United Nations
Economic Commission for Africa

African Trade Policy Centre

Briefing note

Trade relations between the United States of America and Africa, post-African Growth and Opportunity Act

11 June 2019

19-01013

Background

Trade relations between the United States of America and Africa within the framework of the African Growth and Opportunity Act

In trade parlance, the African Growth and Opportunity Act (AGOA) is an Act of the United States Congress that provides unilateral access – that is, access that is non-reciprocal, preferential and, essentially, duty-free – to the market of the United States of America for qualifying goods originating in eligible African countries south of the Sahara. Because the beneficiary African countries are not required to give comparable duty-free treatment to similar goods coming to their markets from the United States, AGOA is typical of the so-called unilateral non-reciprocal preferential schemes. The comparable instrument in Europe would be the legislation since 2001 of the European Union known as Everything but Arms (EBA), which grants similar duty-free access to the European Union single market for all products, except arms, originating from least developed countries (LDCs). While there are many similarities between the AGOA and EBA schemes, they differ in one important respect: while AGOA preferences apply on geographical basis (in principle, only African countries south of the Sahara are eligible), EBA preferences apply on developmental considerations based on the United Nations classification of countries as LDCs, of which 33 are in Africa.

In theory, by discriminating in favour of their respective groups of beneficiary countries to the exclusion of others, both schemes would be in breach of World Trade Organization (WTO) rules on non-discrimination (the most-favoured-nation treatment clause, in particular). However, as a preferential scheme applying to all least developed countries, EBA qualifies as a lawful exception from the MFN principle as provided for in the "Enabling Clause" of 1979. On the other hand, because AGOA is based on geography rather than level of development, it does not qualify as a general exception under any WTO decision; instead, it has been operating within the law because of a time-limited waiver that was granted by the WTO General Council on 30 November 2015. The AGOA waiver comes to an end on 30 September 2025, the scheduled date for termination of AGOA itself. The expectation of the expiry of AGOA on 30 September 2025 also explains the preparatory discussions and consultations that are currently unfolding, albeit slowly, between the United States and Africa.

The contribution of AGOA to African exports to the United States

The impact of AGOA in improving African exports to the United States market is widely regarded as rather marginal. Indeed, a substantial proportion of African exports to the United States in 2018 was concentrated in extractive resources, with oil, gas and petroleum accounting for 73 per cent of United States imports from the region under the scheme. Of course, crude oil imports to the United States rarely attract duties even from non-AGOA countries. There have also been complaints that the country eligibility determination that is made annually by the United States Government, from which no appeal lies, makes the United States an unpredictable market for African exporters. The 2017 decision to suspend duty-free treatment for all AGOA-eligible apparel products from Rwanda due to the latter's refusal to lift the ban on the importation of used clothing from the United States has badly tarnished the image of AGOA.

United States positions on post-2025 trade with Africa: General

In remarks made to the African Diplomatic Corps in Washington, D.C., on 14 November 2018, the Deputy U.S. Trade Representative noted that Africa was a top priority

for the United States and welcomed the conclusion of the Agreement Establishing the African Continental Free Trade Area (AfCFTA) as an instrument that will bring prosperity to Africa. He then suggested that, as African countries open their markets to each other, Africa would also work to strengthen its trading relations with the United States. He reiterated that the conclusion of free trade areas between the United States and those African countries that are ready to join them was the way forward. While AGOA has been successful, he noted:

> "a time-limited, one-way preference programme is only so effective in encouraging investment and long-term commercial ties. Realizing the full potential in our relationship requires us to develop a robust, reciprocal and enduring framework for the future of U.S.–Africa trade".

In suggesting this, the United States is not contemplating, for now, an agreement with the whole of Africa acting as one. The Deputy U.S. Trade Representative specifically acknowledged this in the following excerpt:

> "We recognize and accept that not all African countries are currently interested in an FTA with the United States or are prepared to engage at this time".

Here thus lies the crux of the new proposal – the United States is determined to terminate the unilateral AGOA and replace it with a patchwork of reciprocal free trade agreements, which it wishes to negotiate with individual African countries that are willing to do so. Needless to say, this poses a number of concerns for the African side, including the following:

(a) It undermines the objective to progressively establish a single African market as explicitly recognized in Article 3(a) of the Agreement Establishing AfCFTA;

(b) It encourages African countries to act contrary to several decisions taken by the African Union Assembly itself, "to engage external partners as one bloc speaking with one voice", thereby risking undermining the long-held vision and ambition, in the language of the African Union Agenda 2063, for Africa to "act collectively to promote our common interests and positions in the international arena", which has been understood as critical for the continent's "unity and solidarity in the face of continued external interference"; and

(c) It unnecessarily complicates Africa's integration agenda, not just at the continental level but even regionally, as one can contemplate a situation where a country, say, Uganda, negotiates a free trade agreement with the United States, while other members of the East African Community (EAC) or the Common Market for Eastern and Southern Africa (COMESA) do not.

United States positions on post-2025 trade with Africa: sectoral

The likely detrimental impact of United States positions relating to future free trade areas with individual African countries is not limited to the general systemic concerns illustrated above; there are also sector-specific issues that are likely to cause concerns for Africa. The United States position regarding agricultural products as well as digital trade may be mentioned as examples.

In the agricultural sector, the concerns are fairly well-known, revolving around: (a) the use of unfair, and sometimes unlawful, subsidies that lead to excessive production at home and

subsequent "dumping" in international markets; and (b) the use of modern agricultural production techniques and inputs that at times provoke cultural sensitivities that, in some cases, could even translate to trade-related concerns (such as the 2002 case when Zimbabwe, despite a severe food crisis at the time, was forced to reject food aid from the United States that contained genetically modified crops partly because accepting such aid would have adversely impacted on its agricultural exports to the European Union and others where genetically modified organisms (GMOs) are prohibited).

When it comes to digital trade, the United States is pursuing high-powered diplomacy in every forum to ensure that all future free trade agreements serve as an avenue to exploit its well-recognized competitive advantage in digital technology, including through electronic commerce broadly defined – that is, as stated in the World Trade Organization (WTO) Declaration on Global Electronic Commerce adopted on 25 September 1998, in which the term "electronic commerce" was defined as "the production, distribution, marketing, sale or delivery of goods and services by electronic means" (see WT/L/274 of 30 September 1998). The recent statement of the Deputy U.S. Trade Representative is once again worth quoting here. In his words:

> "One area of particular focus in our recent trade negotiations is digital trade. Our new trade agreement with Canada and Mexico includes the most ambitious digital trade rules ever negotiated. These provisions include:
>
> > A prohibition on barriers to cross-border data flows;
> >
> > A prohibition on data localization policies, which require companies to locate servers and data in a country;
> >
> > A prohibition on discriminatory measures being applied to digital products like software, digital music, and e-books;
> >
> > Protections against requirements to transfer technology or disclose proprietary computer source code and algorithms as a condition of market access.
>
> We would hope and expect to replicate these provisions in any future trade agreements between the United States [and] African countries".

While there is an emerging consensus across Africa that African countries should engage in this debate so as to harness digital technology to serve their national developmental aspirations, some of the key priorities raised by the United States, such as its desire to prohibit data localization policies or technology transfer requirements, are likely to be unacceptable to African countries. Indeed, it is because of such fears that virtually the whole continent, with the notable exception of Nigeria, and more recently Benin, boycotted the initiative to negotiate a new plurilateral agreement on the trade-related aspects of electronic commerce trade at WTO, which was launched at Davos, Switzerland, on 25 January 2019.

Prospects

Considering, on the one hand, the criticisms of AGOA outlined earlier, and the threats posed by the United States proposal to replace AGOA, on the other, Africa needs to decide on its next steps. The options available to African countries are likely to include: (a) seeking renewal of AGOA in its current shape or with minor adjustments on the margins; (b) accepting

the United States proposal to negotiate free trade agreements; or (c) proposing a third option, such as negotiating a single free trade area with the United States, Africa acting as one bloc.

The experience of the ongoing efforts to find a replacement for the Cotonou Partnership Agreement with the European Union suggests that many African countries are likely to go for AGOA renewal as their default starting position, which is unlikely to be accepted by the United States. The European Union has already set a precedent by effectively forcing economic partnership agreements on African countries, including by the use of WTO compatibility requirements as a pretext – a strategy that is almost sure to be emulated by the United States this time. As noted, the United States proposal of negotiating free trade agreements with willing African countries acting individually will damage Africa's integration programme at two levels – at the level of the regional economic communities and at the level of AfCFTA. As a result, this is the worst possible scenario that Africa should be prepared for. The best case scenario for Africa, that is, negotiating a free trade agreement with the whole of Africa acting as one, will encounter hurdles from within Africa as well as from the United States. This is something that needs to be explored carefully and systematically. The extent to which Africa will be confronted by any of the sectoral issues highlighted earlier will, of course, depend on the configuration of the negotiations themselves. In this respect, ECA, working closely with the African Union Commission, should consider launching a work programme to explore all options and propose a viable way forward to the leadership of the continent without delay.

Finally, given that AGOA comes to an end in 2025, by which time there will be new leadership in the United States, bringing with it the prospect of new ideas and priorities for United States trade relations with Africa, one might be tempted to adopt delaying tactics. This, however, should be discouraged because the overall direction of United States trade policy is unlikely to change because of a change of leadership at the top. The Obama Administration, for example, maintained almost exactly the same position as the Trump Administration on post-AGOA relations between the United States and Africa. Indeed, as indicated above, the European Union is already leading the way in this direction. In international trade regulation, where the European Union goes, the United States often follows. Consequently, the sooner Africa comes up with a proposal that is well thought out, the better.