGOA Forum in Johannesburg, and on the side-lines also hosted a “Made In Africa” exhibition which showcased Africa’s manufacturing capacity and importantly the regional value chains that are emerging in various sectors including autos, clothing and textile and agro-processing among others.
- South Africa remains an important anchor for regional value chains (RVC) in the continent.
- South Africa sources intermediary products from many countries in the region into its manufacturing sector and then exports final products to foreign markets including to the United States under AGOA.
- Using automotive sector as an example of regional value chains, the local automotive companies source leather seats from (*Lesotho, Namibia, Botswana and Zimbabwe*), wiring harnesses from (*Botswana, Namibia, Lesotho, eSwatini, Ghana, Nigeria, Zambia, Mozambique*), copper wiring from (*Zambia, Botswana, Eswatini, Zimbabwe, DRC, Namibia, Lesotho*), steering wheel components from Tunisia and rubber from (*Namibia, Lesotho, Botswana, Cote D’Ivoire, Nigeria, Malawi, Ghana and Cameroon*).
- These regional value chains are becoming important as the continent start implementing the AfCFTA and improving Africa’s industrial production base. These is providing a clear indication of how AGOA could be an important lever for the successful implementation of the AfCFTA. . Evidently, if any of the countries are excluded from AGOA, it would have a disruptive effect to Africa’s regional economic integration efforts.
- Imports of copper and copper alloys from Democratic Republic of Congo (\$102 million) and Zambia (\$100 million) into SA supports the manufacturing of electrical and electronic components. Imports of technically specified natural rubber are used in manufacture of vulcanised rubber for trye manufacturing. This is imported from countries such as Nigeria, Ghana and Cote D’Ivoire. Furthermore, South Africa imports \$119 million worth of ignition wiring sets and other wiring sets used in the manufacture of automotive tooling and vehicles engines.
- In most of instances, these imports into the South African automotive industry from other African countries as part of regional value chains, are higher than their exports to the US under AGOA.

- These put South Africa at the centre of regional value chains in the continent.

5. Concerns Raised by the International Intellectual Property Alliance (IIPA) relating to South Africa's Copyright Amendment Bill (CAB) and the Performers Protection Amendment Bill (PPAB)

The International Intellectual Property Alliance submitted these comments in response to Federal Register notice dated 05 June 2024 initiating Annual Africa Growth and Opportunity Act (AGOA) Eligibility Review of sub-Saharan Africa countries to receive AGOA benefits for the year 2024.

In its written comments, IIPA raises the following concerns about South Africa:

- South Africa's current legal regime fails to provide adequate and effective protection of copyrighted materials.
- Significant reforms are needed to South Africa's Copyright Act and Performers' Protection Act to bring the country's laws into compliance with international agreements, including the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and the WIPO Internet Treaties. For example, South Africa lacks basic protections required to enable trade in copyrighted materials in the digital environment.
- These basic protections should include the right of copyright owners to control the distribution of copies of their works and sound recordings, and to control the manner in which their works and sound recordings are communicated to the public.
- South Africa also lacks adequate protections for technological protection measures (TPMs), which foster many of the innovative products and services available online by allowing creators to control and manage access to copyrighted works (for example, via streaming services), and to diversify products and services. At the same time, TPMs enable consumers to enjoy desired content on a variety of platforms, in many different formats, and at a time of their choosing.
- In addition, South Africa's legal regime does not provide adequate civil remedies or criminal penalties to allow rights holders to recover their losses from infringement or to deter piracy. Without an adequate means to remedy infringement or deter piracy, the path for legitimate services to operate is difficult.

- While the intent of South Africa’s copyright reform process was to bring the country’s laws into compliance with international agreements, the bills that ultimately passed fell far short of international norms for the protection of copyrighted works in the digital era. Moreover, the copyright reform process failed to consider whether the proposed changes would be compliant with South Africa’s Constitution and international obligations. Further, as part of its required Socio-Economic Impact Assessment System (SEIAS) process, the government did not publish a SEIAS report to adequately measure the economic impact of the bills on South Africa’s creative sector.
- Enactment of the bills in their current form would place South Africa out of compliance with the AGOA eligibility criteria, the GSP eligibility criteria, international norms, and South Africa’s obligations under the TRIPS Agreement. It is critical that South Africa’s Parliament does not rush this process nor make only cosmetic revisions; instead, consistent with the President’s directives, South Africa’s Parliament should reassess the bills in their entirety for compliance with South Africa’s Constitution and its international obligations. Provisions that are not compliant should be redrafted or deleted from the bills, and any redrafting effort should be based on a meaningful economic impact study, as required under the government’s SEIAS protocols (which the Department of Trade, Industry and Competition still has not produced), and the advice of independent and qualified copyright and constitutional law experts and practitioners.
- The bills contain many provisions that lack clarity, risk major negative disruption of the creative industries, and pose significant harm to the creators they purport to protect. IIPA’s country report on South Africa, submitted to USTR as part of IIPA’s 2023 Special 301 submission includes a full description of the deficiencies in the two pending bills, as well as other deficiencies in South Africa’s legal and enforcement regimes. 28 Major issues of immediate and primary concern to the copyright industries are the following:
 - The bills would severely restrict the contractual freedom of authors, performers, and other rights holders, which is a key factor for the healthy growth of the entire creative sector.
 - The bills would create an overbroad amalgamation of copyright exceptions that includes an expansive “fair use” rubric (not in line with the U.S. doctrine) appended to a large number of extremely open-ended new exceptions and limitations to copyright protection (on top of the existing “fair dealing” provision), resulting in an unclear thicket of exceptions and limitations.

- The bills would unjustly interfere with and over-regulate the relationship between creative parties, including mandating the mode of remuneration for audiovisual performers (requiring payment of royalties), which would destroy producers' ability to finance content, and would block the ability of rights holders to exercise exclusive rights in their copyrighted works and sound recordings.
- The bills would not provide adequate criminal or civil remedies for infringement, including online piracy, and would deny rights holders the ability to effectively enforce their rights against infringers, thus thwarting the development of legitimate markets for copyrighted works and sound recordings.
- The bills' provisions on TPMs are inadequate, falling short of the requirements of the WIPO Internet Treaties, and the over broad exceptions to prohibitions on the circumvention of such measures would further impinge on the ability of legitimate markets for copyrighted materials to further develop.

6. Response by South Africa Government to Issues Raised by IIPA

The President of the Republic of South Africa, His Excellency President Ramaphosa raised reservations on the Bills and on 16 June 2020, the Copyright Amendment Bill (CAB) and the Performers' Protection Amendment Bill (PPAB) were referred back to Parliament. The specific constitutional reservations concerned the following: incorrect tagging of the bills; retrospective arbitrary deprivations of property; insufficient public consultations on the fair use provision; impermissible delegation of legislative power to the Minister; copyright exceptions; and consistency with South Africa's international treaty obligations.

Parliament undertook an extensive parliamentary process from August 2020 to end of February 2024. During the Parliamentary process, it was found and confirmed once again that the Copyright Amendment Bill (CAB) is constitutional. Parliament retained the fair use provision and the copyright exceptions as they were found to be constitutional and compliant with international obligations. Of note is that Parliament (Portfolio Committee) removed the retrospective royalties provisions with retrospective application; the bills were retagged to section 76; Minister's delegated legislative powers were removed from the Bill from royalties clauses, section 6A, 7A and 8A. Overall, the Bill was found to be compliant with international treaties and international

obligations. The royalty provisions were addressed to ensure fairness and equitable remuneration to authors and producers.

The National Assembly process was only confined to the 6 President's reservations. Both Bills were reopened entirely in the National Council of Provinces (the other House of Parliament) from October 2021 until February 2024. The process involved the Select Committee on Trade and Industry, Economic Development, Small Business Development, Tourism, Employment and Labour; provincial legislatures and provinces. Provincial public hearings were held between February and May 2023 because of the section 76 re-tagging. The 7 provinces voted in favour of the CAB which are Gauteng, Mpumalanga, Limpopo, Free State, North West, Northern Cape; one province abstained-KwaZulu Natal and one province voted against, Western Cape. The Select Committee retained fair use, copyright exceptions and all the clauses except few changes. During the negotiating mandates with provinces, some changes were made in the Bill. These changes were tabled at the Portfolio Committee on Trade and Industry in February 2024 and were adopted by the National Assembly in February 2024.

The issues IIPA has raised are not new and have been addressed previously and the public participation processes in Parliament recently have considered them again. The Bills were subjected to very extensive public participation that included further publications of the Bills to the public.

In general, the position in the CAB, on fair use, recognises that copyright regimes across the world are slowly moving away from the closed-list system to an open system, which will keep up with innovation, and changing digital environment. Fair dealing in our current Copyright Act is outdated, limited and static, and does not address the digital world. Fair use, on the other hand, is progressive, dynamic and future proof and 'digital-friendly'. Globally, research has found that fair use has not impacted negatively on the economy. On the contrary, there is evidence that shows that countries with open exceptions and fair use have high levels of innovation, economic growth and development. It is a fact that fair use was coded in the U.S. Copyright Act of 1976 and has not had to be amended, as it applies to new technologies as they arise. Other countries have also adopted fair use in their copyright laws and more countries are considering it, because it is 'future-proof' and benefits users and producers of information and knowledge. Its 4 factors give clarity to what can be used and reused.

The Technological protection measures (TPMs) provided in the CAB suffices and were subject to extensive deliberations and assessed against global best practices. Extensive amendments were added on TPMs during the Portfolio Committee process and subjected to an advertisement to the public and due to possible unintended consequences and concerns for the domestic consumer and competition related issues and others, the provisions in the CAB were retained. The parliamentary deliberations considered the extent of the TPMs and they were found to be sufficient in the South African context and in terms of best practice. It is more so because they are introduced for the first time in the copyright regime of South Africa.

The changes made to the CAB in the recent parliamentary process addressed concerns with royalties; clarifying contract related provisions; copyright enforcement measures, amongst others and strengthened the Bill further to ensure stronger protection and rights of rights holders. The treaty related amendments were considered to ensure alignment with international obligations. The sections include the making the work available by wire or wireless means and communicating the work to the public by wire or wireless means to the public for the published editions and computer programs. The amendments address the digital environment.

South Africa has made strides in an effort to demonstrate some progress toward the adequate and effective protection of intellectual property with the further review of the CAB.

Consideration was given to the adequate remedies such as offences and criminal penalties to allow rights holders to recover their losses from infringement and to deter piracy, particularly the digital related infringements. The CAB provides for greater penalties for natural persons, and extends penalties to firms (non-natural person) which may also be found guilty of infringements.

The Bills were adopted by the NCOP on 29 February 2024 and referred to the President for assent.

The President has not assented to the CAB and it therefore does not constitute law. Accordingly, the law-making process on copyright in South Africa is unfinished business. Until this process is completed, South Africa's current law persists; that is, the Copyright Act, Act No. 98 of 1978 (as amended) and the Performers' Protection Act, Act No. 11 of 1967 (as amended).

Against this background, the central message in the submission is that there is no basis for IIPA to request that eligible AGOA countries such as South Africa provide an update on the status of their current copyright legislation as well as their plans, if any, to amend their copyright legislation and to accede to relevant international instruments. The concerns raised are not in relation to the current laws, but on amendment bills that are still before the President. Any stakeholder, local or foreign had many opportunities to take part in ongoing parliamentary public participation as the process unfolded.

Overall, the issues IIPA is raising have been considered in the recent parliamentary process.

6.5 Concluding Comments

The Copyright Amendment Bill is currently before the President for assent. The Parliamentary process is completed. The process has provided for public participation and all stakeholders, local and foreign were given an opportunity to make their submissions. The recent Parliamentary process has strengthened the Bill because it was subjected to robust deliberations and extensive public participation. The amendments effected were intended to ensure adequate copyright protection, by further taking into consideration further measures to strengthen copyright enforcement in South Africa.

Our key observation and recommendation are that there is no basis for South Africa to be reviewed on the basis of the status of the current copyright legislation under review and in the legislative process. The concerns raised are not in relation to the current laws, but on amendment bills, especially the CAB, that is before the President.

7. Response by South Africa Government to Issues Raised by the National Pork Producers Council

7.1 Clarification on a requirement that lymph nodes must be removed from shoulder cuts.

Pork shoulders may be imported with lymph nodes from the US, subject to processing on arrival in South Africa. The pork side letter (emanating from the bilateral discussions) on this

matter specifies that South Africa would permit the importation of US shoulder cuts for unrestricted sale (without processing on arrival), **provided that the lymphatic and connective tissue of concern is removed in the United States prior to exporting to South Africa.** This was to address concerns for the transmission of the PRRS virus via pork shoulder cuts. When South Africa enquired to USDA to outline how the lymphatic and connective tissues are removed, the response was simply that they are removed with a knife from pork shoulder cuts.

One US consignment of pork shoulder cuts was imported in South Africa for unrestricted sale as a trial consignment. On inspection, DALRRD Inspection Services officials, despite the USA having certified that the connective and lymphatic tissues were removed, discovered lymph nodes. Despite the consignment having arrived with incorrect and actually false certification, South African officials made a concession to allow the imports of these portions if they underwent heat treatment to inactivate the PRRS virus at an approved establishment before entering South Africa. In January 2017 the USDA wrote back suggesting that the matter of the pork shoulder cuts for unrestricted sale be put aside for the time being.

South Africa has requested that USDA describe the full procedure for the removal of the connective and lymphatic tissues, as well as the verification process for these cuts to be imported for unrestricted sale. South Africa is still waiting for information from the USA.

7.2 South Africa imposes stringent trichinae-related freezing requirements for imported pork. The United States does not consider such requirements to be necessary for U.S. pork products.

South Africa is free of Porcine Trichinellosis. Trichinella is also a zoonosis (it can affect people) and the government needs to protect both our animal and human population from its introduction into the country. The USA claims to be free of Trichinella and RSA has asked for their surveillance information and a dossier to this effect based on international guidelines provided by the WOAHT- Terrestrial Animal Health Code. South Africa is still waiting for a response to this request. This information was again promised in November 2023 and to date nothing has been received.

7.3 South Africa imposes a restriction on pork cuts allowed for importation due to concerns related to Porcine Reproductive and Respiratory Syndrome. This restriction appears to be inconsistent with current international standards.

South Africa is one of a handful of countries that are free of PRRS, and thus need to protect its pig population and producers. PRRS was introduced into South Africa three times and each time we managed to eradicate it at great cost to both government and industry.

PRRS is a very erosive disease and farming with it will be very costly to our industry. South Africa did a risk review for PRRS using the Australian and New Zealand Risk Analyses and came up with the current risk mitigation measures for imported pork. These measures were extensively consulted through the WTO process. The recent publication by Hall and Neumann reviewed the available scientific information and concluded that “while the probability of viable PRRS virus being present in a pig carcass may be low, the risk is not zero. Further to this, when the OIE Terrestrial Animal Health Code commission provided the draft PRRS chapter for comments in 2016/2017, the minority of countries free of PRRS noted their opposition to the conditions of the PRRS Chapters. This opposition was noted in the Final Report of the 85th OIE General Session in 2017 and thus further supports the concern that the importation of raw pork into countries where PRRS is not endemic represents a hazard with potentially severe economic consequences.”

As South Africa has gone to great lengths and dedicated substantial resources to the eradication of this disease from the country as well as further confirming absence by means of active surveillance, the risk is not viewed the same as the risk to countries that are endemic for the disease. This and the available scientific information thus warrant measures that are stricter than those recommended by the WOAHP for the majority of countries (which have the disease). Given the scientific evidence of the risk posed by lymph nodes present in connective tissues, we are not in a position to waive this requirement and allow pork imports without the necessary risk mitigation. Currently the import of raw pork from the USA into South Africa continues without interruptions with the negotiated Veterinary Health Certificates for raw pork for further processing as well as specific safe cuts (without lymphoid material) exempt from further processing

It should be noted at this point that South Africa does not export meat to the US due to its onerous demands. For example, before January 2019 when it lost the Foot and Mouth Disease (FMD)

free status, South Africa should have been able to export beef to the US. However, the US engages a tedious process to determine the FMD status of the country. This process was initiated in 2000, and in 2011, it was still not concluded. Following the 2011 outbreak in KwaZulu Natal province, the US informed South Africa that it would be starting the process of establishing the FMD status of the country from scratch.

7.4 Concluding comments

South Africa refutes the allegation by NPPC that it imposes non-science-based restrictions on imports of pork meats which are inconsistent with international standards, and prevent the US from gaining fair access to its market. All countries that South Africa imports pork from need to mitigate these risks of animal disease and thus these restrictions are not aimed at the US specifically, but are applied to all trade partners. The restrictions in South Africa are reasonable and fair, and are aimed at protecting human health and the animal health in South Africa.