Update on the African Growth and Opportunity Act (AGOA) and related developments

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AGOA remains the cornerstone of Africa-U.S. preferential market access, and the legislation accounts for virtually all of Sub-Saharan Africa's non-MFN exports to the U.S. Through AGOA, beneficiary countries only still face approximately 300 residual tariff lines that are not duty-free on entry into the U.S. In order to qualify for preferences, (a) a country must be a current AGOA beneficiary, (b) the product must be eligible for AGOA preferences as per the relevant special program indicator in the U.S. tariff book, and (c) products must originate in AGOA beneficiary countries in accordance to the rules of origin.

1. Trade developments

Aggregate exports to the U.S. from the group of AGOA beneficiaries collectively increased by 49% during the year 2021, according to full year data released by the U.S. trade commission a few days ago. Exports were valued at over $27.4 billion, compared to $18.4 billion in 2020. 2021 exports to the U.S. from this group of countries were also at their highest since 2013.

While energy-related exports (e.g. oil) continue to be an important export category, these tariff lines do not dominate overall export numbers to the extent that they have in some prior years. (Only) one fifth of AGOA countries' aggregate exports to the U.S. comprised oil and gas during 2021. A range of manufactured goods and processed mineral products account for the bulk of exports, including refined non-ferrous metals, iron and steel goods, automotives and parts, textiles, agricultural exports as well as a range of other industrial goods account for the bulk of AGOA countries' U.S.-bound exports in 2021.

South Africa continues to be the leading SSA-based exporter to the U.S. in terms of AGOA preference utilisation (+43% year on year increase over 2020), along with having the most diversified export range.

This is followed by Nigeria (+176% YOY), Kenya (18% YOY), Ghana (+138%), Angola (+108% YOY), Lesotho (+14% YOY), Madagascar (+41% YOY) and Ethiopia (+13% YOY).

Of the leading 20 exporters (by country) to the U.S.,19 increased their overall U.S. exports during 2021, compared to the previous year. 14 of the 20 countries also increased their exports under AGOA preference, some by a greater share relative to their increase in overall exports (e.g. South Africa: +37% overall, +43% AGOA, Madagascar + 11% overall, + 41% AGOA, Lesotho +9% overall, +14% AGOA, Zambia + 230% overall, +1400% AGOA).

South Africa has seen a strong increase in year-on-year AGOA exports of motor vehicles (+44% to $819m, +126% since 2019), articles of jewelry (+82% to $418m, +198% since 2019), ferroalloys (+52% to $400m), fruit and nuts (+6% to 173m) and beverages and spirits (18% to $74m, +29% since 2019). South African exports utilising AGOA have grown to $2.7 billion in 2021. While South Africa's AGOA-eligible exports were higher than in the three previous years, they were still well short of the value recorded during the period 2008 and 2014.

2. Political developments (Country eligibility changes)

The AGOA legislation includes a number of eligibility criteria and standards against which the U.S. President makes an annual determination on continued AGOA eligibility. Early October 2021, following ongoing engagement between the U.S. and the countries concerned, the U.S. President notified Congress about his intention to suspend the AGOA beneficiary status of Ethiopia, Guinea and Mali, for failing to address U.S. concerns around their continued compliance with the AGOA eligibility criteria.

The reasons provided by the U.S. varied: In the case of Ethiopia, for 'gross violations of internationally recognized human rights'; Guinea, for 'not having established, or not making continual progress toward establishing, the protection of the rule of law and of political pluralism'; and Mali for 'not having established, or not making continual progress toward establishing, the protection of the rule of law, political pluralism, and internationally recognized worker rights, and for not addressing gross violations of internationally recognized human rights'.

While all three countries recorded significant exports to the U.S. the impact on Ethiopia is likely to be the largest as it had become a leading exporter under AGOA preference with more than 50% of its exports in each of the past 3 years utilising AGOA on entry into the U.S., and entire export-focused industries (such as textiles, leather goods) largely depending on AGOA preferences.

Other preferential access to the U.S. also remains unavailable currently: the U.S. GSP expired (i.e. was not re-authorised by the US Congress) at the start of 2021 and remains unavailable as of February 2022 (this means that a country's immediate fallback of losing AGOA preferences – continued preferential market access for up to three quarters of AGOA's product coverage – is also moot for now).

Legislative Developments (GSP expiry / relationship with AGOA)

The U.S. GSP provides duty-free access to the U.S. market to approximately 5,000 products (tariff lines). This compares quite favourably with the AGOA coverage – which adds an additional 1,800 tariff lines – although is missing many of the sensitive categories that make AGOA relatively attractive. However, the GSP contains various programmatic limitations, for example certain beneficiary countries are excluded from GSP preferences in specific tariff lines due to the volume of their U.S. exports ('competitive needs limitations' – CNL) while approximately 1,500 tariff lines are reserved for LDC countries only.

AGOA beneficiaries have preferential access to all GSP tariff lines (since these include the special programme indicators 'A' and 'D' for both the GSP and AGOA respectively), but without the CNL restrictions or legislative term limitations of the GSP programme overall. AGOA also offers preferences in a further 1,800 tariff lines. The U.S. GSP is subject to periodic renewal by the U.S. Congress – since the start of AGOA, the GSP has lapsed 8 times, and on only 4 occasions was it renewed prior to expiry. This creates uncertainty that is not necessarily present with AGOA.

Most recently the U.S. GSP expired at the end of 2020 and to date (February 2022) it has not been renewed. The implication of this is as follows:

- The existing 103 GSP beneficiaries are without GSP preferences to the U.S.
- AGOA beneficiaries are not directly affected, as GSP tariff lines are included under AGOA
- The cost of losing AGOA eligibility status is amplified, as the fallback position of (possible) retained GSP preferences is currently absent
- The real value of AGOA has been fundamentally enhanced: not only have full preferences been retained, but the loss of GSP has in effect removed well over 50 "competitor" countries from

the list of preferential market access beneficiaries i.e. any non-AGOA GSP beneficiary (even if the GSP's product coverage and preferences are on a smaller scale than AGOA preferences).

It should be noted that the key differences between the GSP and AGOA – where the latter is more advantageous – involve the greater product coverage (AGOA has +1,800 additional tariff lines, including in many sensitive industrial and agricultural categories), the reduced protectionist measures (CNL restrictions and product graduation when there is a surge in exports to the U.S.), the longer time period of AGOA (end 2025 expiry, versus the much shorter periods for the GSP – and regular expiry and extended periods where no GSP preferences are available to traders – raising costs and uncertainty).

Although the GSP currently remains expired, the US Congress is considering legislation to re-activate the programme, albeit with some changes. The U.S. Senate agreed to legislation during 2021 and at the end of January 2022, the House – by a narrow margin of 222-210 – also agreed on an extension of the GSP (as part of broader legislative proposals), with its own flavour added (H.R. 4521 – America COMPETES Act of 2022). The House will now enter conference negotiations with the Senate for a unified text, pending possible signature into law.

The Bill seeks to extend the GSP by 4 years – retroactively – to end 2024; however, it contains a number of departures from the Senate version, for example, the important governance issue of public review and comment prior to any punitive actions being taken by the Administration against GSP beneficiary countries.

One key concern from the perspective of AGOA beneficiaries lies in the nature of possible changes and standards that could impact on AGOA beneficiary status, since AGOA preferences are only available to countries that have GSP status (the eligibility criteria in the U.S. legislation between GSP and AGOA broadly overlap).

A raft of somewhat tightened standard and criteria, and the language around enforcement and compliance, could make many countries GSP-vulnerable and by extension AGOA-vulnerable. For example, environmental standards are added as an eligibility criteria, requiring beneficiary countries to "effectively enforce its environmental laws, regulations, or other measures, [and] to fulfill its international environmental obligations, including as such obligations relate to public health"; failure to do so (notwithstanding best efforts, and economic constraints) could lead to a country losing its GSP status, and with that, its AGOA status.

3. U.S. – Kenya Free Trade Area negotiations

The U.S. entered into formal negotiations with Kenya with a view to establishing a reciprocal free trade area (FTA). This initiative began under the former Trump Administration, but was in effect halted under the Biden Administration and the new USTR leadership (Katherine Tai) pending a comprehensive review and development of broader policies on this. In recent days, the USTR has indicated that, within weeks, there would be announcements regarding the status and future direction of the U.S.-Kenya negotiations.

4. U.S. Trade Remedies (against South African exporters of lemon juice concentrate)

While AGOA does remove the CNL provisions that can lead to product graduations, it does not remove possible quota restrictions (such as Tariff Rate Quotas on numerous agricultural products) or the ability of the U.S. (for example under the WTO) to raise other trade remedies, for example in proven cases of dumping or surges in imports that cause or threaten to cause injury to domestic industry.

On 6 January 2022 the South African lemon juice industry received notice that a complaint had been filed at the end of 2021 by a Californian citrus juice producer (reportedly Ventura Coastal LLC), petitioning the U.S. Department of Commerce (DOC) and the U.S. International Trade Commission (USITC) to impose anti-dumping duties of 129% on South African (reportedly Cape Fruit Processors in Paarl, and Venco Fruit Processors in Addo) exporters of lemon juice concentrate.

The product involves lemon juice concentrate used as input for further manufacture, excluded is lemon juice sold in standard retail containers, or other lemon juice products such as lemonade. The South African producers have been required to submit business and trade information as part of the investigation. The U.S. market is considered to be far smaller for South African producers compared to the domestic and EU markets. In terms of the U.S. export market, AGOA provides exporters with preferential market access.

Anti-dumping proceedings and investigations are conducted according to a statutory schedule, and it is expected that the process may take approximately 14 months from filing of the petition. Hearings were held in the second part of January and on 11 February, the USITC voted to continue its investigation (i.e. it made a preliminary injury determination that “there is a reasonable indication that a U.S. industry is materially injured by reason of imports of lemon juice from Brazil and South Africa that are allegedly sold in the United States at less than fair value”).

In June 2022, a preliminary antidumping determination should be made by the DOC (unless postponed within statutory limits to end July), with a final determination expected by 19 December 2022. The June (or July) date is quite important: If the USITC and DOC make preliminary determinations that confirm antidumping, U.S. importers have to provide deposits when importing impacted goods from South Africa (or Brazil), covering the provisional ad valorem antidumping duties as determined for the goods in question, from that date onwards (i.e. when the determination is published in the Federal Register). These provisions (and guarantees) remain in place until a final injury determination is made, thus raising the costs for importers and potentially exporters (or resulting in a loss of business).

The USITC will make a final injury determination by end January 2023 and would then publish final antidumping orders (outcomes) by early February 2023, no more than 7 days following the final injury determination.