CLIFFORD CHANCE

PROPOSED LEGISLATION TO RENEW TRADE PARTNERSHIP BETWEEN U.S. AND SUB-SAHARAN AFRICAN COUNTRIES – THE AFRICAN GROWTH AND OPPORTUNITY ACT (AGOA)

I. INTRODUCTION

In April 2024, US Senators Chris Coons (D-Del.) and James Risch (R-Idaho) introduced the African Growth and Opportunity Act ("AGOA" or the "Act") Renewal and Improvement Act of 2024 (the "2024 AGOA Renewal Proposed Legislation") to renew and strengthen a key trade program with sub-Saharan African countries. AGOA is a trade preference program aimed at facilitating deeper investment and stronger commercial ties between the United States and sub-Saharan African countries. Given the importance of the region, including as it relates to critical minerals, strengthening of US trade relationships against the competing policy concerns and other trade competitors (i.e., China) makes this a significant area to watch.

II. ABOUT AGOA

GOA was first enacted in 2000 in the Clinton Administration and has since been a signature US development program for Africa focused on trade and investment. Within a decade of its implementation, AGOA received high praise from the then US Trade Representative for Africa, noting that AGOA created more than 300,000 jobs, and indirectly created about 1.3 million jobs on the continent.[1]

Similar to a Free Trade Agreement (FTA) on a regional basis, AGOA was created to ensure numerous exports from sub-Saharan African countries would have preferred and duty-free access to the US market. Specifically, the Act provides eligible African countries duty-free access to the US market for approximately 6500 tariff lines.[2] This access extends to products that previously required a "Generalized System of Preferences" status.

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1 *See* West Africa Trade Hub (Ghana), *AGOA described as,* May 9, 2010.https://agoa.info/news/article/4641-agoa-described-as.html.

2 Trade Law Centre NPC, *AGOA Product Eligibility Principles*, https://agoa.info/about-agoa/product-eligibility.html.

AGOA was originally extended under the George W. Bush Administration (until September 2007) and then extended again under the Obama Administration. AGOA is set to expire on September 30, 2025. Upon expiry, thousands of export lines to the United States from sub-Saharan Africa could be impacted if there is no additional legislation passed and this could impact the United States' efforts to remain commercially competitive with Russia and China in the region.[3] The 2024 AGOA Renewal Proposed Legislation, if passed, would extend AGOA until 2041.

III. ELIGIBILITY AND COMPETITION WITH CHINA

To benefit from this preferred access to the United States market, sub-Saharan African countries must commit to retaining a democratic and capitalist structure: namely, among others, 1) a market-based economy that protects private property rights, 2) political pluralism, due process, and equal protection of the law, 3) elimination of barriers to US trade and investment, 4) reduction of poverty, 5) the combat of corruption, and 6) protection of workers' rights.[4] The US continuously reviews eligible and applicant sub-Saharan African countries based on these principles and can terminate eligibility on this basis.[5] For example, in 2023, four countries' AGOA eligibility was terminated – the Central African Republic (CAR), Uganda, Gabon, and Niger, due to issues with safeguarding political pluralism or retaining the rule of law in those countries – and Mauritania's AGOA eligibility was reinstated, due to certain programs developed in Mauritania to eliminate forced labor.[6]

Given the political and governance considerations for sub-Saharan African countries to be able to benefit from the trade preference program, critics of AGOA argue that AGOA is not as effective or strategic in driving commerce as China's approach, which often does not involve such policy considerations.[7] For example, as of 2019, the trade patterns between sub-Saharan Africa and the US show that non-petroleum products exported to the US amounted to $3.8 billion, which was double the amount exported to the US in 2001.[8] In comparison, China-Africa trade reached a total value of $157 billion in 2019.

Another criticism of AGOA as it stands is that there is not much room for financial sector investment. Although AGOA's implementation has expanded the export of raw products or labor-intensive products from the continent, the Act does not contain express provisions incentivizing investment in the financial services sector. The COVID-19 pandemic, shortages of liquidity for many sub-Saharan African nations, and currency disparities exasperated this lack of legislative foresight. As a result, financing from private US investors in the region has not

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3 Claire Klobucista and Mariel Ferragamo, Council of Foreign Relations, *AGOA: The U.S.-Africa Trade Program*, Dec. 4, 2023, https://www.cfr.org/backgrounder/agoa-us-africa-trade-program.

4 19 USC 3703.

5 *Id*.

6 The White House, ***Letters to the Speaker of the House and President of the Senate on Intent to Terminate the Designation of the Central African Republic, the Gabonese Republic, Niger, and the Republic of Uganda as Beneficiary Sub-Saharan African Countries Under the African Growth and Opportunity Act***, Oct. 30, 2023, https://whitehouse.gov/briefing-room/presidential-actions/2023/10/30/letters-to-the-speaker-of-the-house-and-president-of-the-senate-on-intent-to-terminate-the-designation-of-the-central-african-republic-the-gabonese-republic-niger-and-the-republic-of-uganda-as-bene/.

7 ***See*** VOA News, ***In Ethiopia, Guinea and Mali, Fears Rise Over Losing Duty-Free Access to US Market***, Jan. 20, 2022. https://www.voanews.com/a/in-ethiopia-guinea-and-mali-fears-rise-over-losing-duty-free-access-to-us-market/6405813.html (after losing its AGOA status in 2022 for conflict in the Tigray region, Ethiopia argued that "China is the biggest destination," for its exports and the country should continue to move closer to China for economic reasons).

8 Daniel F. Runde and Sundar R. Ramanujam, Center for Strategic and International Studies, *Beyond 2025: The Future of the African Growth and Opportunity Act*, March 24, 2022.

grown in levels to match the comparatively exponential growth of the region's population and economic strength in other sectors (i.e., mining, textiles).[9]

IV. FUTURE OF AGOA:

The differing approaches explained below arise from the perceived strengths and failures of AGOA's implementation over the past 24 years.

a. Option 1: "Clean Renewal" or Extending AGOA for another 5-10 years.

   i. Some lawmakers are in favor of a “clean” renewal which means the language adopted in the original legislation would remain unchanged. Specifically, John Kennedy (R-LA) introduced a bill which said the terms as renewed in 2015 would extend until September 30, 2045.[10]

   ii. In keeping AGOA the same, the US could continue its ideological battle with China on the continent – encouraging democracy and self-governance while retaining strategic investments on the continent.

b. Option 2: Renew and Extend with Amended Language

   i. Some have strayed away from the "clean renewal" approach, including Biden's US Trade Representative (USTR) spokesperson, Katherine Tai, who noted that US-Africa trade relations need a more nuanced form of AGOA to reflect the modern economic realities of both regions.[11] Like Representative Tai, many scholars' concerns lie in the current weaknesses of AGOA: not spurring private investment in the region, ignoring the deepening disparity in the types of exports from the region (specifically in technology and digital trade), and failing to reach FTAs with Sub-Saharan African countries or the relatively newly developed African Continental Free Trade Area (AfCTA) Bloc.

   ii. Others have called on legislators to use America's concern for critical minerals as a bargaining chip for the amended language of AGOA. Specifically, to continue US investment in mining with more stringent measures on sustainable mining practices to further differentiate American from Chinese investment in the region.

c. Option 3: Whether renewed or expired, Prioritize Other Forms of Investment or FTAs in Africa

   i. It is clear that specific African nations which have benefitted substantially from AGOA want to enjoy the protections of duty-free access to US markets and also want to spur US private investment in labor-intensive industries.[12] South African President Cyril Ramaphosa noted at the AGOA Forum in South Africa that his country would appreciate an AGOA extension to "incentivize investors to build factories," in the region.[13]

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9 *See* World Bank Group, *Africa's Pulse: An Analysis of Issues Shaping Africa's Economic Future*, April 2024, Vol. 29, https://openknowledge.worldbank.org/server/api/core/bitstreams/11e850d1-50ca-4d49-b4bf-f717d3ad47a8/content.

10 S. 2952, https://www.congress.gov/118/bills/s2952/BILLS-118s2952is.pdf.

11 CSIS, https://www.csis.org/analysis/why-developing-world-and-all-us-need-trade-and-wto.

12 Joe Bavier, Nellie Peyton and Bhargav Acharya, *Biden wants to improve U.S.-Africa trade programme, not just renew it – Blinken*, Reuters, Nov. 3, 2023, https://www.reuters.com/world/africa/biden-administration-wants-improve-africa-us-trade-pact-blinken-says-2023-11-03/.

13 *Id*.

d. Option 4: Let AGOA Expire – No Other Forms of Investment

   i. Although this avenue is not widely discussed because it would have disastrous consequences on weaker eligible AGOA nations as well as have regressive impacts on US-foreign relations on the continent, this option is still on the table if the United States Congress is unable to pass AGOA with the reforms sought by the Office of the United States Trade Representative.

V. 2024 AGOA RENEWAL PROPOSED LEGISLATION:

The 2024 AGOA Renewal Proposed Legislation, if passed, would be a renewal with amended language (Option 2 above). The 2024 AGOA Renewal Proposed Legislation includes the following updates to AGOA: i) a 16-year extension of AGOA, ii) reducing the frequency of eligibility reviews to biennial, iii) funding a study to measure the impact of expanding the types of exports eligible for duty-free access, iv) modifies the rule of origin to include inputs from North African AfCTA members, fostering intra-African supply chains, v) allows countries to remain AGOA-eligible until five years after reaching "high income" status.

Since the 2024 AGOA Renewal Proposed Legislation was introduced in April, there has not yet been action on the proposed bill in Congress but given the importance of bolstering trade in the region and fending of competitors on the continent, the government will need to act and when it does, companies should be quick to identify opportunities.

CONTACTS

Amber Pirson
Associate

T +1 202 912 5094
E amber.pirson@cliffordchance.com

Liz Wangu
Associate

T +1 202 912 5180
E liz.wangu@cliffordchance.com

Michelle Williams
Partner

T +1 202 912 5011
E michelle.williams@cliffordchance.com

Jennifer Chimanga
Co-Head of the Africa Group

T +44 207006 2932
E jennifer.chimanga@cliffordchance.com

Mustapha Mourahib
Co-Head of the Africa Group

T +212 5 2000 8610
E mustapha.mourahib@cliffordchance.com