

## Current issues on the African Growth and Opportunity Act (AGOA)

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**Current Issues on the African Growth and Opportunity Act (AGOA)**

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**Abstract**

The African Growth and Opportunity Act (AGOA) has successfully supported for the sub-Saharan countries to achieve trade-led economic development on one hand, it has been criticized for the limited method for selecting beneficiaries and its legal instability. After the AGOA was renewed for another ten years in 2015, African countries are facing the new challenges such as AGOA reciprocation and the out-of-cycle eligibility review. Based on the active discussions in the AGOA Forum in 2015 and 2016, this paper examines the future potential structures that are most appropriate for U.S.–African trade and investment relationship.

**Keywords:** AGOA, preferential trade arrangement, trade policy, sub-Sahara Africa

**JEL classification:** F13, O24, O55

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## **Introduction**

The African Growth and Opportunity Act (AGOA) is a unilateral trade arrangement of the United States that provides selected countries in Sub-Saharan Africa additional preferential trade benefits including duty-free access to the U.S. market along with liberal rules of origin. Since it was enacted as the U.S. legislation in 2000, the AGOA has contributed to the economic development of beneficiary countries by encouraging exports to the U.S. market and promoting U.S. investment in them. Between 2000 and 2008, total exports under the AGOA<sup>1</sup> from sub-Saharan African countries to the United States significantly increased from \$8.2 billion to \$66.3 billion. Despite of the serious damage by the global financial crisis in 2009, the exports gradually recovered in the following years and totaled \$53.8 billion in 2011. However, they have been declining in recent years again to \$9.3 billion in 2015 (USTR 2016b: 5).

In June 2015, the AGOA was extended for 10 years after sharp arguments between pros and cons. Whereas the longest extension of AGOA in its history provides tangible trade benefits for African producers for a while, the scheduled expiration in 2025 makes the future of the U.S.–Africa relations uncertain. The trade environment related to African countries is changing significantly. Regional integration is progressing within the continent, and outside the continent, for example, concluding economic partnership agreements (EPAs) between the European Union (EU) and African, Caribbean, and Pacific (ACP) countries, trade ties are shifting from unilateral preferences to reciprocal relations (Boateng 2016). In order for African producers and manufactures, most of which have been marginalized from the global value chain for a long time, to be integrated into supply chain networks, it is the time to consider the future structure of the U.S.–Africa economic relations after the AGOA expiration. The United States and sub-Saharan African countries already started to discuss about the post-AGOA policy architecture.

Given these changing circumstances, it is important to examine the recent active discussions to further deepen and diversify the U.S.–Africa trade and investment relationships beyond the AGOA. This paper looks at the AGOA problems before its renewal in 2015 (section 1), current discussions in the AGOA Forum (section 2) and newly emerged issues regarding the AGOA after re-authorization in 2015 (Section 3).

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<sup>1</sup> These figures include exports under the Generalized System of Preferences (GSP).

## I. Original Problems of the AGOA

The AGOA is a constitutive part of the U.S. domestic legislation, entitled the Trade and Development Act of 2000.<sup>2</sup> The Act identifies certain sub-Saharan African countries as being eligible for AGOA benefits and offers them preferential access to the U.S. market. Indeed, the AGOA provides more liberal access to the U.S. market than any other unilateral U.S. preference trade arrangement, including the Generalized System of Preferences (GSP). Specifically, the AGOA adds approximately 1,800 tariff lines to the list of 4,800 duty-free products under the GSP program only for AGOA-eligible countries<sup>3</sup> as well as quota-free exports of textile and apparel products to the United States<sup>4</sup>.

Unlike other preferential trade deals, it is a non-generalized and non-reciprocal preferential arrangement between developing and developed countries, which is not a regional trade agreement (RTA) categorized in Article XXIV of the General Agreement on Tariffs and Trade (GATT), nor is it generalized preferential schemes justified by the Enabling Clause under the World Trade Organization (WTO) legal system. Due to its incompatibility with the WTO rules, the AGOA has been severely criticized since its inception.

### 1. Eligibility Criteria

The objective of the AGOA itself is generally considered positive. However, several issues have arisen.<sup>5</sup> The most problematic among them is the limited method for selecting beneficiaries, which has been criticized as being too arbitrary since the scheme started. The criteria for eligibility under the AGOA are divided into two stages. First, the AGOA extends the possibility of favored trade status in accordance with *geographical* criteria, or forty-nine

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<sup>2</sup> The Act entered into effect in October 2000 and was supposed to continue until September 2008 (AGOA I). However, the first seven-year extension was approved in July, 2004 in response to the strong demand from the African countries. The second ten-year extension, with an expiration date of September 2025, was accepted in June, 2015.

<sup>3</sup> The U.S. Harmonized Tariff Schedule in 2008 included 10,500 tariff lines, of which 3,800 items were already zero tariff on the MFN basis, 4,800 were covered by GSP, and an additional 1,800 became duty free through the AGOA (Williams 2015: 3, and Onambele 2016).

<sup>4</sup> Under a Special Rule ("Third Country Fabric" provision), lesser-developed countries can enjoy an additional preference of duty-free and quota-free access for apparel made from fabric of any origin.

<sup>5</sup> Skepticism regarding the AGOA has appeared in various fields. Apart from doubts over its compatibility with the WTO, the issue of rules of origin is the most controversial problem. For details on this matter, see Flatters (2002). The AGOA makes another 1,800 tariff lines duty free, though a large share of these are included in the GSP benefits for least-developed countries (LDCs). The AGOA extends duty-free treatment to certain apparel and footwear products, which are not eligible under the GSP (even for LDCs). Agricultural products subject to tariff-rate quotas (TRQ) remain ineligible for duty-free treatment under both the AGOA and GSP. AGOA beneficiaries are also exempt from certain caps on allowable duty-free imports under the GSP program.

sub-Saharan African countries. Second, the AGOA recognizes a country as eligible when its government follows certain pre-determined *social and economic* criteria. To be eligible, a country must have established or be making continual progress toward establishing a market-based economy, the rule of law, the elimination of barriers to U.S. trade and investment, economic policies to reduce poverty, the protection of internationally recognized worker rights, and a system to combat corruption.

Additionally, a country is examined to see whether it adopts policies that do not interfere with U.S. national security or foreign policy, do not violate internationally recognized human rights, do not support international terrorism, and eliminate the worst forms of child labor (USTR 2003: 9). In the WTO trade policy review of the United States in 2004, the EU pointed out that “the eligibility to AGOA is not only dependent on objective criteria related to the development status of individual countries.” Where political and non-objective criteria are used to determine AGOA benefits, the EU is skeptical of whether these criteria are “square with the applicable WTO rules governing such arrangements” (EC 2004: 14 and 16).

While the eligibility requirements are set out in Section 104 of the AGOA legislation, it is the United States that determines, annually, whether countries have met them.<sup>6</sup> Beneficiary status may therefore be granted or withdrawn at the discretion of the U.S. President. Actually, some countries have been newly designated as eligible countries, while others have been removed from the list of eligible countries. For example, Madagascar was suspended from AGOA preference in 2010 owing to a coup d’etat that occurred in the previous year and then granted beneficiary status again in 2014 after the President was elected in a democratic general election.

Another case was Swaziland. The U.S. government decided to withdraw Swaziland's AGOA eligibility, effective January 1, 2015, after showing its concerns over the several years due to not demonstrated progress on the protection of internationally recognized worker rights. The impact of AGOA withdrawal has been significant, described “the loss of the AGOA eligibility status resulted to the loss of thousands of jobs, mainly in the textile industry as they could no longer have market access to the US with qualifying Sub-Saharan African countries.”<sup>7</sup>

As the recent case, Burundi was also excluded from the AGOA-eligible list effective

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<sup>6</sup> Under the AGOA, for their eligibility status to be determined, forty-nine potential beneficiaries have their cases reviewed annually.

<sup>7</sup> *Swazi Observer*, “One month to AGOA review cycle,” written by Mlondi Panza, May 1, 2016.

January 1, 2016, “due to its failure to meet rule of law, human rights, and political pluralism eligibility criteria” (USTR 2016b). Then President Obama provided notification of Burundi’s exclusion to Congress:

“... I have determined that the Government of Burundi has not established or is not making continual progress toward establishing the rule of law and political pluralism, as required by the AGOA eligibility requirements.... In particular, the continuing crackdown on opposition members, which has included assassinations, extra-judicial killings, arbitrary arrests, and torture, have worsened significantly during the election campaign that returned President Nkurunziza to power earlier this year. In addition, the Government of Burundi has blocked opposing parties from holding organizational meetings and campaigning throughout the electoral process. Police and armed youth militias with links to the ruling party have intimidated the opposition, contributing to nearly 200,000 refugees fleeing the country since April 2015. Accordingly, I intend to terminate the designation of Burundi as a beneficiary sub-Saharan African country under AGOA as of January 1, 2016.” (USTR 2016b)

Beneficiary countries do not have any right to make counterarguments against U.S. government decisions because the AGOA is a U.S. national legislation. This is a noteworthy difference from the EU’s non-reciprocal preferential trade arrangements toward African countries, which are governed by international law and thus cannot be changed only by the EU without agreement among the contracting parties.

Table 1: Qualification and Disqualification of AGOA Beneficiary Status

	Inclusion to the eligible list	Exclusion from the eligible list
2001	<ul style="list-style-type: none"> <li>• Swaziland (January)</li> </ul>	
2002	<ul style="list-style-type: none"> <li>• Sierra Leone</li> <li>• Cote d'Ivoire (May)</li> </ul>	
2003	<ul style="list-style-type: none"> <li>• Gambia (March)</li> <li>• Democratic Republic of Congo (October)</li> </ul>	
2004	<ul style="list-style-type: none"> <li>• Angola</li> </ul>	<ul style="list-style-type: none"> <li>• Central African Republic (following a coup, January)</li> <li>• Eritrea (for human rights abuses, January)</li> </ul>
2005	<ul style="list-style-type: none"> <li>• Burkina Faso</li> </ul>	<ul style="list-style-type: none"> <li>• Cote d'Ivoire (due to political unrest and armed conflict, January)</li> </ul>
2006		<ul style="list-style-type: none"> <li>• Mauritania (following a coup, January)</li> </ul>
2007	<ul style="list-style-type: none"> <li>• Liberia</li> <li>• Mauritania (restored in June)</li> </ul>	
2008	<ul style="list-style-type: none"> <li>• Togo</li> </ul>	
2009	<ul style="list-style-type: none"> <li>• Mauritania (restored in December)</li> </ul>	<ul style="list-style-type: none"> <li>• Mauritania (following a coup, January)</li> </ul>
2010		<ul style="list-style-type: none"> <li>• Guinea (following a coup, January)</li> <li>• Madagascar (following a coup, January)</li> <li>• Niger (due to concerns with rule of law, January)</li> </ul>
2011	<ul style="list-style-type: none"> <li>• Cote d'Ivoire (restored in October)</li> <li>• Guinea (restored in October)</li> <li>• Niger (restored in October)</li> </ul>	<ul style="list-style-type: none"> <li>• DRC (for human rights abuses, January)</li> </ul>
2012	<ul style="list-style-type: none"> <li>• South Sudan (December)</li> </ul>	
2013	<ul style="list-style-type: none"> <li>• Mali (restored in December)</li> </ul>	<ul style="list-style-type: none"> <li>• Mali (following a coup, January)</li> <li>• Guinea-Bissau (following a coup, January)</li> </ul>
2014	<ul style="list-style-type: none"> <li>• Madagascar (restored in June)</li> <li>• Guinea-Bissau (restored in December)</li> </ul>	
2015		<ul style="list-style-type: none"> <li>• Gambia (for human rights abuses, January)</li> <li>• South Sudan (due to political violence and armed conflict, January)</li> <li>• Swaziland (for failure to protect internationally recognized labor rights, January)</li> </ul>
2016		<ul style="list-style-type: none"> <li>• Burundi (due to concerns with human rights, governance, and rule of law, January)</li> </ul>
2017		<ul style="list-style-type: none"> <li>• Seychelles (graduated due to gaining developed country status, January)</li> </ul>

Source: GAO (2015) and USTR (2016b).



## 2. Legal Instability

Another problem of the AGOA is legal instability. The United States, a preference-giving country, can easily revise the AGOA scheme. Because the AGOA, similar to other U.S. regional preferential schemes, has been enacted under U.S. federal law,<sup>8</sup> the United States has the discretion to amend and even terminate it. Most of the potential partner countries in the AGOA worry about the ambiguity in their approval or continuing eligibility.

The AGOA, as mentioned above, offers a more expansive range of duty-free treatments than the GSP, which means that the AGOA program is sometimes regarded as an extended version of a GSP scheme. The AGOA program, however, does not apply to all developed or least developed countries. Thus, the AGOA can be recognized as a non-reciprocal and geographically based preferential trade arrangement, which is incompatible with WTO rules. At the inauguration of the AGOA scheme, the United States sought a GATT waiver for its obligations under Article I because the application of the AGOA would potentially constitute an MFN violation. In addition, the Enabling Clause and even Part IV of the General Agreement, which aims to promote the economic development of *all* developing countries, did not justify geographically-limited preferences such as the AGOA.

In view of the current legal system of the WTO, therefore, it is impossible to conclude that specific trade preferences for limited groups of developing countries are compatible with WTO rules. Countries as participants in the AGOA, therefore, have strived to create various measures in order to achieve compliance with the WTO. There are three possible ways for states to justify the AGOA schemes as deviations from MFN treatment: (a) by obtaining a WTO waiver pursuant to Article IX of the WTO Agreement; (b) by extending specific preferences to all developing countries; and (c) by creating free trade areas, as specified in Article XXIV of the GATT.

In the past, countries have usually maintained these specific preferences by obtaining waivers. In fact, the United States sought a WTO waiver for its obligations under Article I of the GATT and received it in 2009 for seven years and again in 2015 for ten years. However, subsequent renewal of the waiver would encounter considerable difficulty owing to the deep-rooted criticism against preferential trade arrangements from WTO member countries

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<sup>8</sup> The CBERA, commonly referred to as the Caribbean Basin Initiative (CBI), also authorizes the United States to provide unilaterally to eligible Caribbean countries preferential trade and tax benefits, including duty-free access to the U.S. market for eligible products.

that had been excluded.<sup>9</sup> This is partly because in 1995 the reform of the GATT into a new institution, the WTO, brought about the enhancement and expansion of the “rule of law.” As a result, there was an increasing belief that exceptions that could erode the legal system had to be restrained. Even if the WTO grants waivers for regional and unilateral preferential schemes, the waiver period is now shorter than in most cases in the past. Those preferential schemes that have not yet received waivers are likely to be examined by the Dispute Settlement Body (DSB) to determine their consistency with WTO rules.<sup>10</sup>

The second option for attaining WTO compatibility for preferential trade schemes has come to have little effect. GSP preferences are to be non-discriminatory across developing countries, except for those favoring the LDCs. In order to assimilate geographically limited preferences into GSP schemes, some preference-giving countries have attempted to generalize these schemes. However, both sides of the preferential scheme share negative views about the extension of limited preferences to all developing countries. Hence, developing countries might lose existing preferences. On the other hand, developed countries might lose their strategic measures for assisting specific groups of developing countries.

Considering these circumstances, countries in recent years have actively attempted to substitute specific preferences with free trade areas, which are officially permitted in the WTO system. The EU’s policy to replace the Cotonou Agreement with seven EPAs is a good example. The United States also considers the AGOA should be transformed toward free trade agreements (FTAs) with sub-Saharan African countries (IPC 2003). This is the trend because concluding FTAs would be the most logical and practical way among several possible options for a non-reciprocal and geographically based preferential trade arrangement to be authorized under the WTO legal framework.

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<sup>9</sup> Under article XXV of the GATT, a waiver requires approval by a two-thirds majority of the votes cast and one-half of the contracting parties.

<sup>10</sup> For instance, India called for the establishment of a panel under the DSU that would examine the EU’s special tariff preferences to the so-called Drug Arrangements, under which only twelve developing countries could benefit. The WTO issued a panel report on December 1, 2003, and found the EU’s arrangement to be in violation of trade rules because it discriminated against other developing countries.

## II. Discussions at the AGOA Forum

The AGOA legislation establishes an annual meeting—the U.S.-Sub-Saharan Africa Trade and Economic Cooperation Forum (AGOAF Forum)—to promote a high-level dialogue on trade and investment-related issues. In addition to the cabinet ministers and government officials from each concerned country, private sector and civil society representatives gather and discuss trade and economic relations between the United States and AGOA-eligible African countries. Fifteen meetings have been held to date (Table 2). The meeting, held once a year, gives all stakeholders the opportunity to exchange ideas on potential avenues for enhancing U.S.–Africa economic ties. In order to find some clues that indicate current trends and future perspectives of the AGOA, the arguments at the latest two AGOAF Forums held in 2015 and 2016 are examined in this section.

Table 2: AGOAF Forum (2001-2016)

Year	Place	Main Theme
2016 (the 15th)	Washington, D.C. (USA)	Maximizing U.S.-Africa Trade and Investment; AGOAF and Beyond
2015 (the 14th)	Libreville (Gabon)	Charting a course for a sustainable U.S. Africa Trade and Investment Partnership
2014 (the 13rd)	Washington, D.C. (USA)	Investing in the Next Generation
2013 (the 12nd)	Addis Ababa (Ethiopia)	Sustainable Transformation through Trade and Technology
2012 (the 11th)	Washington, D.C. (USA)	Enhancing Africa’s Infrastructure for Trade
2011 (the 10th)	Lusaka (Zambia)	Enhanced Trade Through Increased Competitiveness, Value Addition, and Deeper Regional Integration
2010 (the 9th)	Washington, D.C. / Kansas City (USA)	New Strategies for a Changing World
2009 (the 8th)	Nairobi (Kenya)	Realizing the Full Potential of AGOAF Through Expansion of Trade and Investment
2008 (the 7th)	Washington, D.C. (USA)	---
2007 (the 6th)	Accra (Ghana)	As Trade Grows, Africa Prospers: Optimizing Benefits Under AGOAF
2006 (the 5th)	Washington, D.C. (USA)	---
2005 (the 4th)	Dakar (Senegal)	Expanding and Diversifying Trade to Promote Growth and Competitiveness
2004 (the 3rd)	Washington, D.C. (USA)	---
2003 (the 2nd)	Port Louis (Mauritius)	Trade and Investment: Tool for Growth and Development
2001 (the 1st)	Washington, D.C. (USA)	---

Source: Author.

## **1. AGOA Forum in 2015**

The 14th AGOA Forum was held August 24–27, 2015 in Libreville, the capitol of Gabon. Because the AGOA Forum 2015 was held just after the U.S. Congress approved legislation to reauthorize the AGOA for another ten years, each African beneficial country addressed its gratitude for its extension. While many countries mentioned the importance and necessity of the AGOA scheme for African development, some problems and expectations for the future AGOA were pointed out: from the U.S. side, a shift to reciprocal partnerships such as the FTA or EPA, and from the African countries, a demand for more flexibility targeting agricultural products. Five keywords that were repeatedly mentioned in the Ministries' statement could represent the discussion at the AGOA Forum 2015.

### **(1) Regional Integration**

In recent years, African countries have accelerated regional integration to link together their small, fragmented domestic markets. As a first step in regional integration, eight regional economic communities (RECs) have played a main role, such as the East African Community (EAC) and Southern Africa Development Community (SADC). In June 2015, three of these RECs, the EAC, SADC, and Common Market for Eastern and Southern Africa (COMESA), launched the Tripartite Free Trade Agreement (TFTA), which covers all the member countries of the three RECs. At the same time, member countries of the African Union have headed Africa-wide trade and economic integration, and one week after the launch of the TFTA, they reached an agreement to start formal negotiations on the Continental Free Trade Agreement (CFTA). Reflecting on these situations, many African trade ministers mentioned the necessity and importance of regional integration, using terms such as “regional infrastructure” and “regional value chain” in the AGOA Forum. For example, Burundi, as a landlocked country, inevitably requires access to ports to export its domestic products. Therefore, the country insisted that if it were able to use the ports of neighboring countries as “regional infrastructure” which would be a result of further integration in the EAC, it would utilize the AGOA more.

### **(2) Diversity**

For the four consecutive years from 2011 to 2015 exports under the AGOA had decreased totaling \$9.3 billion in 2015 (USTR 2016b, ICTSD 2016), which was the same level as the

first year of the AGOA initiation. The reason for this decrease is primarily attributed to a drop in oil exports from the African continent.

The main export goods under the AGOA are limited to products in the mining, textile, clothing, and apparel industries. Especially oil exports from sub-Saharan countries alone account for nearly two-thirds of the total exports under the AGOA. Therefore, the total exports easily fluctuate depending on the price of oil. For the sustainable development of African countries, diversification of these export items is critical. Recognizing this need, each African country has enacted various policies, generally in vain. Therefore, the AGOA has devised to encourage non-oil exports and to promote the diversification of African trade with the United States.<sup>11</sup> There are two ways to diversify exports under the AGOA: 1) increasing exports of agricultural products and 2) increasing exports of manufacturing products. The former is related to the keyword “flexibility,” and the latter is related to “industrialization,” as mentioned below.

### (3) Flexibility

The AGOA provides duty-free access to the U.S. market for approximately 85% of U.S. import items. However, many of the goods with which African countries are most competitive, for example, agricultural products such as sugar and the raw cotton, are excluded from AGOA preferences. Even though some agricultural items are listed as AGOA-eligible goods, most of them are not quota-free, and the quantity that can access the U.S. market is surely limited. Therefore, many African countries have requested that the AGOA become more flexible, and specifically, to remove tariff quotas from agricultural products. For example, if the quota on cacao was reduced or removed, cacao exports would increase, which would in turn enhance and enlarge the stability of cacao production and ultimately grow the cacao-related food industry.

For the export of agricultural products to the U.S. market, however, it is necessary to meet U.S. food safety standards. In order for African countries to meet the U.S. domestic standards or associated international standards, they must make their own standard systems qualified and functional. In the AGOA Forum, many countries expressed a desire for the United States to cooperate in supporting trade facilitation, including improving food standards.

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<sup>11</sup> According to the USTR, Sub-Saharan non-oil exports to the United States under the AGOA have nearly tripled, from \$1.4 billion in 2001 to \$4.1 billion in 2015, mainly due to increased exports of automobiles and parts, apparel, fruits and nuts, cocoa, prepared vegetables, footwear, and cut flowers (USTR 2016b: 5).

#### (4) Industrialization

The economic structure of Africa, which greatly depends on the mining industry and primary products, has always been pointed out as a weak point. Industrialization is an indispensable element in achieving sustainable growth. Each African country has undertaken various policy actions, but unfortunately there are few countries that have been successful to date. One of the factors hindering industrialization is the small size of the countries' domestic markets. Therefore, African countries have recently been promoting an approach based on an idea called "regional industrialization" to develop the whole local community, such as the SADC and EAC. Regional integration, for example, the creation of the SADC-FTA and TFTA, is part of the same developmental strategy.

#### (5) Reciprocity

During the argument on the AGOA extension in the United States prior to its re-authorization in June 2015, the most critical point was whether the AGOA should change its current unilateral scheme to reciprocal agreements such as FTAs or EPAs. At the same time, the EU–Africa trade relationship had shifted from the unilateral Lome/Cotonou Agreement to reciprocal EPAs. This change in EU policy stimulated argument in the United States.

The merits of making the AGOA framework reciprocal included the following: 1) obtain WTO compatibility (positive for both the United States and African countries), 2) begin service trade liberalization in the African market (positive for the United States), and 3) stabilize the granting of AGOA preferences from the United States without the discretionary examination of AGOA eligibility (positive for African countries). However, there were some negative points as well: 1) lowering the usefulness of the AGOA as a policy tool because of the loss of discretion (negative for the United States) and 2) opening domestic markets for the United States (negative for African countries).

The U.S. senators who participated in the AGOA Forum strongly stated that there would be no further AGOA extension after 2025 and that African countries should begin preparations for future reciprocal FTAs/EPAs. African countries reacted in various ways. For example, Kenya expressed that it was in favor of the AGOA shift to reciprocal. Nigeria, on the other, indicated a negative posture, fearing that its service industry would be seriously damaged by opening its domestic market to the United States.

## 2. AGOA Forum in 2016

At the 2016 AGOA Forum in Washington, D.C., the participants focused on how to build strong trade and investment relationships between the United States and sub-Saharan African countries, even after the AGOA expires in 2025. Along with the year's theme, "Maximizing U.S.–Africa Trade and Investment: AGOA and Beyond," the Forum addressed several AGOA utilization strategies as well as potential pathways beyond AGOA.

### (1) Maximizing AGOA utilization

As mentioned in the introductory section, total exports under the AGOA have been decreasing in recent years. The AGOA, which had significant effects in the first decade, has not been performing as expected recently. Only a few countries, such as Ethiopia, Mauritius, Madagascar, and Botswana, have been able to facilitate their national economic policies and trade environments to actively utilize the AGOA scheme. The many beneficiary countries only claim preference on a few items out of the nearly 6,500 eligible tariff lines. Tanzania, for example, exports many manufacturing goods outside of the AGOA framework, even though such items are AGOA eligible. Possible causes of this non-usage are slow progress in diversification and a lack of capacity on the part of the export manufactures.

The U.S. government announced several policy options for boosting AGOA utilization to establish African competitive advantages in the post-AGO period in the report titled "Beyond AGOA Looking to the Future of U.S.–Africa Trade and Investment" which released just before the AGOA Forum. The report aimed at "reinvigorating the U.S.–Africa trade and investment relationship and for reimagining the policy architecture to propel this relationship into the future" (USTR 2016c). The main points are as follows:

- Support African regional economic integration

The goal of creating viable regional markets in sub-Saharan Africa is both an African and a U.S. priority. While initiating expanded trade discussions with one regional leader may be the best first step, as the EU did with South Africa, the goal should be to expand to a more regional footing over time.

- Move toward greater reciprocity.

As more reciprocal arrangements go into effect within sub-Saharan Africa and between African countries and other developed country partners, the pressure to consider more stable, permanent, and mutually beneficial alternatives to AGOA will grow in the United States as well.

- Support African value-added production and promote diversification of exports.  
Africa’s economic future depends, in important part, on its ability to add value on the continent to its vast natural resources and agricultural commodities, as well as on its ability to diversify its exports.
- Include African reforms across a broad range of policy areas.  
Developing countries—even the least developed among them—are capable of taking on significant policy reform obligations and drawing powerful benefit from them in growth, economic diversification, and the alleviation of poverty.
- Promote African integration into the global trading system.  
There is a strong correlation between developing countries that have reformed, liberalized, and integrated their economies into the global trading system and those that have experienced the most significant improvements in development outcomes. This includes developing country U.S. FTA partners.
- Account for different levels of readiness and capacity across the region.  
Sub-Saharan Africa is comprised of a diverse group of countries at differing levels of development, wealth, and readiness for expanded trade engagement. The next generation trade framework with sub-Saharan Africa will need to recognize this and avoid a “lowest common denominator” approach, while also helping to bring standards up in all countries over time.

Many African Ministers at the AGOA Forum recognized that they have not yet fully took advantage of the AGOA preferences and requested that the United States work together to maximize the benefits of the scheme (ICTSD 2016). Thus, the U.S. proposals in the report were regarded as the starting point in discussions of potential policy measures.

## (2) Making the AGOA reciprocal

Another main issue of the Forum was the future policy architecture of the trade and investment relationship between the United States and sub-Saharan Africa after the AGOA expiration in 2025. The USTR report explored different types of policy instruments that not only the United States and sub-Sahara Africa but also the EU and other countries have used for deepening and expanding trade ties among concerned parties, such as: (1) comprehensive and high-standard free trade agreements, (2) limited, asymmetrical EU-type agreements, (3) collaborative arrangements such as Trade Africa, and (4) preference programs with policy-based eligibility criteria (USTR 2016c). The former half are reciprocal while the latter half are unilateral arrangements. The AGOA Forum participants discussed the potential options that would be most appropriate for U.S.–Africa trade and investment based on the



advantages and disadvantages of these various approaches.

While the United States emphasized the need to prepare for a more reciprocal arrangement beyond the AGOA, most African trade ministers opposed the plan of two-way FTAs, which they feared would affect the economic growth of sub-Saharan African countries. The statement of Joshua Setipa, Lesotho's Trade Minister, represented the attitude of African ministers: "Africa still needs more time before it is exposed to competition by the goods from America. Any agreement with the US must reflect the realities in Africa's economy." South Africa's Trade and Industry Minister, Rob Davies cautioned that "it would be very difficult for South Africa and the Southern African Customs Union (SACU) to negotiate a conventional FTA with the US because the US has a very specific model for their negotiations and require countries to make comprehensive commitments on a wide range of areas, including investment and public procurement."<sup>12</sup> He also expressed his concern that "this would limit South Africa and SACU's 'policy space' to industrialise and diversify their economies."<sup>13</sup>

Moreover, the African Trade ministers were concerned with US participation in the Trans-Pacific Partnership Agreement (TPP), the negotiations for which were concluding at that time. Kenya's Trade Principal Secretary Chris Kiptoo said that "the preferences that Kenya enjoyed would be eroded once the US entered into trade agreements with other states outside Africa," noting that "Vietnam is a big producer of textiles and this will make it difficult for us to compete with them once they get duty- and quota-free access to the US market."<sup>14</sup>

### **III. Challenges of the U.S.–African Trade Environment**

#### **1. Potential FTAs with sub-Saharan Africa**

As AGOA reciprocity was a focus of the AGOA Forum in consecutive two years, the AGOA beneficiaries were clearly concerned about the post-AGOA strategic architecture of the United States for sub-Saharan Africa. While the United States strongly encouraged its African

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<sup>12</sup> *Uganda Business News*, "Whither the US-Africa trade relationship after AGOA?" 4 October 2016.

<sup>13</sup> *Uganda Business News*, "Whither the US-Africa trade relationship after AGOA?" 4 October 2016.

<sup>14</sup> The EastAfrican, "African countries campaign against America's trade deal with Asia," September 30, 2016 (<http://www.theeastafrican.co.ke/business/African-countries-campaign-against-America-trade-deal-with-Asia/2560-3400232-m0y7haz/index.html>).

partners to take full advantage of the AGOA scheme until its expiration in 2025, it strongly requested that they consider “more stable, permanent, and mutually beneficial alternatives to AGOA” to enhance the U.S.–Africa trade relationship beyond the AGOA (USTR 2016c).

Each African country has a different level of economic development and capacity to implement significant trade obligations, a different level of political will towards entering into FTAs with the United States, and different national economic priorities, especially in regard to trade and industrial policies. It would be hard to gain the cooperation of all beneficiary countries to make the AGOA reciprocal. Some countries – including Kenya and Mauritius – have expressed an interest in establishing more mature, long-term trade relationships with the United States, including new free trade agreements. However, many countries have expressed their concerns about a post-AGOA reciprocal trade environment.

As mentioned above, a preferential scheme for specific developing countries is legally unstable for them in three senses: (i) it needs a WTO waiver, (ii) it can be changed at the discretion of a preference-giving country, and (iii) it should be replaced by reciprocal FTAs. To overcome this instability, non-generalized preferential schemes should be created as FTAs between developed and developing countries with flexibility. In the trade negotiation such as Doha Development Agenda in the WTO framework, differential treatments in favour of developing countries are permitted in some extent under the name of “flexibility.” Reflecting the notion of this differentiation, certain forms in international instruments are setting differential standards, permitting grace periods in implementation, requiring flexibility (less stringent commitments), and the provision of international assistance (Yu 2002, French 2000: 39). The grace period, or the form of delayed compliance timetables, is a popular type of differentiation. In other words, developing countries, especially the LDCs, are not expected to give full reciprocity, but rather less than full reciprocity. This indicates that developing countries do not need to liberalize their economies in the same manner as developed countries do. Nevertheless, they should fulfill their obligations as participants of FTAs to some extent. As one option of the future AGOA architecture, FTAs of this type with flexibility would be noteworthy.

It is true that many African countries and regional groups are already moving away from unilateral relationship – preference-giving and preference-receiving relation – and towards more equal relationship with their trading partners. For example, RECs on the African continent have enthusiastically proceeded with regional integration, including the formation of FTAs or customs unions, promoting wider or even continent-wide FTAs among

several like-minded RECs. Moreover, the United States and AGOA beneficiaries can learn from the EU's experience of negotiation on EPAs, which transformed from a unilateral preferential agreement, the Cotonou Agreement, to reciprocal trade pacts.

## **2. A New Discretionary Measure: Out-of-Cycle Review**

The AGOA Extension & Enhancement Act in June 2015 made the AGOA extend for another 10 years as well as the US government legitimate to review the eligibility of sub-Saharan Africa countries on an ongoing basis in addition to on an annual basis. With this new tool called "out-of-cycle" review, the United States has a greater discretion than before to initiate the eligibility review at any time. In other words, it has a greater discretion to suspend the AGOA benefits at any time. This special provision was introduced in the AGOA in order to counteract against South Africa's long-standing import barriers to U.S. agricultural products. However, the out-of-cycle review has become a serious threat to all AGOA beneficiary countries.

### *Case 1: South Africa*

South Africa imposed anti-dumping duty on U.S. chicken exports since 2000. Despite this anti-dumping duty has been removed in 2015, the South Africa raised its health standard due to the risk of the bird flu infection, which resulted in the trade barriers for the U.S. poultry, pork, and beef exports. Beneficiary countries under the AGOA must be "making continual progress towards eliminating barriers to trade and investment with the United States." Claiming that South Africa was failing to meet this criteria, the out-of-cycle review was initiated on July 21, 2015, just after this new eligibility review mechanism entered into effect. South Africa benchmarked on poultry, pork, and beef, however, its response was too slow. On November 5, 2015, the then President Obama indicated his plan "to suspend duty-free treatment for all AGOA-eligible agricultural goods from South Africa after 60 days" (USTR 2016a).

"I am taking this step because South Africa continues to impose several longstanding barriers to U.S. trade, including barriers affecting certain U.S. agricultural exports, and thus I have determined that South Africa is not making continual progress toward the elimination of barriers to United States trade and investment as required by section 104 of AGOA. I have determined that such suspension of benefits would be more effective in

promoting compliance by South Africa with the eligibility requirements listed in section 104 of AGOA than the termination of South Africa's designation as a beneficiary sub-Saharan African country, as it would better promote continuing efforts between the United States and South Africa to resolve these outstanding issues.” (White House 2015)

After intensive negotiation between the two governments, South Africa finally reached all the required benchmarks for U.S. poultry, pork, and beef. As a result, imports of U.S. poultry products were restored in South Africa in March 2016, which maintained full benefits under the AGOA in exchange. This case demonstrated the possible risk that the sovereignty exercising domestic policy, such as health standards might be restricted by foreign countries. Kevin Lovell, CEO South African Poultry Association, sharply criticized in this regards:

“[t]he renewal of the AGOA is a perfect example of subliminal racism and colonial domination. US poultry producers were stopped from dumping their chicken waste in South Africa for 17 years with anti-dumping duties that were never challenged in court or at the World Trade Organisation. Instead, by threatening AGOA’s renewal, South Africa was effectively blackmailed into accepting their products, as well as reducing our food safety standards to accommodate their unwillingness to produce products compliant with South African standards.”<sup>15</sup>

### *Case 2: Lesotho*

Lesotho’s eligibility for AGOA has been on the edge since the military action by the Lesotho Defense Force (LDF) occurred in August 2014. The U.S. government has showed the concerns whether Lesotho complies with certain AGOA criteria at the latest two annual reviews of 2015 and 2016. Even though then “President Obama determined that Lesotho will remain eligible for trade benefits under AGOA in 2017,”<sup>16</sup> the U.S. government have kept showing its concern due to government’s failure to address issues of “impunity and the rule of law”<sup>17</sup> as well as to implement SADC Commission of Inquiry recommendations. The U.S. Trade Representative, Ambassador Froman, said in his letter as below:

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<sup>15</sup> Business Report, “Poultry imports not helping South Africans,” Opinion, June 17, 2016.

(<http://www.iol.co.za/business-report/opinion/poultry-imports-not-helping-south-africans-2035475>).

<sup>16</sup> Ambassador Froman’s letter to the Lesotho government dated January 13, 2017 (*Lesotho Times*, “US warns Lesotho on AGOA,” January 26, 2017).

<sup>17</sup> *Lesotho Times*, “US speaks out on AGOA,” November 25, 2016.

“Despite this progress, we remain deeply concerned that Lesotho has not made further progress in meeting the other benchmarks, including addressing and implementing the rest of the SADC recommendations. ... The Trade Preferences Extension Act of 2015 provides greater flexibility to review countries’ AGOA eligibility on an ongoing basis, including by initiating an out-of-cycle review at any point during the calendar year.”<sup>18</sup>

In order for Lesotho to avoid such a review, Ambassador Froman said “immediate and concrete steps need to be made to meet the other benchmarks and demonstrate continual progress” toward meeting AGOA’S eligibility criteria.<sup>19</sup> In addition to the implementation of SADC recommendations, “security sector reform efforts to transform the LDF into a professional and cohesive institution; and humane treatment of all LDF personnel in custody and access for international organizations to verify the conditions of their detention in light of the SADC report findings of torture and abuse” were required.<sup>20</sup> Towards the deadline of March 2017, Lesotho is enacting the Amnesty Bill as well as implementing constitutional and security sector reforms.

#### **IV. Concluding Remarks**

It is true that the AGOA has successfully supported for the sub-Saharan countries to make trade-led economic growth for more than fifteen years. On the other hand, it is also true that the AGOA had many problems originated from its institutional architecture itself such as eligibility criteria and legal instability. The renewal of the AGOA in 2015, likewise, has both positive and negative effects simultaneously. With the longer-term extension than ever before, the reauthorized AGOA provides the stability and predictability for African regional producers and exporters. On the other hand, it leads beneficiary countries to face the new challenges such as AGOA reciprocation and the out-of-cycle eligibility review. The alternative approach to make AGOA reciprocal would be a preferential scheme in the manner of FTAs but with flexibility.

Before the AGOA benefits expiration, the African countries need to seriously consider possible policy instruments that are most appropriate for U.S.–African trade and investment

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<sup>18</sup> *Lesotho Times*, “US warns Lesotho on AGOA,” 26 Jan 2017.

<sup>19</sup> *Lesotho Times*, “US warns Lesotho on AGOA,” 26 Jan 2017.

<sup>20</sup> *Lesotho Times*, “US warns Lesotho on AGOA,” 26 Jan 2017.

and to prepare the post-AGOA economic environment. The possible policy option would be regional integration in the African continent, diversification of exports, regional industrialization which can make value-chains in the continent, ultimately promoting African countries to be integrated into global value chains. African countries already recognized the importance of all these policy measures, which were discussed in the recent AGOA Forums. In order to realize these policies, it would be necessary for African countries to begin with maximizing the AGOA utilization first.

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Annex 1: List of AGOA-eligible Countries (as of March, 2017)

<b>Country</b>	<b>Date declared AGOA eligible</b>
Angola	December 30, 2003
Benin	October 2, 2000
Botswana	October 2, 2000
Burkina Faso	December 10, 2004
Burundi	January 1, 2006, lost eligibility January 1, 2016
Cameroon	October 2, 2000
Cape Verde	October 2, 2000
Chad	October 2, 2000
Comoros	January 30, 2008
Congo (Republic)	October 2, 2000
Congo (DRC)	granted October 31, 2003, declared ineligible January 1, 2011
Cote d'Ivoire	October 25, 2011
Djibouti	October 2, 2000
Ethiopia	October 2, 2000
Gabon	October 2, 2000
Gambia	December 31, 2002, lost eligibility January, 2015
Ghana	October 2, 2000
Guinea	Restored October 25, 2011
Guinea-Bissau	December 20, 2012, regained eligibility December 23, 2014
Kenya	October 2, 2000
Lesotho	October 2, 2000
Liberia	December 29, 2006
Madagascar	Regained eligibility January 26, 2014
Malawi	October 2, 2000
Mali	Regained eligibility January 1, 2014
Mauritania	Restored December 23, 2009
Mauritius	October 2, 2000
Mozambique	October 2, 2000
Namibia	October 2, 2000
Niger	Restored October 25, 2011
Nigeria	October 2, 2000
Rwanda	October 2, 2000
Sao Tome and Principe	October 2, 2000
Senegal	October 2, 2000
Seychelles (graduated)	October 2, 2000, declared ineligible effective January 1, 2017
Sierra Leone	October 23, 2002
South Africa	October 2, 2000
South Sudan	January 1, 2013, lost eligibility January, 2015
Swaziland	Lost eligibility January, 2015
Tanzania	October 2, 2000
Togo	April 17, 2008
Uganda	October 2, 2000
Zambia	October 2, 2000

Source: ITA (International Trade Administration, U.S. Department of Commerce) Homepage, "General Country Eligibility Provisions," (<http://trade.gov/agoa/eligibility/>).