The AGOA as stepping stone for USA–Africa free trade agreements

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Abstract

Purpose – The purpose of this paper is to show how the pattern of trade relations between the USA and African countries is gradually shifting toward reciprocity. It therefore demonstrates that the African Growth and Opportunity Act (AGOA) was conceived to be a building block toward future bilateral trade agreements.

Design/methodology/approach – This paper adopts a historical approach to the USA’s policy toward Africa in general and in trade matters in particular. It critically reviews the chronology of US involvement in the continent.

Findings – Although it was designed as a preferential trade arrangement, AGOA was intended to evolve into reciprocal trade agreements. This is what the USA started doing even prior to the entry into force of the AGOA, by entering into Trade and Investment Framework Agreements with individual countries or blocs. It also transpires that the deployment comes as a response to the European Union which is already engaged in the redefinition of its own trade relations with Africa since 2004.

Originality/value – The paper is important in many respects. Not only it is a study of the US practice as preference-granting country, but it is also interested in the typology of trade agreements concluded by the USA in other regions of the world. This is important to indicate and analyze the types of provisions African countries should be expected to face when the time of entering into reciprocal binding trade treaties arrives.

Keywords AGOA, African countries, Free trade agreements, Preferential trade arrangements, US trade policy

Paper type Research paper

1. Introduction

Increased trade and commercial relations between the USA and Africa is a prominent feature of the US overall policy in Africa. In that relationship, trade policy is considered as a mutually beneficial tool to promote a stable and sustainable economic growth in sub-Saharan Africa, which is a region with enormous economic potentials of interest to the USA. It is in this context that the US Congress adopted the Trade and Development Act in 2000 to authorize:

[... ] a new trade and investment policy for sub-Saharan Africa, expand trade benefits to the countries in the Caribbean Basin, renew the generalized system of preferences, and reauthorize the trade adjustment assistance programs[1].

Title 1 of that Act, concerning the “extension of certain trade benefits to sub-Saharan Africa”, is what has become to be known as the African Growth and Opportunity Act (AGOA)[2].

Signed into law by the then US President Bill Clinton in May 2000, AGOA is a preferential trade scheme which grants market access to the USA for the exports of a selected group of African countries. Its main legal characteristic is that it is unilateral thus nonreciprocal, with the preference-granting country, the USA, defining the eligibility criteria and the products concerned. Notified to the Committee on Trade and Development of the
World Trade Organization (WTO) on 10 January 2001[3], AGOA qualifies in the WTO jargon as a “preferential trade arrangement[4]”. Although it is unilateral in nature, this instrument was never designed and intended to remain so. Indeed, evidences point to the fact that AGOA was meant to be a building block toward the negotiations of more comprehensive trade (and investment) agreements with African countries. This paper intends to show how the pattern of trade relations between the USA and African countries is gradually shifting toward that objective. Initially planned to expire in 2008, AGOA has since been extended a number of times until 2025 when it is expected to give way to the numerous trade agreements in gestation.

In 2016, America elected a new president whose trade agenda was informed by inward protectionism, or what he claimed to be the “unfairness” of the US trade agreements. Although the claim that US trade agreements are not fair appears to have been around since the early 1990s, that is decades prior to newly elected US president’s campaign and election, it was mainly grounded on the necessity to ensure that non-trade values are not trumped by economic globalization (Meyer, 2017). To be sure, this sentiment that US trade policies needed to be readdressed was commonly shared by the main presidential election’s contestants albeit for different reasons (Meyer, 2017, p. 3). However, the type of “fairness” which the new US president sets out to address is one that targets trade agreements that according to him are no longer, if at all, beneficial to the US economy and jobs and therefore need to be renegotiated. This was to be done in a way that responds to Abraham Lincoln’s warning that “abandonment of the protective policy by the American government [...] will produce want and ruin among [the American] people” (Trump, 2017).

Not so long after assuming office, the newly elected president issued two executive orders on trade[5], said in fulfillment of campaign promises. The first-order purports to identify violations and abuses of trade agreements to which the USA is a party, with the aim of either correcting these abuses or terminate these agreements altogether[6]. The order is premised on the fact that many “[USA] free trade agreements, investment agreements, and trade relations have failed” to “enhance (…) economic growth, contribute favorably to [the country’s] balance of trade, and strengthen the American manufacturing base[7]. By this action, the Trump Administration intends to negotiate new trade and investment agreements that benefit America, and to renegotiate or terminate the existing ones that harm the US economy[7]. The second executive order establishes an Office of Trade and Manufacturing Policy within the White House Office[8] with the mission to:

[...] defend and serve American workers and domestic manufacturers while advising the President on policies to increase economic growth, decrease the trade deficit, and strengthen the United States manufacturing and defense industrial bases[9].

America’s new strategy unmistakably targets Africa too.

The USA, the European Union (EU) and other developed countries have provided developing countries and least developed countries (LDCs) with preferential market access via trade policies in the form of nonreciprocal trade preference programs since the early 1970s. However, the EU, an active preferential trade provider to African countries, is already engaged in a process of redefining its trade relationships with Africa since 2004. In fact, following the banana saga at the WTO[10], the EU has been negotiating Economic Partnership Agreements (EPAs) with its African partners in a bid to preserve their historical bond. This has also entailed a shift from preferences toward reciprocity. The US trade relation with African countries is gradually taking the same path, perhaps as a response to EU’s move but certainly as a redeployment of its own global trade agenda.
Another important factor likely to affect the USA–Africa trade relations worth mentioning is the arrival of China in the global economic governance scene, particularly in international trade policy. China officially joined the WTO in 2001 the same year that the Doha Development Round was launched and the AGOA notified to the WTO. As an instrument of its foreign policy, China also grants a nonreciprocal tariff preference treatment to a group of African LDCs with which it has diplomatic relations[11]. China’s Duty-Free Quota-Free (DFQF) Programme, which does not require political conditions from the recipients[12], was launched in 2010 and covers more than 98 per cent of China’s total import from the beneficiary countries[13]. As a result, the USA has been relegated to the fourth Africa’s most important export market behind China, the EU and India, respectively, first, second and third (Davis, 2017, p. 382). China is consequently another major player in Africa so that the US competition with the EU to build long-lasting economic ties with African countries cannot ignore that dynamics, which calls for a strategic response. For example, Lande and Matanda (2017) suggest to the USA, rather than merely focusing on the EU, to use AGOA as a weapon to challenge Chinese deindustrialization policy in Africa both by diversifying its trade and building trade capacity of its African partners.

Furthermore, African countries recently completed the first phase of the African Continental Free Trade Agreement (AfCFTA) in March 2018 which purports to establish the largest trade agreement ever created in the WTO era. This suggests that African economies would henceforth be speaking with a single voice in trade negotiations, as already been signaled with regard to the cooperation with the EU after February 2020 when the Cotonou Agreement will expire[14]. By this “common position”, the African Union wants any future engagements with the EU to be detached from the African, Caribbean and Pacific grouping. This reconfiguration, in turn, possibly will influence the way the USA deals with individual African countries in bilateral trade negotiations. However, the change of direction may probably occur in the long term. In effect, just like the common position vis-à-vis the EU will not affect the EPAs already signed or currently under negotiations with the expectation to be concluded soon, the USA stands to be undisturbed in its trade relations with AGOA-eligible countries, including, as relevant for this paper, negotiations of future reciprocal free trade agreements (FTAs).

The WTO waiver that authorizes the USA to grant tariff preferences to African countries is due to expire on 30 September 2025[15]. In what follows, this contribution discusses the conception of the AGOA initiative as a building block to give way to future FTAs between the USA and African countries after 2025. Section 2 revisits the historical relations between the USA and Africa and the context in which the AGOA was brought up. Although the USA had persistently displayed reluctance to any regime of tariff preferences, its later embrace of preferentialism was dictated by converging forces in multilateral forums. Section 3 on its part points at, and analyses, the evidences of AGOA’s increasing move from unilateralism toward espousal of the main characteristics of FTAs, i.e. reciprocity. Some final remarks are provided in Section 4.

2. The US trade relations with Africa under the African Growth and Opportunity Act initiative

2.1 Brief background of US policy toward Africa before the African Growth and Opportunity Act

Historically, the US foreign policy toward the African continent has been characterized by neglect if not outright indifference. The US Presidents generally paid a low level of attention to African issues especially in the absence of crises. Another reason for this neglect was simply the perception that African issues were more a European problem than an American
Although the post of an Assistant Secretary for the Bureau of African Affairs was created within the US administration in 1958, at a period when African countries were gaining their independence, it did not trigger any real involvement by the USA in African affairs apart in situations of political crises and internal conflicts in the continent. Although its involvement was widely military, the US did not enter in such strategic defense agreements in the likes of the Inter-American Reciprocal Assistance Treaty signed with Latin America in 1947 or the North Atlantic Treaty Organization entered into with Western Europe in 1949.

The US intervention in postindependence Africa was also largely motivated by its desire to curb Soviet influence (Schraeder, 1991, pp. 387-388). Consequently, successive US administrations have for the most part considered the continent not as an essential player but as a theater of ideological battles and of struggles for the influence and positioning of the USA. This trend continued through the Clinton Administration, which, during the first term, did little to reverse the status quo (Schraeder, 1998).

However, in a geopolitical context that had undergone profound changes since the collapse of the Soviet Union, the interest of the USA in Africa equally began to grow. The abundance of Africa’s natural resources was one driver of America’s repositioning in the continent. The competition for African markets was particularly acute in the oil sector where European companies, mainly French, which had the greatest shares, saw America’s move as an “aggression” (Schraeder, 2000). However, President Clinton’s Africa tour definitely marked a turning point in the USA–Africa relationship. In an address to Parliament of South Africa in March 1998, he stated the following:

In coming to Africa, my motive in part was to help the American people see the new Africa with new eyes, and to focus our own efforts on new policies suited to the new reality. It used to be when American policy makers thought of Africa at all, they would ask, what can we do for Africa, or whatever can we do about Africa? Those were the wrong questions. The right question today is, what we can do with Africa (Clinton, 2005a).

This speech was echoing an earlier position adopted by its Secretary of State few years back, when he averred that “the Clinton Administration’s new relationship toward Africa will differ in important respects from the approach of the past […] years” (Schraeder, 1998, p. 1). The US “trade-not-aid” strategy that culminated in the enactment of the AGOA, evolved against this background (McCormick, 2006).

2.2 The African Growth and Opportunity Act in the context of US regime of preferences
2.2.1 Historically opposed to the regime of tariff preferences. Although the US foreign policy toward Africa has been that of neglect until quite recently, its attitude with regard to the regime of preferences in trade relations was also characterized by opposition. As is well known, the USA has not always been a proponent of unilateralism. Although it is today one of the main providers of preferential access to its market to developing countries and LDCs, the notions of multilateralism and nondiscrimination have been the US credo in international trade for decades (Gero and Lana, 1995). It is today established that one reason for the USA to set up trade and related agreements in many parts of the world is motivated by competition with either earlier or proposed EU initiatives in the same markets (Cox, 2014; Leith and Whalley, 2003). This behavior was particularly acute during the competitive liberalization policy pursued by the Bush Administration (Leith and Whalley, 2003; Evenett and Meier, 2008). Consequently, when the General Agreement on Tariffs and Trade (GATT) was inked in 1947, one issue of discordance between the USA and the UK was the Ottawa Imperial Preferences, a UK trade preference granted to its colonies represented in the
Commonwealth which ran in conflict with the idea of the most-favored nation (MFN) advocated by the USA (Zeiler, 1997). Indeed, the GATT texts expected negotiators to “enter into reciprocal and mutually advantageous negotiations […] directed […] to the elimination of import tariff preferences” (Glickman, 1947, p. 439).

During the GATT negotiations, the few less developed countries at the table asked for the inclusion of provisions on economic development in the texts. As a result of these demands, Article 15 which dealt with “preferential agreements for economic development and reconstruction” recognized that:

[...] special circumstances, including the need for economic development or reconstruction, may justify new preferential agreements between two or more countries in the interest of the programmes of economic development or reconstruction of one or more of them[16].

On the failure of the International Trade Organization (ITO) to enter into force, this provision was unfortunately not included in the original GATT.

By the 1960s, with the increasing number of developing countries joining the GATT, the requests to integrate their positions became more pressing. One triggering event of this regain of attention was the non-violation complaint brought by Uruguay in 1961 against the whole developed-country GATT membership in which it claimed nullification and impairment of benefits as a result of these countries’ commercial barriers regardless of their legality[17]. This was in fact, as Hudec argues, a “showpiece litigation” aimed at drawing attention on the difficulties faced by developing countries when trying to have access to the market of developed countries (Hudec, 2011, p. 57), and to demonstrate that “GATT law did not protect developing countries” (Hudec, 2011, p. 59). The logical next step for this observation was for developing countries bloc to accentuate demands for more economic development exceptions from GATT rules. In particular, they urged for adoption by developed countries of new obligations for their particular benefit and an effective enforcement of developed countries obligations toward them.

Running concurrently to developing countries’ grievances in the GATT was the discussion of tariff preferences brought to the fore by the newly established European Coal and Steel Community in 1952 which will be transformed in 1957 into the European Economic Community (EEC), a Preferential Trade Agreement (PTA) in the sense of Article XXIV of the GATT.

2.2.2 The fait accompli of the GATT generalized system of preference scheme. The EEC was a regional trade agreement (RTA) whereby participants were allowed to grant preferences among themselves. Not only did the scheme go far beyond the terms of Article XXIV of the GATT, by providing for an elimination of trade barriers between the members and the establishment of a common external commercial policy as well as the elimination of restrictions on movement of capital and labor and coordination of certain internal economic policies, but the test of its compatibility with the multilateral rules proved to be a Herculean task (Dam, 1963, pp. 641-654). Matters were exacerbated by the (il)legality of the extension of the preferential tariffs between individual European countries and their African ex-colonies or colonies which the EEC, as a whole, wished to keep in place. In fact, under Article XXV.5 of the GATT, GATT contracting parties were allowed, under certain circumstances, to have their obligations waived for a period of time. This was the regime under which some developed countries had been granting preferences to their colonies before the creation of the EEC. However, despite US opposition to the underlying idea of preferences, the EEC managed by this tour de force to grant new preferences to developing countries without fully complying with the requirements of Article XXIV of the GATT (Hudec, 2011, pp. 59-60).
Although the EEC preferences benefitted a number of developing countries, it was not designed to target all similarly situated countries [18]. Consequently, their grievances against the GATT remained all the more acute. Indeed, the “failure of the trade of less developed countries to develop as rapidly as that of industrialized countries” remained a major problem for international trade [19]. This issue was going to be addressed simultaneously by the newly established United Nations Conference on Trade and Development (UNCTAD) and the GATT (Part IV).

The GATT adopted Part IV in 1965 on trade and development, which, far from adding any substantial discipline as developing countries had expected, and notwithstanding the legalistic language used to draft the texts, actually did little to commit industrialized countries beyond mere exhortations (Hudec, 2011, p. 64). During the same period, and unsatisfied by the provision of Part IV to deliver on the expectations of developing nations, the second UNCTAD will adopt Resolution 21 which called for the establishment of a “generalized nonreciprocal, non-discriminatory system of preferences in favour of the developing countries, including special measures in favour of the least advanced among the developing countries [20]”. This was the birth of the generalized system of preferences (GSP) whose objective was threefold: to increase developing countries’ export earnings, promote their industrialization and accelerate their rates of economic growth [20].

Faced with this state of affairs, GATT contracting parties resolved in 1971 to adopt waivers authorizing the GSP thereby marking a big step in the recognition of development needs of these underdeveloped nations [21]. The EEC was the first to grant GSP to African countries, a move encouraged by the USA in part because of its support to the EEC enlargement and an interest in the political stability of Europe (Ismael, 2017, p. 6), but mainly because, as Hudec argues, it would use the GSP as leverage to compel the EEC to abandon its “special preferences” to African countries, particularly the reverse preferences (Hudec, 2011, p. 69). Although the latter did succeed, it did not manage to prevent the EEC from moving on with two GSP schemes one of which was specially devised for a select group of developing countries, notably its members’ ex-colonies. What became known as the Lomé Convention was brought about in this context.

Although firmly opposed to the idea of preference in the first place, as we just saw, the USA was faced, to some extent, with a fait accompli. Hence, in 1974 it will implement the GSP program which had been in force for other developed countries since three years. It did that by adding a Title V to the Trade Act of 1974 under which the US President was given the authority to provide “duty-free treatment for any eligible article from any beneficiary developing country [22]”. The AGOA, enacted 26 years later with a different focus came to add to the existing GSP regime already in place.

3. The African Growth and Opportunity Act as building block for future free trade agreements: from preferentialism to reciprocity

3.1 The African Growth and Opportunity Act initiative

Africa matters to all Americans. (…) Over 100,000 American jobs depend upon our exports to Africa. There could be millions more when Africa realizes its potential. As Africa grows it will need what we produce and we will need what Africa produces (Clinton, 2005b).

The US President pronounced these words a couple of months prior to the entry into force of the AGOA. As mentioned in the introduction, the AGOA came into force in 2000, with the broad objective of boosting exports from sub-Saharan Africa to the USA by eliminating tariff barriers on a large number of their exports. It builds on the US GSP program,
increasing the range of products for which preferential access is granted to include such
products as petroleum, clothing and a range of other agricultural and industrial products.

The AGOA promises to deepen US economic partnership with Africa and expand two-
way trade to the benefit of both partners. It also encourages Sub-Saharan Africa (SSA)
countries to undertake economic reforms and engage in the world economy. The underlying
rationale is that as reform spurs growth in Africa, it is expected that it will create new and
bigger markets for US exports. The scheme contains two set of provisions. The first
provides eligible sub-Saharan African countries with duty-free access to the US market for
over 1,800 products, including for lesser developed countries. This is actually an expansion
of the list of products already granted duty-free access under the GSP. These additional
products include value-added agricultural and manufactured goods such as processed
foods, apparel and footwear. Unlike the GSP, which is provided to all developing countries
regardless of location, only AGOA-eligible countries can benefit from this additional list of
products. The second set of preferences is the apparel provision. Undeniably, AGOA goes
beyond standard GSP provisions and includes a special apparel rule of origin for lesser
developed countries, referred to as the “third country fabric provision” which allows
beneficiary countries to use non-USA, non-AGOA fabric in making apparel for duty-free
export under AGOA. The apparel scheme is only available to few members, as its
benefits are more selective than the general AGOA criteria.

Statistics on AGOA tell a mixed story to say the least. Nonreciprocal trade arrangements
such as AGOA generally raise a number of questions one of which is whether they actually
increase trade between the donors and recipients countries, and if not, how the latter can
effectively derive benefit from them. A stream of literature casts doubts on the merit of these
schemes to live up to their objectives. For instance, Ozden and Reinhardt (2005) argue that
these types of agreements do not generally increase trade. However, some of the negative
findings rest on the assumption that GSP programs tend to exclude from the concessions
important export products such as textiles and apparel (Panagariya, 2002, pp. 1427-1429).
Although this hypothesis to some extent holds true for EU GSP, it is not always the case for
AGOA which has a relaxed rule of origin for apparel. By this special rule, AGOA-apparel
countries actually got a better deal as compared to EU GSP scheme. This was translated into
increase export to the USA compared to pre-AGOA years (de Melo and Portugal-Perez,
2014), although particularly so during the time frame when the Multi Fiber Agreement
(MFA) was still in force. But this benefit only accrued to a subset of AGOA recipients
that are eligible under the apparel scheme.

Moreover, beyond apparel, Davis (2017, pp. 377-379) documents the positive changes that
AGOA has brought to the export to the USA. This benefit is however limited to some
countries that have set up aggressive industrial policies. To mitigate the effects of supply-
side constraints that are associated with GSP in general, a number of AGOA beneficiaries
(notably Ethiopia, Kenya, Madagascar and Mauritius) have adopted national utilization
strategies resulting in a sharp increase of their export to the USA (Davis, 2017, pp. 379-380).
The decline in the US demand for petroleum products also had repercussion on AGOA-led
exports.

Besides capacity constraints, which are on the receiver’s side, the USA bears its own
share of responsibility for the program’s low consumption. AGOA underutilization is mostly
caused by US nontariff barriers, particularly products standards and sanitary and
phytosanitary measures. Underperformance in trade flows may also be attributed to the
nontrade-related conditionality, which is a non-negligible factor preventing nonconforming
states from exporting to the USA (Hoekman, 2005, p. 407).
Indeed, AGOA is not just a trade pact. It is also an instrument for institutional and rule of law reforms in the beneficiary countries and comes with stringent eligibility criteria. Political considerations matter as much for eligibility as economic factors. In effect, Section 104(a)(1)-(3) of the AGOA Act lays down the following relevant criteria at the appreciation of the US President when assessing a country’s eligibility:

1. [A country that] has established or is making continual progress toward establishing:
   - a market-based economy that protects private property rights;
   - the rule of law, political pluralism and the right to due process, a fair trial and equal protection under the law;
   - the elimination of barriers to US trade and investment;
   - [...]; and
   - protection of internationally recognized worker rights.

2. [A country that] does not engage in activities that undermine US national security or foreign policy interests

3. [A country that] does not engage in gross violations of internationally recognized human rights [... ] and cooperates in international efforts to eliminate human rights violations [... ]

The US Congress requires the President to determine annually whether beneficiary countries are eligible for AGOA benefits based on progress in meeting eligibility criteria, including the ones mentioned above. Pursuant to Section 104(b):

[...] [i]f the President determines that an eligible sub-Saharan African country is not making continual progress in meeting the requirements described in subsection (a)(1), the President shall terminate the designation of the country.

Although it is legally speaking a preferential trade arrangement, the regime is actually littered with reverse preferences with regard to the conditions embedded in the texts. The fact of compelling preference-receiving countries to open their economies in return or abide by non-trade or extra-trade requirements has been the issue of many criticisms against both the EU and US preferential schemes (Bhagwati, 2005, p. 29). Yet, the benefactor had also planned for the relationship to evolve when the recipients become ready for a win–win reciprocal trade.

### 3.2 Seeds of reciprocity planted from the design

The GSP is designed to promote economic growth in developing countries by providing preferential duty-free treatment for a broad range of products imported into the USA from eligible countries. An underlying principle of the GSP program is that the creation of trade opportunities for developing countries helps to encourage broad-based economic development and sustain momentum for economic reform and liberalization in these countries. Consistent with the idea of the system of preferences to build capacity to enter into FTAs, it was already understood that this would be temporal when the USA began to implement its GSP program with Africa in the 1970s. Although the GSP offered little “in absolute terms” to the truly poor nations as opposed to the most industrialized among them who actually gained considerably from the scheme despite findings of the positive impact of preferential trade arrangements to exports of recipients (Gil-Pareja et al., 2014)[25], the USA was conscious that to achieve MFN liberalization with underdeveloped countries it would
have to result to bilateral talks with them either individually or in group (McCulloch, 1982).
This would entail granting increased access to important labor-intensive products such as
textiles, apparel or footwear from developing countries while benefitting in return of a
market access for US producers of high-technology consumer goods as well as agricultural

When AGOA was passed, the “reciprocal reduction of trade and investment barriers in
Africa which] will enhance the benefits of trade and investment for the region as well as
enhance commercial and political ties” between the USA and sub-Saharan Africa was
encouraged in the “mutual interest” of both parties[26]. Consequently, US Congress
supported “reciprocal and mutually beneficial trade agreements, including the possibility of
establishing free trade areas” in the interests of both the USA and sub-Saharan Africa’s
countries[27]. So clearly, the contemplation of future FTAs was manifest right from the
start, although not necessarily to materialize in the short run. AGOA was to serve as
stepping stone. Indeed, the turn toward reciprocity in the AGOA text will only start to be
made clear in 2015 during the fourth renewal (Ismael, 2017, p. 9). However, in the meantime,
several indicators of that switch were perceptible through negotiations of numerous trade
and investment agreements, which, although of a nonbinding character, were signals for
future engagements.

3.3 Growing signs of bilateralism
3.3.1 USA–Africa trade post-African Growth and Opportunity Act: a primer. The
proliferation of regional and bilateral trade agreements is a prevalent feature of the global
trading system. Indeed, The WTO 2011 World Trade Report recorded around 300 (noti-
ified and not notified) PTAs in force in 2010, with WTO Members being parties to 13 PTAs on
average each. With the failure of WTO negotiations to deliver, the interest of WTO
Members has only grown crescendo. Reflecting the current African and global trade policy
landscape, there are many pointers to the effect that AGOA’s focus is gradually shifting to a
point where it will give way to more reciprocal trade agreements (USA Trade
Representative, 2016). Although negative terms-of-trade effects on Africa from this move is
apprehended, hopes of potential gains from this reciprocal market access rest on the
potential conclusion of the AfCFTA prior to AGOA’s expiry in 2025 (Davis, 2017, p. 381).
(Mckenzie and Meissner, 2017) Lande and Matanda (2017, p. 391) agree that reciprocity is
not necessarily a bad thing for African regional integration in general but caution that the
sequencing of the reforms matters and could only be beneficial after the formation of the
AfCFTA. The typology of US trade agreements gives us an indication of the variety of
noncommercially related values that the USA includes in its trade negotiations.

Generally, the USA makes use of a combination of WTO plus (WTO+) and WTO extra
(WTO-X) provisions, thereby going far beyond the scope of current WTO agreements.
These range from the inclusion of provisions relating to agricultural tariffs, technical
barriers to trade, services, intellectual property (WTO+) to issues such as labor market
regulations, competition policy, environmental law, investment and the movement of capital
(WTO-X) (Horn et al., 2010). As known, the USA is not the only actor who expects to export
its values in its trade agreements. From the exportation of concepts relating to issues of
“services of general interest” or competition law already espoused by its partners in Eastern
Europe, the EU envisions to:

[…] enrich this agenda with new concepts such as enhanced corporate social responsibility to
ensure a high level of protection for European consumers; increased legitimacy for investment
arbitration systems that the EU uses in its international agreements with an expressed preference
in establishing a multilateral investment court; or a more targeted system of unilateral
preferences given to developing and least developed countries via the Generalized System of Preferences (Delimatis, 2017, p. 586).

Although reciprocity is a probable outcome after 2025, it remains questionable whether it is an appropriate call. In fact, preparations for a post-AGOA relationship started under the Obama Administration back in 2015 before AGOA extension. By adopting two additional initiatives besides AGOA, Power Africa[28] and Trade Africa[29], the USA expected to deepen its economic ties with African countries (Claussen, 2017, p. 384). Although these initiatives may be signs that the USA intends to support Africa’s integration, including the AfCFTA, this does not in any way mean that its own interest in landing trade deals have vanished. To the contrary, this can be seen as a helping hand to accelerate African countries’ readiness to enter into reciprocal trade, in the same way as any other capacity-building program operates. This to some extent matches the idea that any future USA–Africa trade relations should be anchored on African Union’s structural transformation of African economies (Kategekwa, 2017).

However, African RTAs are “flexible legal regimes” characterized by a variable geometry aimed at ensuring equality in the sharing of the benefits of trade liberalization among its members (Gathii, 2010). They do not rest solely on the vision of a market-led integration but generally pursue multiple objectives. The wisdom behind African RTAs contrast with trade agreements in other parts of the world, especially Europe and North America, where the strict compliance to the legal obligations is scrupulously monitored[30]. Consequently, Claussen (2017, pp. 386-388) argues that the types of binding and expansive agreements negotiated by the USA may not be suitable for post-AGOA USA–Africa trade talks and recommends exploring alternative “trade law instruments” including “collaborative agreements” such as the one with East Africa trade bloc mentioned below. For this author, Trade and Investment Framework Agreements (TIFAs), which are usually used as FTAs’ harbingers, could also be viewed in the same way and not necessarily evolve toward reciprocal trade agreements (Claussen, 2017, p. 387).

The next sections trace the trend toward reciprocity in the US bilateral trade and framework agreements in place with individual countries and regional groupings.

3.3.2 The trade and investment framework agreements with individual African countries or blocs. TIFAs have been in the US policy landscape since the late 1980s. First used in 1989 in the George H.W. Bush administration, it had not seized to be used by his successors (Peinhardt and Allee, 2002, p. 759). In principle, these are agreements signed with countries “in the beginning stages of opening up their economies to international trade and investment, either because they were traditionally isolated or had closed economies” (Peinhardt and Allee, 2002, p. 762). Generally speaking, they are the antechamber of future FTAs with the US. Nonbinding in nature they provide strategic frameworks and principles for dialogue on trade and investment issues between the USA and the other parties to the TIFA. Although their names may vary, these agreements all serve as a forum for the USA and its partners to meet and discuss issues of mutual interest with the objective of improving cooperation and enhancing opportunities for trade and investment. For the USA, it is primarily an instrument to secure market openings and policies that go beyond what is obtainable at the WTO (Cox, 2014 at 1529). The USA and its TIFA partners consult on a wide range of issues related to trade and investment. Topics for consultation and possible further cooperation include market access issues, labor, the environment, protection and enforcement of intellectual property rights and capacity building. The USA has TIFAs with countries at different levels of development and trade and investment interests.

Initiated prior to the entry into force of AGOA with South Africa[31], Ghana[32] and Nigeria[33], the USA has since entered into TIFAs with the Common Market of Eastern and
Southern Africa, the largest regional economic community in Africa comprised 19 member states, of which 14 were AGOA-eligible. This trend has continued steadily with individual countries and other economic organizations up to the signing in 2008 of the more ambitious Trade, Investment and Development Cooperative Agreement with the Southern African Customs Union (SACU) after the failed USA-SACU FTA deal. It also inked bilateral investment treaties with six sub-Saharan African countries[34]. The most recent move is the signing of the Cooperation Agreement on Trade Facilitation, sanitary and phytosanitary (SPS) measures and technical barriers to trade (TBT) with the East African Community in 2015 to complement the 2008 TIFA between both parties. All these combined are an indication of the shifting trade pattern between the USA and Africa.

3.3.3 The African Growth and Opportunity Act extension and enhancement act of 2015. The AGOA Extension Act 2015[35] provides a long-term extension of AGOA for 10 years. Building on the 2000 original law, it is cluttered with references to reciprocity and nondiscriminatory trade, which makes observers question whether AGOA is still a benevolent unidirectional trade program or a service for which the USA is now asking payment for (Ismael, 2017, p. 5). The Act underlines that the objective of the USA is to take the first opportunity available to seek to negotiate reciprocal FTAs with sub-Saharan African countries. As the EU has already negotiated and concluded several EPAs with individual countries and subregions in Africa, the USA feels that it is also entitled to the same treatment (USTRA, 2016), a move already taken under the same mindset in Latin America (Cox, 2014, p. 1535)[36].

In its mission to further integrate African countries into the global economy, the USA believes that elimination of barriers to trade and investment in sub-Saharan Africa will increase the utilization of the AGOA and enhance the trade relationship between the USA and these countries[37]. The bulk of novelty comes from the new Section 108. From the onset, one is stricken by the “policy” of the USA which is to “continue to seek to deepen and expand trade and investment ties between sub-Saharan Africa” including through “the negotiation of trade and investment framework agreements, bilateral investment treaties, and free trade agreements[38]”. In addition, the USA plans to negotiate these agreements not only with individual countries but also “with the Regional Economic Communities, as appropriate”. This may rightly be seen as a mere sequel of what was initiated in the TIFAs. However, when the Act proceeds by stating that the USA will seek to “promote full implementation of commitments made under the WTO Agreement”, including the Trade Facilitation Agreement, in a bid to improve the use of AGOA[39], one questions whether it has not always been the case. The AGOA is authorized under the waiver and is WTO-compliant so that such a detail may at first appear redundant. Yet, the context of this claim is provided by Section 108(4) which reads:

[It is the policy of the USA to continue to] promote the negotiation of trade agreements that cover substantially all trade between parties to such agreements and, if other countries seek to negotiate trade agreements that do not cover substantially all trade, continue to object in all appropriate forums (emphasis added).

By this tone, the USA is at the same time letting the whole WTO membership know that its AGOA scheme will be morphing into a full-fledged WTO-compliant PTA while warning all WTO Members that it will continue to monitor their trade agreements and challenge them when they do not meet the requirement of Article XXIV of the GATT. Even though, as Mavroidis (2006) shows, PTAs challenges do not really abound at the WTO, chiefly for strategical reasons, the main target is easy to decipher. To think of US historic rival, the EU
and the urge to bring its current EPAs into compatibility with Article XXIV of the GATT or face challenges are not far-fetched.

3.3.4 The African free trade initiative act.

As African economies mature in the 21st century, America should also mature its trade relationships with them. Our legislation requires the president to establish a plan to negotiate and enter into Free Trade Agreements with our friends in sub-Saharan Africa. […] America will benefit greatly from Free Trade Agreements as we partner with and secure deeper ties to the bolstering and competitive economies in sub-Saharan Africa.[40]

It is by this quote that the Republican Senator Inhofe of Oklahoma accompanied the Bill for an African Free Trade Initiative Act introduced in the Senate on 19 May 2015[41]. In essence, the USA is considering maturing its trade relationships with sub-Saharan African countries by negotiating and entering into FTAs with them. For the sponsor of the African Free Trade Act, the bill seeks to amend the AGOA and develop “a plan for each sub-Saharan African country for negotiating and entering into free trade agreements and for other purposes[42].” It instructs the President of the USA to “identify” 15 countries or groups of countries “that are most ready” for a FTA with the USA[43].

Although that identification is yet to materialize, negotiation of bilateral reciprocal trade agreements is happening already, as their conception predates the design of the AGOA, yet in the spirit of the GSP back then. So far, the USA has successfully concluded one FTA with an African country, but one question one is tempted to ask is whether this can serve as a template for its future FTAs with sub-Saharan Africa. Strategically, Morocco’s FTA was negotiated as part of US Middle East series of agreements. The provisions of the US–Morocco FTA cover issues which may not be suited for sub-Saharan Africa countries’ economies as a whole. In effect, the inclusion of WTO-X provisions such as labor market regulations is definitely at odd with African countries’ resistance to social clauses at the WTO. Chapter 22:5 of the US–Morocco FTA leaves room for any country or group of countries to accede to the treaty provided it/they accept(s) all the terms. Interestingly, Morocco has recently applied to join the Economic Community of West African States (ECOWAS) trade bloc. Could Morocco’s potential admission to ECOWAS be a Trojan horse through which the USA may seek to replicate its FTA provisions with West African states?

4. Conclusion

Enacted in 2000, the AGOA changed the direction of the USA–Africa trade relations. It extended the GSP in place since 1974 by increasing the range of products for which preferential access is granted to include such products as petroleum, clothing and a range of other agricultural and industrial products. Apart from its trade component, AGOA also purports to encourage rule of law reforms in beneficiary countries as a condition for continued eligibility. Although designed as a preferential trade arrangement, it was intended to morph into reciprocal trade agreements when African countries would be ready economically. The USA–Africa trade relation upon the expiration of AGOA waiver will certainly be based on reciprocity. Whether this is a desirable trajectory and one that will support the African continent’s own agenda of integration will be measured only upon entry into force of the AfCFTA. The USA is yet to pick a country for a model FTA which will then be used for other countries that would signal their readiness. Although the FTA with Morocco is not a suitable template for countries at diverse levels of economic development, a possible admission of Morocco as a member of the ECOWAS may eventually break the wall and let that model diffuse through West African countries.
Notes


2. AGOA, Title I, Public Law 106-200 [hereinafter “AGOA Law”].

3. Committee on Trade and Development, Generalized System of Preferences, Notification by the USA – Addendum, WTO Doc. WT/COMTD/N/1/Add.3, 1 March 2001. This was notified pursuant to Paragraph 1(c) of the Transparency Mechanism for PTAs.

4. At the WTO, RTAs are defined as reciprocal trade agreements between two or more partners (including PTAs and customs unions), whereas PTAs are unilateral trade preferences (including the GSPs). While the PTAs abbreviation is used in that context to refer to the latter, PTAs in this paper instead refers to Preferential Trade Agreements which are reciprocal in nature. This is consistent with the literature in the field since RTAs are not always concluded among adjacent (regional) countries, hence the wide preference for PTAs in that scenario.

5. Under US law, an “executive order” is a statement from the president about how the federal agencies he oversees are to use their resources. It derives its source from Article II of the Constitution of the USA, which delegates to him the authority to “take Care that the laws are faithfully executed”. See Hebe (1972).


10. See European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27 (EC – Banana III). The Banana saga is one the longest legal battles that the WTO has encountered to date. It was initiated in 1995 and only found a final ruling in 2008.

11. See Committee on Trade and Development, Notification of Preferential Trade Arrangement, WT/COMTD/N/39, 18 October 2011. It is notified under Paragraph 1(b) of the PTAs Transparency Mechanisms covering PTAs taking the form of preferential treatment accorded by any Member to products of least-developed countries.

12. For instance, the USA expelled Burundi and the Democratic Republic of Congo from AGOA citing political instability and human rights abuses. But these countries’ benefit of China’s DFQF scheme remains intact.


17. See Report of the Panel on the Uruguayan Recourse to Article XXIII, GATT Doc. L/1923 – 11S/95, adopted 16 November 1962. The countries expressly named were Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Italy, Japan, The Netherlands, Norway, Sweden, Switzerland and the USA.

18. This will eventually be the reason of a complaint brought by India a couple of years at before the WTO dispute settlement mechanism. See Appellate Body Report, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R, 7 April 2004 (“EC – Tariff Preferences”).


22. Section 501, US Trade Act of 1974, Public Law 93-618 (H.R 10710), 19 U.S.C. 2461 et seq., 3 January 1975. Initially authorized for a 10-year period, beginning on 1 January 1976, it has since then been extended 13 times and expired on 31 December 2017. The latest Bill (H.R.4979), which would renew the GSP retroactively, was introduced in the House of Representatives on 8 February 2018. At the time of writing, it is yet to go through all the approval processes before it becomes law.

23. Under Section 112(b) the original AGOA Act, shirts assembled by the qualifying African country were required to be made from fabrics “wholly formed and cut” in the USA. In addition, the fabric must be made from US yarns, forcing Africa to import from the USA. In 2002, Congress amended AGOA for the first time through the Trade Act of 2002 (Public Law 107-210), which included adjustments to the textile and apparel provisions.

24. The MFA was enacted in 1974 to protect developed countries’ textile from textiles originating from developing countries. It acted as a barrier to Asian textiles’ access to the markets of developed countries. It was phased out in 2005 after which AGOA countries lost the advantage over Asian textiles exporters.

25. In another study, the same authors find the reverse to be also true. See Gil-Pareja et al. (2017).

26. Section 102(1) and (10) of AGOA Law.

27. Section 103 (4) of AGOA Law.

28. The aim of this five-year initiative launched in 2013 is to support economic growth and development by increasing access to reliable, affordable and sustainable power in Africa. “Power Africa brings together technical and legal experts, the private sector, and governments from around the world to work in partnership to increase the number of people with access to power”. See USAID: www.usaid.gov/powerafrica (accessed 23 April 2018).

29. The Trade Africa Trade Initiative is a partnership between the USA and sub-Saharan Africa to increase internal and intra-regional African trade and enhance economic ties among both regions and other global markets. Trade Africa focus on four key areas: trade facilitation, technical barriers to trade, sanitary and phytosanitary measures and competitiveness issues. It builds on AGOA, which remains the cornerstone of USA-Africa trade partnership.

30. This also explains why the record of inter-State dispute settlements on compliance with the terms of the treaties establishing these RTAs is blank.


34. In addition to Northern African countries (Egypt, 1986; Morocco, 1986; and Tunisia, 1990), the six sub-Saharan African countries with whom the USA has signed are Cameroon (1986); Congo (1990); Democratic Republic of Congo (1984); Mozambique (1998); Rwanda (2008) and Senegal (1983).


36. C.f. Lande and Matanda (2017) (requiring the US President to focus on China’s tactics too).


38. Section 108(1) P.L. 114-27.


42. Per the official title as introduced to the Senate.

43. See Section 2(b)(1) of the African Free Trade Initiative Act Bill.

References


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