

**ADDRESSING THE REGULATORY IMPEDIMENTS CONSTRAINING TANZANIA
FIRMS FROM LEVERAGING MARKET ACCESS OPPORTUNITY UNDER
AFRICAN GROWTH OPPORTUNITY ACT**

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DECLARATION

I declare that this Mini-Dissertation which is hereby submitted for the award of Legum Magister (LL.M) in International Trade, Investment and Business Law in Africa at International Development Law Unit, Centre for Human Rights, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

Signed

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ABSTRACT

The African Growth and Opportunity Act (AGOA) is a trade arrangement scheme between the United States of America and eligible sub-Saharan African (SSA) countries. It offers non-reciprocal preferential treatment over 7000 products exported from African countries to the US market. AGOA is one among a number of trade preferential schemes that Tanzania is eligible. The Act provides for issues such as but not limited to trade and investment. Tanzania has a history of poor export performance despite the preferential treatment. This legal study examines the existing legal and regulatory framework governing trade and investment in an attempt to identify regulatory weaknesses resulting in Tanzania's poor trade performance. Also, the study indulges in Kenya's experience under AGOA to find whether Tanzania may draw lessons from the country success story under the preferential arrangement. The study then formulates recommendations in view of improving Tanzania's trade enabling framework to increase exports and potentially become a regional trade hub including establishing an effective national AGOA strategy.

LIST OF ACCRONYMS

ACTIF	African Cotton & Textile Industries Federation
AGOA	African Growth Opportunity Act
BRELA	Business Registration and Licensing Agency
CFTA	Continental Free Trade Area
CRBs	Credit reference bureaus
CU	Customs Union
EAC	Eastern Africa Community
EC	European Council
ECA	Hub- East and Central Africa Global Competitiveness Hub
EPC	Export Promotion Council
EPZ	Export Processing Zone
FDI	Foreign Direct Investment
FTA	Free Trade Area
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GOK	Government of Kenya
GOT	Government of Tanzania
GSP	Generalized System of Preference
IIDS	Integrated Industrial Development Strategy
IMF	International Monetary Fund
ITC	International Trade Centre
ITO	International Trade Organization
KE	Kenya
LDCs	Least Developed Countries
MDGs	Millennium Development Goals
MFA	Multi-Fibre Agreement
MFN	Most-Favoured-Nation
MITM	Ministry of Industry, Trade and Marketing
MOF	Ministry of Finance

NAFTA	North-America Free Trade Agreement
NISC	National Investment Steering Committee
OECD	Organisation for Economic Co-operation and Development
PTAs	Preferential Trade Agreements
SACCOS	Savings and Credit Cooperative Societies
SAWTEE	South Asia Watch on Trade, Economics and Environment
SDT	Special and Differential Treatment
SEZ	Special Economic Zone
Shs	Shillings
SMEs	Small and Medium-sized Enterprises
SSA	Sub Saharan Africa
TIC	Tanzania Investment Centre
TRA	Tanzania Revenue Authority
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TZ	Tanzania
UN	United Nations
UNCTAD	United Nation Conference on Trade and Development
US	United States
USA	United States of America
USAID	United States Agency for International Development
VAT	Value Added Tax
WTO	World Trade Organization

LIST OF TREATIES AND INSTRUMENTS

- The AGOA Trade Preferences Extension Act, 2015
- The Economic Development Zones (Miscellaneous Amendments) Act, Laws of Tanzania 2011
- The Export Processing Zones (Amendments) Act, Laws of Tanzania 2006
- The Export Processing Zones Act, Laws of Kenya 1990
- The Export Processing Zones Act, Laws of Tanzania 2002
- The General Agreement on Tariffs and Trade 1947
- The General Agreement on Tariffs and Trade 1994
- The land (amendment) Act, Laws of Tanzania 2004
- The Licensing Laws (Repeal and Amendment) Act, Laws of Kenya 2007
- The Licensing Laws (Repeals and Amendment) Act, Laws of Kenya 2006
- The Marrakesh Agreement Establishing the World Trade Organization
- The Special Economic Zones Act, Laws of Tanzania 2006
- The Tanzania Investment Act, 1997
- The local government finances act, Laws of Tanzania 1982
- The USA Trade and development Act 2000; The African Growth and Opportunity Act
- Universities Act, Laws of Kenya 2012
- Protocol on the establishment of the East African customs union
- The Agreement on trade-related aspects of intellectual property rights 1995
- The General Agreement on Trade in Services (GATS) 1995
- Tanzania national trade policy, 2003
- Tanzania national investment promotion policy, 1996

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CHAPTER 1

INTRODUCTION

1.1 Background to the study

The African Growth and Opportunity Act (AGOA) is a trade arrangement between the United States of America (USA) and Sub-Saharan African (SSA) countries. The arrangement is designated to promote SSA countries trade and investment competitiveness that will lead to economic growth, create jobs and raise the standard of living in African countries. The same is achieved through granting duty-free and quota-free treatment on designated export products from eligible SSA countries entering the USA market.

AGOA was signed into law in 2000 as part of the United States Trade and Development Act of 2000.¹ This legislation authorises USA trade and investment policy for the SSA and the Caribbean basin. The policy's aim is to renew and increase preferential product coverage of the Generalised System of Preferences (GSP) and reauthorise the trade adjustment assistance schemes to the designated countries.² Before this Act came into effect in 2000, most of SSA countries were granted favourable tariff preferential treatment on exports of various products to the USA market under the USA-GSP scheme.³ Thus, AGOA is an extension leg of the GSP scheme but provides more benefits. AGOA grants preferential treatment for about 7000 products including the 5,000 products covered under the GSP exported from SSA to the United States (US) market.⁴ AGOA includes products such as clothing, crude petroleum, footwear, watches, handbags, and auto motives products that are not covered under the GSP.⁵

Since AGOA came into effect in 2000, the trade arrangement has been amended a number of times⁶ to provide for and clarify the technical terms of the arrangement and to extend existence timeframe of the preferences to SSA. Initially, AGOA was set to terminate in September 2015, but with the recent legislative amendment signed into law in the USA in June 2015, the preferential trade scheme has been extended for 10 years until 2025.⁷ It is important to note that AGOA is a unilateral trade and non-reciprocal trade arrangement. The preferential treatment accorded to the various designated products is applicable only to

¹ USA Trade and development Act 2000, The African Growth and Opportunity Act

http://agoa.info/images/documents/2385/AGOA_legal_text.pdf (accessed on 12 October 2015)

² Section 102 and 103 of The African Growth and Opportunity Act 2000 (accessed on 12 October 2015)

³ 'Generalized System of Preferences (GSP)' <https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preference-gsp> (accessed on 20 October 2015)

⁴ 'AGOA Product Eligibility' <http://agoa.info/about-agoa/> (accessed on 10 January 2016)

⁵ As above

⁶ 'AGOA Amendments' <http://agoa.info/about-agoa/amendments.html> (accessed on 12 January 2016)

⁷ As above

exports from eligible SSA countries to the US market, exports from the USA to the SSA markets are not granted any preferential treatment and amendments to the Act are decided only by the US government.

Notwithstanding that AGOA trade arrangement preferences are available for the benefit of SSA countries, African countries are not automatically eligible for AGOA benefits. First, the country has to be included in the AGOA statutory list.⁸ Second, African countries should establish and maintain the rule of law, a free market-led economy, policies to eliminate poverty, remove barriers to trade, observe protection of human rights and not to engage in activities that amount to supporting terrorism.⁹ Currently, 39 SSA countries are eligible for the AGOA benefits.¹⁰

1.2 Problem statement

It has been 15 years since the AGOA was signed into law by the USA Congress to promote the growth of trade and investment in Africa. Over the years, Tanzania trade performance in the preferential trade arrangement has dropped gradually from 18.8% in 2002 to 4.1% in 2015.¹¹ The reasons for the poor trade performance include but not limited to lack of sufficient information about AGOA to public institutions, private sector and business firms. Unfortunately, the few that are aware of AGOA opportunities fail to take advantage of the available opportunity due to the high cost of production as a result of existing gaps in the legal, regulatory and institutional framework in the country. For instance, to date Tanzania lacks a national policy to support business firms from taking advantage of the enhanced market access under the AGOA trade preferential arrangement as the ones established in Kenya and Lesotho.¹²

The national trade policy acknowledges that export-driven production is potentially a powerful means of raising the standard of living, generating employment and eradicating

⁸ Section 107 of The AGOA 2000

⁹ Section 104 and 105 of the AGOA 2000

¹⁰ AGOA eligible countries now include: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Chad, Comoros, Republic of Congo, Djibouti, Ethiopia, Gabon, Ghana, Kenya, Lesotho, Liberia, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, South Africa, Tanzania, Togo, Uganda, Zambia

¹¹ 'Failure to tap AGOA market' Daily News <http://www.dailynews.co.tz/index.php/local-news> (accessed on 11 November 2015)

¹² As above

poverty in the country.¹³ However, the country has not established incentives or strategies to enable traders to benefit under AGOA. For any country to achieve export success; national trade policy, laws, and regulations should work in synergy so as to create a business friendly environment and foster competitiveness.¹⁴

It is against this backdrop that this legal study argues that lack of a sound regulatory framework is partly responsible for the poor trade performance of Tanzania under the AGOA preferential arrangement. It also argues that with a sound regulatory framework, Tanzania's trade potentials will be greatly enhanced, and its export-led trade capacity will be unleashed under the AGOA opportunity.

1.3 Research question(s)

The overarching research question which this research will answer is: What are the regulatory gaps responsible for the poor performance of Tanzania under AGOA trade preference arrangement?

In particular, this study will seek to answer the following questions:

- i. What is a multilateral trade system and how does preferential trade arrangements fit in?
- ii. What is the nature and context of AGOA as a preferential trade agreement?
- iii. In which way does the existing legal and regulatory framework constrain Tanzanian firms from leveraging enhanced market opportunity under AGOA arrangement?
- iv. What regulatory approach should be adopted to unleash Tanzania's capacity to leverage export-led trade under the AGOA preferential arrangement?

1.4 Thesis statement

This legal study argues that Tanzanian businesses are constrained by the existing legal and regulatory framework governing trade and investment in the country. In addition, the study contends that such regulatory gaps are responsible for Tanzania's poor trade performance

¹³MITM 'Tanzania National Export Strategy' <http://www.tzdp.org.tz/> (accessed on 11 October 2015)

¹⁴International Trade Centre (ITC) 'National Trade Policy for Export Success' (2011)

under AGOA preferential trade arrangement. It also contends that with a sound enabling regulatory framework to implement a national export-led trade policy in the country and with adequate support to the private-sector, Tanzania would not only benefit from the AGOA market access initiative but also enhance the country's trade competitiveness at the regional and international market level.

1.5 Significance of research

The research is significant because it would contribute to developing a national AGOA strategy that would support the ability of Tanzanian firms to export to the US market and to leverage opportunities that AGOA offers.¹⁵ The subject is timely because in 2015 the life validity of AGOA preferences was extended for 10 years to 2025. This study intends to identify and address the challenges that prevented Tanzanian firms from exploiting US market opportunity and strengthen business relationship with the US in the last 15 years.

1.6 Literature review

Since AGOA came into effect in 2000, there has been enriching controversial literature on the provisions of the Act and the economic impact the trade agreement has had for the eligible SSA countries. From the available literature, it is established that among the contentious issues relating to the effectiveness of AGOA trade preferences to SSA is the capacity of the beneficiary countries to take advantage of the available opportunities under the preferential trade arrangement.¹⁶ Most African countries without external aid fail to utilise tariff preferences accorded to export products and compete in the developed market arena such as that of US, with other countries producing like products. This debate derives from the fact that SSA countries trade experience under AGOA have failed to fully tap into the opportunities provided for under the arrangement.¹⁷

¹⁵ 'Call for Aggressive AGOA Strategy,' Daily News <http://dailynews.co.tz/> (accessed on 11 November 2015)

¹⁶ UNCTAD Secretariat 'Main Recent Initiatives In Favour Of Least Developed Countries in the area Of Preferential Market Access: Preliminary impact assessment' Geneva 2003

http://unctad.org/en/Docs/tb50d5_en.pdf (accessed on 20 November 2015) ; R Adhikari 'Supply-side constraints facing South Asian LDCs: Frontiers and dynamics (SAWTEE) (2011)

¹⁷ BR Williams 'African Growth and Opportunity Act: Background and Reauthorization' CRS (2015) <https://www.fas.org> (accessed on 13 November 2015) ; N Condon & M Stern 'The effectiveness of African Growth and Opportunity Act (AGOA) in increasing trade from Least Developed Countries 'Systematic Review Report (2010) [r4d.dfid.gov.uk/PDF/Outputs/Systematic Reviews/AGOA-Report.pdf](http://r4d.dfid.gov.uk/PDF/Outputs/Systematic%20Reviews/AGOA-Report.pdf) (accessed on 16 November 2015)

Different views have emerged regarding the impact of AGOA in SSA countries. Some writers have critically argued that the trade arrangement is a way for the US to exploit untapped resources available in African countries and overflow their markets with goods that sabotage the small growing industries in disguise.¹⁸ The established trade arrangement is on a non-reciprocal basis which means that preferential treatment is accorded to exports from eligible SSA countries and not on import products from the US. However, eligibility of SSA countries for AGOA preferences requires not only to establish a free market-led economy but also to eliminate all sort of trade barriers in their countries including tariff protection that most African countries have in place to foster the growth of their growing industries.¹⁹ Such requirement opens SSA countries markets to a flow of American goods that inevitably undermine the local industry.²⁰ Moreover, it is argued that the trade agreement is designed to promote SSA countries trade and investment competitiveness that will boost economic development of SSA countries, alleviate poverty and create jobs. The reality is that most foreign investment driven by AGOA preference in SSA countries has established light manufacturing industries particularly textile and apparel firms that impart no new skills to the employees, underpay and exploits workers. Most capital intensive industries, particularly oil and mineral extraction in Africa, are foreign owned, and they import expatriates from developed countries.²¹

Most agricultural products are regarded as ‘sensitive item’ to enter the US market.²² Thus, even under AGOA, agricultural products remain subject to high tariff rate or to unreasonable quota restriction. More than half of SSA countries eligible for AGOA, their economies are driven by the trade of agricultural produce. Such indirect restrictions imposed in the US market undermine the real objective of the trade arrangement.²³

The other view on the impact of AGOA trade arrangement in the SSA countries is that the unilateral and non-reciprocal preferential scheme offered by the US has considerably changed

¹⁸ As above

¹⁹ J Hickel ‘Trading with the enemy’ (2011) http://fpif.org/trading_with_the_enemy/ (accessed on 10 March 2016)

²⁰ As above; (n 15 above)

²¹ N Condon & M Stern (n 22 above)

²² E Bianchi & P Sanguinetti ‘Improving the Access of Mercosur Agriculture Exports to the US: lesson from NAFTA’ ITD (2004) <http://idbdocs.iadb.org/> (accessed on 10 March 2016); VC Jones ‘Generalized System of Preferences: Background and renewal debate’ CRS (2015) <https://fas.org>

²³ E Naumann ‘An Overview of AGOA performance, beneficiaries renewal provisions and the status of South Africa’ Tralac (2015) www.tralac.org/ (accessed on 15 November 2015)

the economic conditions in the SSA countries. Williams²⁴ highlights that the annual gross domestic product (GDP) growth of SSA was a percentage point lower than the global GDP growth before the trade arrangement came into effect, that is, it was 2.7% for SSA to 3.3% global average pre-AGOA period. Since AGOA came into existence, SSA's GDP growth averaged 6.3%, more than two points higher to 3.9% world average. In addition to the increase in GDP, AGOA is the driver of export growth to the US market for most of the beneficiary countries including Mauritius, Lesotho, South Africa, and Angola. Its impact has been positive on most of the beneficiary countries' revenue, taxes, and growth of investment and increase of employment over the years.²⁵ If it was not for AGOA preferences and particularly the special rule that permit preferences for products that use third country fabric, textile and apparel industries growth in Kenya and Lesotho, would not have attained the growth rate that they achieved by far.

Taking into account of both different views on the impact of AGOA on the SSA countries, AGOA offers more favourable preferential treatment to exports from Africa. It is the only trade arrangement that grants special treatment on clothes that use third party (non-AGOA beneficiary) fabric in production from SSA countries.²⁶ It offers duty-free and quota free for over 7000 products exported from Africa.²⁷ Through AGOA, US provides trade-related assistance to SSA countries to promote the growth of trade. For instance, the Africa Women Entrepreneurship Programme (AWEP) launched in 2010 equips women entrepreneurs to accelerate the growth of their businesses through taking advantage of AGOA.²⁸ AGOA is an important trade arrangement to SSA countries; most beneficiary countries were fore-frontiers lobbying for the extension of the scheme way before 2015.²⁹

Moreover, the Tanzanian economy depends on agriculture, which accounts for more than half of the country GDP. As common to LDC's, the country suffers from weakness on its export supply capacities. The most prevalent supply deficiencies affecting Tanzania from actually utilizing the preferential market access opportunities available to it include poor infrastructure. In particular, this include water supply, electricity supply, transportation

²⁴ BR Williams 'African Growth and Opportunity Act: Background and Reauthorization' CRS (2015) <https://www.fas.org> (accessed on 13 November 2015)

²⁵E Naumann (n 26 above)

²⁶ (n 1 above)

²⁷ 'AGOA Product Eligibility' <http://agoa.info/about-agoa/>

²⁸ M Odongo 'The Africa Growth and Opportunity Act, Challenges and Opportunities' (2015)

www.ieakenya.or.ke/downloads (accessed on on 30 November 2015)

²⁹ (n 13 above)

means, limited access to financial services, lack of a sound legal and regulatory environment enabling conduct of business, poor technology, inadequate public institutions, as well as poor resource allocation.³⁰ The WTO trade policy review on Tanzania (2000)³¹ describes the country's trading policies as "a confusing agglomeration of memoranda that vary from one ministry to another".

WTO policy review on Tanzania maintains that the country like most African countries largely relies on export duties and Value Added Tax (VAT), consequently succumbing to economic pressure to keep in place laws and policies that in one way or the other derail export. The laws in question will always impact on what Tanzania exports to the rest of the world. The lengthy administrative procedures and bureaucracy hinder the activities of any business.³²

Trade as a tool for economic growth and development needs to be accompanied by sound domestic policies to produce results. Most developed countries such as the US have reviewed the schemes that offer preferential market access on exports and decide to provide more favourable preferential treatment to Least Developed Countries.³³ However, proponents of the effectiveness of special and differential treatment on trade argue that market access preferences are not always conducive to practical benefit recipient countries, particularly when the latter are disadvantaged countries facing severe supply constraints as the case of Tanzania and most other beneficiaries of AGOA preferential trade arrangement.³⁴

In the light of the above literature, it is evident that poor performance of most developing and least developed countries on taking advantage of the preferential market access availed to them is affected by weak supply capacities. The author agrees that trade is a tool for economic growth and development if it is supplemented by sound policies, law and regulation that are in harmony with one another to improve the export capacity of a country. It is the thrust of this study to identify and address the gaps prevailing in the regulatory framework that constrains firms from utilising enhanced market access under AGOA.

³⁰ ILEAP (2004) 'Constraints to East Africa's Utilization of Market Access Initiatives' <http://www.ileap-jeicp.org/downloads> (accessed on 2 November 2015)

³¹ WTO 'Trade Policy Review: Tanzania (2000)' <https://www.wto.org> (accessed on 3 November 2015)

³² A.P Rutabazibwa, 'Impact of the agricultural WTO agreement on the domestic legal framework in Tanzania' (2006)

³³ UNCTAD Secretariat 'Main Recent Initiatives In Favour Of Least Developed Countries In The Area Of Preferential Market Access: Preliminary Impact Assessment' Geneva 2003
http://unctad.org/en/Docs/tb50d5_en.pdf (accessed on 20 November 2015)

³⁴ As above; R Adhikari 'Supply-side constraints facing South Asian LDCs: Frontiers and dynamics' (SAWTEE) (2011)

1.7 Research methodology

Basically, the study entails a qualitative review of literature, including primary sources such as policies and legislations from Tanzania. Secondary sources, including reports from trade-related institutions, relevant documents, working papers and journal articles were considered. The study was desk-top, library based and online database search in nature.

The approach adopted in this study was descriptive, analytical and prescriptive. The descriptive approach is adopted in providing an overview of the AGOA, while the analytical approach is used in evaluating the existing legal, regulatory and institutional framework governing doing business in Tanzania. The prescriptive approach is adopted for the recommendations.

1.8 Scope of study and limitation

This legal study focuses on the analysis of policies, laws and regulatory framework governing trade and investment undertakings in relation to the Tanzania's participation under AGOA regime. In the process, this study seeks to assess the adequacy of the existing national trade policy, the legal and institutional framework for taking advantage of the preferential trade arrangement. The case study of Kenya trade performance under AGOA is discussed as far as it provides lessons which may be of interest to creating a better enabling business environment in Tanzania.

However, this research does not extensively delve into the economic constraints that hinder Tanzania from taking advantage of the AGOA market access which includes inadequate infrastructure particularly water supply, electricity, transport and telecommunication, use of out-dated methods for production, corruption and poor security of property, etc. The idea is to undertake legal analysis on Tanzania's export performance under AGOA.

1.9 Outline of Chapters

This chapter lays the foundation for the study by discussing introductory elements which include: the background to the study, problem statement, thesis statement, research questions, objective and significance of the study, research methodology and the scope and limitation of the study

Chapter 2 traces the evolution of the global trading system to the present WTO system and preferential trade agreements in the multilateral trading system.

Chapter 3 provides a general understanding of AGOA trade arrangement and examines its compatibility within the framework of the multilateral trading system.

Chapter 4 explores the trade opportunities available to Tanzania and analyses the challenges faced by businesses in Tanzania in leveraging the market access opportunity offered under the AGOA preferential trade arrangement.

Chapter 5 examines Kenya's trade experience under AGOA scheme with a view to draw lessons from it.

Chapter 6 provides a summary of findings of the study, conclusions are drawn and recommendations made.

CHAPTER 2

CONTEXTUALISING PREFERENTIAL TRADE AGREEMENTS IN THE MULTILATERAL TRADE SYSTEM

2.1 Introduction

As stated in chapter one, the aim of this research paper is to identify and address the prevailing legal and regulatory challenges that prevent Tanzania firms from exploiting the preferential US market opportunity provided under the AGOA. To provide light to the same, this chapter attempts to trace the evolution of multilateral trade system and the co-existence of preferential trade agreements in the multilateral trading system. This approach is taken deliberately because it is worthwhile to know the jurisprudence behind preferential trade arrangement before discussing the provision of the AGOA text.

2.2 Historical overview of the multilateral trading system

The order and principles in the present multilateral trading system is an outcome of economic revolutions that took place from the 19th century.¹

2.2.1 Pre-First World War

The 18th to 19th centuries industrial revolution brought about significant changes in the world economy.² The immense technological innovations in industries, communication, and transportation unleashed ships, railways, telegraph, automobiles and aeroplanes which facilitated movement of people and goods around the globe.³ Industrialisation began in Britain and with time it spread to Europe and America.⁴ Industrialised countries produced goods that they were efficient in, thus it reinforced trade diversification. In the early 19th century, technological advances steadily led to fall of transportation cost which eventually enhanced expansion of international trade and capital flows. The northern industrialised countries sold their manufactured goods and sourced raw materials from the southern countries⁵. This marked the beginning of uneven income distribution among the north-industrialized countries and the south-raw material supplying countries. Britain as the world

¹L Hackett 'Industrial Revolution' <http://history-world.org/Industrial%20Intro> (accessed on 20 January 2016)

² 'Industrial Revolution' <http://www.history.com/topics/industrial-revolution> (accessed on 15 January 2016)

³ 'The creation of the multilateral trading system' https://www.wto.org/english/res_e/booksp_e/ (accessed on 20 January 2016)

⁴ (n 2 above)

⁵ L Hackett 'Industrial Revolution' <http://history-world.org/Industrial%20Intro.htm> (accessed on 20 January 2016)

economic power together with a few industrialised nations dominated the world trade total share.⁶

Following Britain's gold parity single currency and free trade policy, countries developed a fixed exchange rate system against each other that enhanced stability and predictability in economic cooperation and capital flows.⁷ France believed that Britain's dominance in industrial performance was due to her policy of trade liberalisation, thus France negotiated a bilateral agreement with Britain that sought concession to reduce trade tariff barriers between the countries and a most-favoured-nation clause which guaranteed non-discrimination treatment if either of the countries lowered tariff with third parties. The countries agreed to the terms and signed the Anglo-French treaty, 1860 to effect the same.⁸ This treaty influenced influx of bilateral agreements among European countries with the inclusion of the MFN obligation.⁹ Later on, apart from Britain which adhered to trade liberalisation, other European countries found their bilateral agreements obligations hard to live with which led to renegotiating or denouncing their agreements and break of trade wars among countries due to unilateral increase of tariffs to protect domestic producers.¹⁰ A remarkable economic cooperation feature during this period was that trade was underpinned by bilateral relations and not by an international instrument and also countries were committed to their fixed domestic currency values. However, this system had inherent weaknesses, there were no impartial institutions to oversee their commitments.¹¹ Besides, European countries rush to expand their colonial empires in Africa and Asia was a waning to trade liberalisation practices.

Industrialised countries scramble for colonial empire power led to the outbreak of the First World War in 1914.¹² The war disrupted trade relations; the gold parity single currency collapsed, Europe was left devastated and the economic policies after the war based on strict trade restrictions.¹³ Economic instability was compounded by financial challenges; countries failed to restore the gold parity standards and failed to agree on a common formula for tariff reductions. Consequently, it led to the economic depression from 1929. During this period,

⁶ (n 1 above)

⁷ RM Stern 'The Multilateral trading system' <http://fordschool.umich.edu/rsie/workingpapers> (accessed on January 23 2016)

⁸ R Cass & M Knoll 'International Trade Law' (2013)

⁹ RM Stern (n 7 above)

¹⁰ 'Trends in international trade' https://www.wto.org/english/res_e/booksp_e/wtr13-2b_e.pdf (accessed on 10 January 2016)

¹¹ 'Causes of World War 1' <http://www.heeve.com> (accessed on 11 January)

¹² As above

¹³ 'The Great Depression 1929' <http://useconomy.about.com/od/> (accessed on 24 January)

new trade barriers emerged and international trade value declined by two-third amid 1929 to 1934.¹⁴ Partly one of the reasons why the world economy failed to recover after the First World War was due to lack of a global economic leadership that would direct a viable recovery strategy and restore international stability.¹⁵

The 1929 economic depression triggered political insecurity; countries adopted mechanisms to protect their national interest at the expense of their collective interests which ultimately led to the breakout of the Second World War in 1939. For instance, USA enacted the Smoot-Hawley Tariff Act in 1930 that raised tariff rates over 20,000 imported goods to record levels aiming to protect domestic farmers from agricultural imports and falling farm prices.¹⁶

2.2.2 Post-Second World War

With the coming to an end of the Second World War, developed countries led by the USA saw the opportunity to reorganise the world, drawing lessons from the polarisation of uneven economic developments and restrictive trade policies among states that led to the tragedies of the First World War and the Great Depression.¹⁷ After consultations, nations agreed to the creation of institutions to facilitate global economic reorganisation.¹⁸ In 1944, the International Bank for Reconstruction and Development (IBRD) known as the World Bank, was created to be responsible for providing financial aid for economic reconstruction in post-World War II and also regulate international investment. In 1945, the International Monetary Fund (IMF) was established responsible to monitor exchange rates and address balance of payments deficit of nations.¹⁹ The initial plan was to create a third institution to be known as the International Trade Organization (ITO) as a specialised agency of the United Nations that would be responsible for regulation of trade-related activities of international economic cooperation along with the other two mentioned institutions. However, an attempt to create ITO in 1948 failed because most nations did not ratify the charter establishing the ITO known as the Havana Charter.²⁰

¹⁴ ‘The creation of the multilateral trading system’ https://www.wto.org/english/res_e/booksp_e/ (accessed on 25 January 2016)

¹⁵ (n 10 above)

¹⁶ (n 9 above)

¹⁷ M Sanson *Essential International Trade Law*, (2002)

¹⁸ As above

¹⁹ SK Ghizoni ‘Establishment of the Bretton Woods System’ (2013) <http://www.federalreservehistory.org/> (accessed on 25 January 2016)

²⁰ ‘The GATT years: from Havana to Marrakesh’ https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (accessed on 30 January 2016)

2.2.3 From ITO to WTO

The World powers aimed to create the ITO at the UN Conference on Trade and Employment held in Havana, Cuba 1947.²¹ More than 50 nations participated in negotiations to create the trade organisation.²² The ITO charter agreed upon in 1948 was a comprehensive code containing rules addressing several matters. These include but are not limited to trade restrictions practices, labour and employment, economic development, investment and services, subsidies, countervailing measures, anti-dumping, special provisions on free trade areas and customs unions and intergovernmental commodity agreements.²³

Meanwhile, as the Second World War II was ending, 15 states led by the United States and the United Kingdom began a multilateral negotiations on removal or reduction of tariff and non-tariff barriers to trade.²⁴ They wanted to promote trade and rectify protectionist measures that have been in place since the 1930s. There was a round of negotiations in December 1945 which proved to be successful as it resulted in the formulation of trade rules and reduction of tariff on more than 40,000 items affecting about one-fifth of the world at the time.²⁵ By 1947, the negotiating group on reduction of trade-tariff barriers expanded to 23 nations and in October of that year, the General Agreement on Tariff and Trade (GATT) was signed as a 'Protocol of Provisional Application'.²⁶ The agreement went into effect in June 1948 consisting of 23 founding members referred to 'contracting parties.'

The 23 founding members of the GATT were also part of the group negotiating the ITO charter. GATT had many provisions similar to ITO charter but limited to the purpose of reducing trade tariffs pending the creation of the ITO.²⁷ The expectation was that the ITO would supersede GATT to liberalise and regulate activities of international trade. Thus, GATT had no formal institutional arrangement.²⁸

The Havana Conference began in November 1947, a month after the GATT was signed. The ITO charter was agreed in March 1948, but most countries did not ratify the charter to give it effect.²⁹ When it became apparent that US Senate will not ratify the ITO charter in 1950,

²¹ R Lattimore et al 'Trade rounds and the WTO' in *International Trade: Free, Fair and Open* (2009)

²² As above

²³ The WTO: An Historical, Legal, and Organizational Overview <http://internationalecon.com/wto/WTO-archive/ch1.html> (accessed on 29 January 2016)

²⁴ 'The GATT years: from Havana to Marrakesh' <https://www.wto.org/> (accessed on 30 January 2016)

²⁵ R Lattimore et al 'Trade rounds and the WTO' in *International Trade: Free, Fair and Open* (2009)

²⁶ (n 17 above); (n 23 above)

²⁷ (23 above)

²⁸ M Sanson *Essential International Trade Law* (2002)

²⁹ J Kasto *The function and future of the WTO* (1996)

plans for creation of the ITO were effectively abandoned.³⁰ Therefore, GATT became the only multilateral instrument regulating the conduct of international trade in goods among member countries, and the number of members increased over time.

2.3 The General Agreement on Tariff and Trade (GATT) 1947

The GATT regulated the conduct of international trade in goods from 1947 to 1994. The primary aim of the GATT was to reduce stringent protection of domestic industries through reduction of tariffs. The original GATT legal instrument was divided into three parts consisting of 35 articles in total.³¹ Part I contained two articles that are the most-favoured-nation treatment and schedule of concessions. Part II included 21 articles providing for matters such as national treatment, anti-dumping, restrictions on trade and general exceptions. Part III had 122 articles providing for the formation of customs unions and free trade areas together with procedural provisions including accession to the GATT, modification of schedules and withdrawal of concessions.

The GATT 1947 legal provisions remained the same for some years. The significant addition to the original legal text was Part IV of the agreement titled ‘trade and development’ in 1966.³² Part IV has three articles stating clearly for contracting parties to promote trade of less developed countries through increasing access to their products in the world market. This additional part had minimal impact to less developed nations trade conduct because the provisions had no defined legal obligation for the contracting parties to cater for less developed countries needs.³³

Moreover, the contracting parties conducted a series of the trade negotiations in a continual effort to reduce tariffs that resulted in other additions to the GATT 1947. To-date a total of eight trade rounds have been conducted and finalised, the ninth trade round known as the Doha round is still in progress.

The Tokyo Round of 1973 to 1979 is the seventh trade round. In this round, parties negotiated and created several codes and non-tariff barriers to trade agreements.

The emergence of Special and differential preferential trade arrangements

A notable feature of the Tokyo Trade Round is the adoption of the decision on differential and more favourable treatment reciprocity and fuller participation of developing countries in

³⁰ (n 23 & 24 above)

³¹ GATT 1947 https://www.wto.org/english/docs_e/legal_e/gatt47.pdf (accessed on 30 January 2016)

³² Special and differential treatment provisions <https://www.wto.org> (accessed on 2 February 2016)

³³ I Feichtner *The law and politics of WTO Waivers: stability and flexibility in Public International Law* (2012)

November 1979 commonly known as the ‘Enabling Clause’.³⁴ This decision serves as an exception to the MFN non-discrimination, permitting trade preferences between developing countries and for unilateral preferences by developed countries to developing countries. This decision was never formally incorporated into the GATT, but its provisions have influenced the creation of unilateral and non-reciprocal preferential trade arrangements.

The Uruguay Trade Round’s duration was from 1986 to 1994. This round brought significant changes to the rules governing international trade, negotiations covered trade in goods and trade in services.³⁵The Uruguay Round agreements were signed at Marrakesh, Morocco in 1994. The primary international trade rules applicable to goods in trade are now contained in the GATT 1994. This took into account substantive changes agreed to in the Uruguay Round, but it incorporated within it provisions of the GATT 1947 as amended or rectified.³⁶

The signing of the Uruguay Round trade agreements marked the transition from the provisional GATT 1947 to the WTO. The WTO was officially established in January 1995³⁷.The Marrakesh agreement reinforced the legal and institutional framework of world trading system. In addition to the GATT 1994, two new agreements were established, namely; the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Collectively, these agreements are referred as to multilateral trade agreements since they constitute trade policy obligation to which all the WTO members have accepted.³⁸

2.4 WTO as an institutional framework for multilateral trading system

The WTO as a multilateral organisation regulates activities of trade between its member nations. All multilateral trade agreements are embodied with indispensable principles including the Non-discrimination, reciprocity, transparency and binding tariffs.

WTO is a forum for governments to negotiate trade issues and the agreed terms are signed by member nations and become the rules for international trade.³⁹ Governments ratify these rules to form part of their domestic legal system. Therefore, WTO agreement rules apply to local

³⁴ ‘The Enabling Clause 1979’ <https://www.wto.org>(accessed on 2 February 2016)

³⁵ ‘WTO/GATT - chronology of achievements’ <https://www.wto.org>(accessed on 10 January 2016)
(n 29 above)

³⁶ ‘GATT 1994’ <https://www.wto.org>(accessed on 30 January 2016)

³⁷ As above

³⁸ ‘Agreement establishing the WTO’ <https://www.wto.org> (accessed on 30 January 2016)

³⁹ ‘Understanding the WTO’ <https://www.wto.org>(accessed on 2 February 2016)

firms and nationals in the conduct of international trade.⁴⁰ Currently, the WTO has 162 member states.⁴¹

2.5 Preferential trade agreements in the multilateral trading system

In the light of the historical evolution of the multilateral trading system, the cornerstone of the WTO is the Non-discrimination principle; whereas member countries are expected not to discriminate against each other. However, since inception of the GATT in 1947 to the present multilateral trade agreements, member countries are allowed to enter into preferential trade agreements with one another through various provisions of multilateral trade agreements.

Preferential trade agreements are international agreements with restrictive membership that aim to increase partners respective market access.⁴² The Preferential Trade Agreements permitted as exception under multilateral trade agreements are such as;

- Non-reciprocal PTAs are such international trade agreements that provide for one way preferential tariffs elimination or reduction, such as the US-GSP agreement.
- Reciprocal PTAs are such international trade agreements that provide a two-way preferential treatment on only part of the trade.
- Free Trade Areas are such international agreements that provide a two-way preferential treatment and eliminating tariffs on substantially all trade between the contracting parties such as NAFTA and CFTA.
- Customs Unions are such international agreements which are basically FTAs whose contracting members additionally agree on a common external tariff against imports from non-members such as the EAC.

AGOA falls with the first category of the above mentioned PTAs, the Non-reciprocal preferential trade arrangement.

Generally, PTAs are built on the foundation of the WTO agreements however their nature enumerates more comprehensive and stronger principles than such provided under the WTO agreements. Over the past twenty years PTAs that liberalize trade between countries have proliferated. The proliferation of PTAs shows no signs of slowing down in the near future. Nearly all members of the WTO belong to at least one preferential trade arrangement. The proliferation of PTAs also is not limited to developed economies. On the contrary, many PTAs are concluded between developing countries. The average African country belongs to

⁴⁰ As above

⁴¹ 'Members and Observers' <https://www.wto.org> (accessed on 3 February 2016)

⁴² Limao N "Preferential Trade Agreements" NBER, 2016 <http://www.nber.org/papers/w22138.pdf>

four different agreements, Tanzania for instance is a party to eleven bilateral agreements and also it is a beneficiary for preferential duty-free status for most of its exports to the EU market and the US market.⁴³

The legal relationship between WTO agreements and PTA rules is that they co-exist. The relation between PTA members and other WTO members is guided by the WTO agreements that is; PTAs must comply with GATT Article XXIV, the Enabling Clause or GATS Article V. If it fails to do so, the PTA remains valid but if, and to the extent MFN applies, concessions exchanged in the PTA must be extended to all WTO Members.

AGOA is a non-reciprocal preferential trade arrangement between the US and eligible SSA countries. The trade arrangement is not a regional trade agreement and not in agreement with the generalised preferential system justified under the Enabling Clause. However, AGOA has been in force since year 2000. The validity of AGOA scheme in the multilateral trading system is discussed in depth in the next chapter.

2.6 Conclusion

In the long run, multilateral trade liberalisation remains the way forward. WTO is the vehicle through which governments create a well-functioning international trading system. PTA are part and parcel of the multilateral trading system, they are the key source of international trade policy reforms. The depth of policies negotiated and agreed by member countries under PTA mostly goes beyond tariff reduction to cover other aspects that indirectly affect international trade such as non-tariff barriers to trade, and intellectual property it is desirable that these Agreements continue to be scrutinized by the WTO.

⁴³<http://www.tas.gov.eg/English/Trade%20Agreements/Countries> (accessed 3 November 2016)

CHAPTER 3

LEGALITY OF THE AFRICAN GROWTH AND OPPORTUNITY ACT WITHIN THE FRAMEWORK OF THE WTO SYSTEM

3.1 Introduction

The world trading system is framed around basic principles of non-discrimination, reciprocity and transparency among the trading members.

Howbeit, under the WTO legal system Article XXIV of the GATT 1994 and the Enabling Clause provide exceptions to the basic guiding principle of non-discrimination.¹ Through these provisions, member states are permitted to form bilateral and regional trade arrangements that liberalize more trade between two or more members. The application of Article XXIV rules is considerably stricter than the rules of the Enabling Clause. A regional trade scheme under Article XXIV may be established between two or more parties excluding other WTO members whereas under the Enabling Clause in exceptional circumstances, it provides special and differential treatment (SDT) for regional trade agreements among developing countries and permits developed countries to grant preferential treatment to all developing countries (generalised system of preferences). The type of rules that govern bilateral and regional trade arrangements in the global trading system influences the nature and level of liberalisation to which the parties of such schemes agree.²

The general rule in the WTO trading system is that all bilateral and regional trade arrangement formed among member states should be notified to the WTO.³ Since 1990's there has been a proliferation of bilateral and regional trade arrangements notified under different acceptable provisions.⁴ Currently, almost all WTO member states are parties to such arrangements. AGOA is one of the many bilateral trade schemes existing in the multilateral trading scheme. AGOA is a non-reciprocal preferential trade arrangement between the US and eligible SSA countries.

The trade scheme is not a regional trade agreement and not in agreement with generalised preferential system justified under the Enabling Clause. This chapter elucidates the legal foundation of granting special and differential treatment to developing countries in

¹ 'GATT 1994' <https://www.wto.org> (accessed on 30 January 2016)

² LB Allen 'Bilateral and regional trade agreements' (2012) <http://www.a4id.org/> (accessed on 4 March 2016)

³ 'Agreement Establishing the WTO' <https://www.wto.org> (accessed on 30 January 2016)

⁴ 'Regional trade agreements' <https://www.wto.org> (accessed on 4 March 2016)

multilateral trading system, the compatibility of AGOA within the WTO rules and lastly, it provides an overview of the Act.

3.2 Legal foundation of SDT within the WTO system

At the conference of the UNCTAD in 1964,⁵ it was argued that the Most-Favoured Nations (MFN), a non-discrimination principle under the GATT 1947, did not take into consideration the reality of the inequalities prevailing among multilateral trading member states. This is because it is practically difficult to apply trading rules in the same manner to all member countries, which are at different levels or stages of development. This confirms the global policy response to rectifying the imbalances of nations economic relations, where there is a need to provide special and different treatment to developing countries. The treatment required the developed countries to eliminate tariff barriers to exports of developing countries without requiring reciprocal treatment from them.

In consideration of the economic development level of the developing and least developed nations, a proposal was put forward for the formation of a generalized system of preferences (GSP) that authorises developed states to grant non-reciprocal and non-discriminatory preference to all developing countries on tariff rates applied on exports from developing states into their markets.⁶The GSP proposal aimed to increase export earnings to developing states that will directly encourage industrialization and accelerate their economic growth.⁷

With the efforts of the UNCTAD, the provisions entitled trade and development were added to the GATT as part IV of the agreement. Trade and development provisions in the global trading system brought a radical change on trade relationship between the developed and developing countries.⁸Article XXXVI of the GATT provides that developed parties should not expect reciprocity from less developed parties on commitments to remove tariff and other barriers to trade.⁹ However, the application of the Part IV of the GATT rules was limited because it did not provide any legal obligation to the developed states to grant SDT to less developed states.¹⁰ These provisions were voluntary options available to the developed states.

⁵ ‘About GSP’ <http://unctad.org/en/Pages/About> (accessed on 15 March 2016)

⁶ K Moss ‘The Consequences Of The WTO Appellate body decision in EC—Tariff preferences for the AGOA and Sub-Saharan Africa’ (2006) <http://nyujilp.org/wp-content/uploads> (accessed on 10 March 2016)

⁷ (n 6 above)

⁸ A Keck & P Low ‘Special and Differential Treatment in the WTO: Why, When and How?’(2004) <https://www.wto.org> (accessed on 11 March 2016)

⁹ ‘General Agreement on Tariffs and Trade 1994’ <https://www.wto.org/> (accessed on 19 February 2016)

¹⁰ A Yanai ‘Legal Framework for North-South RTA under the WTO system’ (2003) <http://www.ide.go.jp> (accessed on 11 March 2016)

Developing countries could not demand such preferences as a right conferred on them. Moreover, giving preferences to some few states at the exclusion of other states amounted to a violation of the MFN obligation. Thus, the enjoyment of the benefits of preferences granted was uncertain.

Due to the underlying MFN obligation issue, the GATT contracting parties in 1997 agreed to waive the MFN obligation for GSP schemes for a period of 10 years.¹¹ The waiver permitted developed countries to give preferential tariff rate on exports from developing states. In the multilateral trading system an act allowed through a waiver is of a temporary nature.

There was not a permanent legal basis for granting preferential treatment to developing states until the end of the GATT Tokyo Round in 1979. In this round, parties agreed to and adopted the decision on differential and more favourable treatment, reciprocity and fuller participation of developing countries commonly referred as the Enabling Clause.¹² The noteworthy features of this clause are such as it allows a deviation from the MFN principle to grant SDT in favour of less developed countries on tariffs and non-tariff measures in accordance with the generalized system of preference.¹³ It allows developed countries to grant non-reciprocal trade preferences to the developing states and give even more favourable preferential treatment to the least developed countries. Also it introduced the rule of graduation, where a state graduates from a state giving preference under GSP scheme once it attain a certain level of economic development. The Enabling Clause has since been incorporated into the GATT 1994.¹⁴

It is the Enabling Clause that provides the legal basis for the developed countries to unilaterally provide preferential market access to exports from the developing countries. The non-reciprocal preferences provided must be in favour of all developing countries, for instance the US-GSP scheme.

In *India vs. European Communities preferential tariff*,¹⁵ India claimed against the European Community (EC) at the WTO panel that EC tariff preference under a special scheme to

¹¹ JJ Grimmet 'Trade Preferences for Developing Countries and the WTO' (2011) <https://www.fas.org> (accessed on 12 March 2016)

¹² 'Differential and more favorable treatment reciprocity and fuller participation of developing countries' <https://www.wto.org/> (accessed on 6 March 2016)

¹³ As above

¹⁴ Agreement Establishing the World Trade Organization, Annex 1A, General Agreement on Tariffs and Trade 1994, para. 1(b)(iv)

¹⁵ *India v European Communities*, WTO dispute settlement DS246 <https://www.wto.org/> (accessed on 15 March 2016)

combat drug production and trafficking to 12 specified GSP beneficiary states were granted more tariff reduction than that which was offered to other developing countries pursuant to the EC-GSP system. Such act from the EC created undue difficulty for India to export to the EC, hence it was a violation of MFN obligations under GATT 1994 and that the special preferences were not justified under the Enabling Clause.¹⁶ The WTO panel held that identical tariff preferences under the GSP scheme should be granted to all developing countries without discrimination. However, the EC appealed the decision to the WTO appellate body. After review, the appellate body reversed the panel's interpretation of Para 2(a) of the Enabling Clause by stating that the preference giving country by virtue of the Enabling Clause, could treat developing countries differently provided that identical treatment was available to all similarly situated GSP beneficiaries, that is to say beneficiaries with the same development, financial and trade needs which the favourable treatment granted intends to address. With regard to the appellate body's interpretation of the Enabling Clause, the preference giving country may offer preferences to developing countries with modifications on which recipients may get more favourable treatment than other recipients.

3.3 Compatibility of AGOA with the multilateral trading rules

AGOA is a non-reciprocal and non-generalized preferential agreement between US and eligible SSA countries. The Act aims to increase market access for SSA products in order to boost economy growth of African countries and to enhance commercial and political ties between the US and Africa.¹⁷

On the face of the WTO rules, AGOA is not compatible to the multilateral trade rules for the reason that beneficiaries of the agreement have been chosen in limited manner. It is only 48 countries listed as beneficiaries.¹⁸ AGOA preferences are not available to all developing and least developed countries in the global trading system. Providing special treatment to few selected eligible developing countries is against the rule of the GSP scheme within WTO framework.

In addition, the eligibility criteria of the listed beneficiaries for the AGOA depends on the ability of their governments to maintain the pre-determined basis such as rule of law, progress towards establishing a market based economy, country not engaged in acts that amount to gross violation human rights, terrorism and activities that undermine US national

¹⁶ Moss (n 7 above)

¹⁷ Section 102 of the AGOA 2000 <http://agoa.info/images> (accessed on 5 March 2016)

¹⁸ Section 107 of The AGOA 2000

security and foreign policy effort.¹⁹ The underlying objectives of the Act are positive with an intention to assist African countries to accelerate their economy growth through trade. However, the eligibility requirements imposed are questionable as to whether they are conforming to WTO rules governing such trade arrangements.²⁰

With regard to WTO appellate body decision on India vs. European Communities Preferential Tariff,²¹ the appellate body's interpretation of the Enabling Clause is that the preference giving country may offer preferences to developing countries with modification on which recipients may get more favourable treatment than other recipients. AGOA tackles a need that is peculiar to SSA countries. However, the recipients of the benefits are identified on a closed list with no provision indicating intention to add or remove any recipient from the list. Also, some beneficiaries of the AGOA do not qualify for the WTO or the US least developed nation status. Examples of these countries are South Africa, Kenya, and Mauritius.²² Thus, AGOA is inconsistent with the WTO appellate interpretation of the Enabling Clause.

Hence, AGOA is not a regional trade arrangement nor is it a generalized system of preference justified by the Enabling Clause and under Article XXIV of the GATT 1994. As such the US had to seek for a waiver from the WTO to provide AGOA preferences to SSA countries without being required to extend the same preferential treatment to like products of any other member of the WTO.

The US applied for a waiver from most favoured nation and non-discrimination provision obligations.²³ The General Council approved the request of the US, and the waiver granted on condition that the US should submit annual reports to the WTO general council on the implementation of the trade related arrangements under AGOA.²⁴

3.4 Overview of the AGOA 2000

AGOA is a legislation of the United States Congress that regulates explicit aspects of trade and investment between the US and the qualifying SSA countries. The law was enacted as

¹⁹ Section 104 of AGOA 2000

²⁰ Yanai (n 11 above)

²¹ (n 16 above)

²² Moss (9 above)

²³ Article 1:1 of the GATT 1994; Article XII of the Agreement establishing the WTO

²⁴ Council for Trade in goods, waivers for US trade-preference programmers' <https://www.wto.org> (accessed on 19 March 2016)

part of the United States Trade and Development Act of 2000.²⁵ This legislation authorises USA trade and investment policy for the SSA and the Caribbean basin. The policy's aim is to renew and increase preferential product coverage of the Generalised System of Preferences (GSP) and re-authorise the trade adjustment assistance schemes to the designated countries.²⁶ Before this Act came into effect in 2000, most of SSA countries were granted preferential treatment on exports of designated products to the US market under the USA-GSP scheme.²⁷ Thus, AGOA is an extension leg of the GSP scheme but provides more benefits.

Since its enactment, it has been amended several times to include technical changes to the already existing terms, the recent legislative amendment signed into law in the US in June 2015 to further extend AGOA for 10 years to 2025.²⁸ The objective of the Act is to promote SSA countries trade and investment competitiveness that will lead to economic growth, create jobs and raise the standard of living to African countries.

3.4.1 AGOA eligibility

The eligibility requirements of the AGOA are developed by the US government in consultation with SSA countries. The various requirements to qualify SSA countries for the preferential treatment include the following:

Country eligibility

SSA countries are not automatically eligible for AGOA preferences. There are terms and conditions of consideration by the US. A country has to be included in the US statutorily list of SSA beneficiary of the designated preferences.²⁹ Then the Act authorises the President to review and determine annually that such country fulfils and maintains the criteria as stated in the Act.³⁰ These are:

- A free market-based economy;
- implementation of rule of law;

²⁵ USA Trade and development Act 2000, The African Growth and Opportunity Act http://agoa.info/images/documents/2385/AGOA_legal_text.pdf (accessed on 12 March 2016)

²⁶ Section 102 and 103 of The AGOA 2000

²⁷ 'Generalized System of Preferences (GSP)' <https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preference-gsp> (accessed on 20 March 2015)

²⁸ AGOA Extension & Enhancement Act (AEEA) 2015 <http://agoa.info/downloads/legal.html> (accessed on 25 March 2016)

²⁹ Section 107 of the AGOA 2000

³⁰ Section 111 of the AGOA 2000

- elimination of barriers to US trade and investment. Furthermore a country must maintain an adequate investment protection environment;
- implementation of socio-economic policies to reduce poverty and improve health care;
- establishment of a system to combat corruption and bribery; and
- protection of international recognized human rights.

Additionally, the eligible countries must not engage in acts that amount to gross violation human of rights, support terrorism and activities that undermine US national security and foreign policy effort.³¹

In exercise of the power to monitor and review of the SSA countries for continual compliance of the eligibility criteria to the preferences annually in the course of AGOA existence, most African countries have been terminated from the preference regime. However, some countries were reinstated for the preferences later on. For instance in January 2013, Mali was suspended from AGOA because of a coup d'état in March 2012. In July 2013, Mali inaugurated a democratically-elected president, whose government implemented market-based reforms, investing in infrastructure and human capital and pledged to address public sector corruption, combat human rights abuses, and strengthen rule of law in the country. So in January 2014, Mali was reinstated for AGOA preferences.³² Madagascar was suspended from AGOA on January 1, 2010 following a 2009 coup d'état and reinstated on January 2015 after improving their political and economic situation.³³

Product eligibility

AGOA is like the GSP in providing duty free and quota-free preference on eligible designated products. However, under AGOA preferential treatment is accorded to exports originating from eligible SSA countries only. Products authorised under the AGOA scheme include all products covered under the GSP scheme with an additional of more than 1,800 products. Moreover, there are certain products designated eligible under AGOA preferences that are not eligible under GSP product coverage example apparel, footwear and automotive

³¹ Section 104 (2) & (3) of the AGOA 200

³² 'Country profile: Mali' <http://agoa.info/profiles/mali.html> (accessed on 26 March 2016)

³³ 'President Obama removes Swaziland, reinstates Madagascar for AGOA Benefits' <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/June> (accessed on 26 March 2016)

products. Also, country eligibility requirements under AGOA go beyond those of GSP scheme.³⁴

The Generalized System of Preferences (GSP) is a US preferential trade arrangement established in 1976, by the US Trade Act of 1974. Its objective is to accelerate economic growth by offering duty-free on about 3,400 products to all developing countries and an additional coverage on 1,400 products to the least developed countries. A total of 122 countries are eligible for the GSP trade preferential scheme of which all the SSA countries are beneficiaries to this scheme as well.³⁵ In 2015, the GSP scheme was reauthorised for a further period until 2017.³⁶ Thus combining GSP and AGOA preferential product coverage, about 7000 products are eligible for duty free and largely quota free treatment from SSA countries to the US market.

Over 98% of the products covered under AGOA preferences enter the US market duty free, agricultural products such as sugar, tobacco and peanuts receive duty free treatment but subject to quantitative limits.

Rules of Origin

Rules of origin are conditions or requirements used to determine where the product originates so as to determine if such good is eligible for preference or not.³⁷ Products exported from the beneficiary countries under AGOA must meet a certain level of local requirement for it to qualify origin from that country. The primary feature for products to qualify eligibility for AGOA preferences is that such product should be the “growth, produce or manufacture” of the beneficiary country.³⁸ Basically, AGOA preferences are designated to benefit only a number of the selected countries for the good of their economic development. They are implemented so as to clarify on the amount of work and process that may be undertaken locally to produce a product for it to be considered an economic origin of such country. Rules of origin are in place so as to promote local value addition to a product and to prevent

³⁴ BR Williams AGOA: Background and reauthorization (2015) CRS

<https://www.fas.org/sgp/crs/row/R43173.pdf> (accessed on 25 March 2016)

³⁵ W Schneidman & ZA Lewis ‘AGOA: Looking back, Looking forward’ (2012)

http://www.brookings.edu/~media/research/files/reports/2012/6/agoa/agoa_full_report.pdf (accessed on 25 March 2016)

³⁶ ‘Generalized System of Preferences’ <https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preference-gsp> (accessed on 26 May 2016)

³⁷ P Brenton ‘Preferential Rules of Origin’

<http://siteresources.worldbank.org/INTRANETTRADE/Resources/C8.pdf> (accessed on 28 March 2016)

³⁸ ‘AGOA Product Eligibility’ <http://agoa.info/about-agoa/product-eligibility.html> (accessed on 26 March 2016)

wrongful transshipment. Wrongful transshipment occurs where goods are produced from non-AGOA country and are purposely routed through a beneficiary country without local value addition to the product from such country so as to take advantage of the preferences available.

The rules of origin are based on percentage test, whereby a certain minimum percentage is required on local content input in the product.³⁹ A product qualifies for the duty free treatments if it is directly exported from AGOA beneficiary country and minimum of 35% of the product value is regarded to be originating from the beneficiary country. Additionally, up to 15% of the expected 35% local content value may be of US origin material or part and the remainder may be from any other AGOA beneficiary country.⁴⁰ Notably, the requirement for textile and apparel products rule of origin is independent from non-textile and apparel products.

Textile and Apparel Provisions

Textile and apparel goods exported under AGOA have exceptionally played a significant role in the economic growth process of some beneficiaries that have been able to export to the US market; for example, Lesotho and Kenya. The Act provides more favourable treatment for textile and apparel products.

For a beneficiary country to be eligible for textile and apparel benefits they must put in place an effective Visa System (goods tracking system) that comply with the requirements of US custom standards service.⁴¹ The aim of the Visa System is to avoid unlawful transshipment of apparel products not produced from AGOA countries. Thus, not all AGOA beneficiaries are eligible for the apparel benefits.

A notable feature of AGOA on the apparel benefits is the third country fabric rule, this rule permits least developed AGOA beneficiaries to use in production yarn and fabric inputs from a country that is not necessary an AGOA beneficiary country.⁴² The major exporters of textile and apparel products such as Kenya and Lesotho rely on the imported fabrics to produce apparel that enjoy AGOA preferential treatment.

³⁹ 'AGOA General rules of origin' <http://agoa.info/about-agoa/product-eligibility.html> (accessed on 26 March 2016)

⁴⁰ (n 40 above)

⁴¹ Sec 133 of the AGOA 2000

⁴² 'AGOA's 'Wearing Apparel' Rules of Origin' <http://agoa.info/about-agoa/apparel-rules-of-origin.html> (accessed on 26 March 2016)

Generally, in the US garments are deemed import sensitive, thus the MFN tariff rate on textile and apparel products entering the US market is high. Likewise garment items are excluded under the US-GSP scheme. Thus, AGOA grants more favourable relaxed rules on origin on textile and apparel item. It gives SSA countries exports a competitive advantage over other trading partners in the US market.

Least Developed Country Status

All the SSA beneficiary countries that had a per capita GDP less than USD 1,500 in 1998 as measured by the International Bank for Reconstruction and Development⁴³ attain LDC status for AGOA regime. Countries such as Namibia and Botswana are granted with LDC status. LDCs under AGOA regime enjoy more flexible rules governing the textile and apparel preferences.

3.5 The AGOA Extension & Enhancement Act (AEEA) of 2015

The reauthorization of the AGOA was passed by Congress on 25th June 2015 with President Obama signing it into law on 29th June, 2015 and is now officially known as AGOA Extension & Enhancement Act (AEEA) of 2015.⁴⁴ In the AEEA, the preferences are extended until 2025. A 10 year period is the longest extension period the Bill has ever received. It provides clarity and stability to beneficiary countries to strategies on how to effectively utilise the available market access opportunity and for new and existing investors to feel confident with their investment decisions. The extension affirms the following;

- Improved transparency of AGOA review process

It has enhanced flexibility on beneficiary country annual review. A country whose eligibility is in question shall receive notification. The Act has codified a new review mechanism by introducing the concept of out of cycle review. In addition, it has provided the US government with flexibility in dealing with countries not meeting the eligibility criteria. Therefore, the US may decide to “suspend, withdraw, or limit” the country from the duty-free treatment.

⁴³ ‘AGOA Country Eligibility’ <http://agoa.info/about-agoa/apparel-rules-of-origin.html> (26 March 2016)

⁴⁴ <http://agoa.info/downloads/legal.html> (accessed on 26 March 2016)

- Provides a long term extension of third-country fabric rule

The Act extends rules of origin that allows for greater accumulation among AGOA beneficiaries, a 10-year extension of the third-country fabric provision, essential for nurturing the development of the textile and apparel industry in SSA;

- Encourages greater regional integration

AEEA promotes regional integration by expanding the rules of origin to allow AGOA countries flexibility to combine inputs to meet the rules of origin for AGOA eligible products.

- Ensures certainty of AGOA operations

The reauthorisation seeks to address the challenge that undermined most beneficiary countries by requiring the trade administration to notify Congress and any affected country at least 60 days before removing a country from the regime or suspending, or limiting any benefits.

- Encourages SSA countries to develop 'National-AGOA strategies'

Beneficiary countries are encouraged to cooperate with US-trade hubs to develop and publish specific country utilisation strategies that identify sectors that they can be competitive and how it plans to take advantage of the potential. This will provide responsible business firms, from Africa and the U.S., more opportunities to engage governments on how to take advantage of the scheme.

- Simplifies claims for preference

The Act encourages beneficiary countries to adopt and implement WTO Agreements, particularly, the Trade Facilitation Agreement (TFA) which seeks to address import-export transit trade operations by improving transparency. The same will make it easier for SSA countries to complete paperwork to export to the US market.

3.6 Impact of AGOA on SSA countries

For the past 15 years that AGOA has been in existence, the Act served as an accelerator to facilitating the growth of USA-African trade and investment relationship. The preferential market access opportunity has made Africa's share of global trade increase to 3.5% by 2013

and intra-African trade accounting for 12.8% of total African trade by 2012.⁴⁵ The trade arrangement stimulated the growth of much-needed investment in the region.

Increased export from SSA to US

The preferential market access opportunity on substantially all products granted to the SSA led to growth of exports from SSA to the US. During AGOA period, African exports to the US have substantively increased more than fivefold from pre-AGOA time, reaching about USD 53 billion in 2011.⁴⁶

Diversification of exports

AGOA provided new market opportunity for non-traditional exports and value added products. Beneficiary countries have been able to foster growth of various growing industries so as to leverage the available preferential opportunity. Apart from oil, other products exported to the US are textile and apparel, chemical products, machinery, footwear, sportswear and cut flowers. Through AGOA, African producers are encouraged to produce value added products to become competitive internationally. For instance, South Africa, through AGOA, has been able to grow its automotive, chemical and agriculture produce.⁴⁷ The number of beneficiary countries exporting non-oil products has steadily increased from 13 in 2001 to 22 countries by 2011 while major non-oil exporters under AGOA include Lesotho, Kenya, Ethiopia and Mauritius.⁴⁸

Job creation and investment growth

In the SSA, AGOA stimulated new business opportunities that facilitated growth of much needed investments in the SSA countries for them to leverage the available opportunities which in turn created jobs for over 1 million of people across SSA. For instance, Lesotho employment in the textile and apparel sector increased from about 19,000 before AGOA to 45,000 jobs in 2011.⁴⁹ Investment growth in the SSA countries has increased with companies

⁴⁵W Schneidman & ZA Lewis 'AGOA: Looking back, Looking forward' (2012)

<http://www.brookings.edu/~media/research/> (11 March 2016)

⁴⁶ L Paez et al 'A Decade of African-US Trade under the African Growth and Opportunity Act (AGOA): Challenges, Opportunities and a Framework for Post-AGOA Engagement' (2010) <http://www.afdb.org> (11 March 2016)

⁴⁷ (n 46 above)

⁴⁸ BR Williams (n 35 above)

⁴⁹ Lesotho - National AGOA strategy <http://agoa.info/downloads/6086.html> (accessed on 26 March 2016)

from various parts of the globe investing in Africa. In 2016, the US direct investment in SSA estimated worth USD 13.8 billion.⁵⁰

In July 2010, the US State Departments Office of Global Women Issues, the Bureau of African Affairs and the Bureau of Economic and Business Affairs established African Women's Entrepreneurship Programme (AWEP).⁵¹ The programme aims to empower African women entrepreneurs and further their business ability so they can benefit from exporting under AGOA. Since its inception, the programme has successfully created a network of over 16000 women entrepreneurs across SSA that have been able to create over 17,000 jobs.

Intra-African Trade

Through its special rule of origin on textile and apparel products, AGOA encourages African regional integration by allowing for regional value chains, it boost trade among African countries. Before the revocation of AGOA benefits in Madagascar in 2010, textile and apparel industry had a successful regional supply chain, with denim from Lesotho, Cotton yarn from South Africa and Tanzania zippers from Swaziland.⁵² Revocation of benefits to Madagascar negatively affected the regional production chain.

3.6.1 Appraisal of the AGOA impact to SSA

A great number of studies on the trade relationship of US-SSA argue that the increase of total exports under AGOA is attributed to oil exports. Oil products account for about 70% of total exports to the US from AGOA beneficiaries.⁵³ It is also argued that export growth rate is highly influenced by these oil products of which even without AGOA they would still enter the US market since the MFN tariff rate on oil products import are not prohibitively high. The applicable rate is less than 0.5% of the products value.⁵⁴ Thus, with oil exports dominating the total value of exports from SSA, it undermines the effectiveness of AGOA increased exports from SSA.⁵⁵ Furthermore, under AGOA only a few beneficiary countries have been able to benefit which are mostly the countries that export oil products and few

⁵⁰ (n above)

⁵¹ 'African Women's Entrepreneurship Program' <https://eca.state.gov/highlight/african-womens-entrepreneurship-program> (accessed on 27 March 2016)

⁵² B Williams (n 35 above)

⁵³ W Schneidman & ZA Lewis (n 36 above)

⁵⁴ Moss (n 9 above)

⁵⁵ As above

other countries that had capacity to produce products of value for international competitiveness; for example, South Africa.

AGOA requires beneficiary countries to eliminate barriers to trade and investment. The two way trade relationship between the US-SSA strongly favours the US over SSA countries. Statistics indicate that the US exports more to SSA than her imports from the beneficiary countries. For instance, Benin has hardly exported to the US since it attained its beneficiary status. However, it has imported about USD 600 million worth of products that partly contribute to undercut local producers of the like imported goods.⁵⁶ Tanzania has a small growing textile and apparel industry; yet the country is a net importer of second hand clothes from the US that are supplied at a lower cost than the country's manufactured apparel. It is clear that excessive apparel import hinders growth of the local industry.

For the jobs created through AGOA, the Act does not require the jobs created be necessarily for Africans nor the firms exporting under AGOA must be owned by Africans. Most of the firms from SSA leveraging benefits under AGOA are owned by foreigners such as Americans, Chinese and Indians. Extractive industries are high capital intensive and require skilled labour. Thus, most of the oil and mineral firms in SSA countries are foreign owned such as Shell, and Anglo-American and import expert personnel from developed countries. Furthermore, jobs created in the textile and apparel industries are often exploitative in nature. Most beneficiary countries developed Export Processing Zone (EPZ) to take advantage of the AGOA. The laws and regulatory framework in the zones are quite relaxed so as to attract investment. However, labour laws in the zone are not implemented. Workers are made to work overtime without pay and sometimes paid low wages. In 2006, the average wage of EPZ worker in Asian owned apparel firm was barely paid more than a dollar a day.⁵⁷

3.6 Conclusion

To conclude this section, AGOA provides an opportunity for the eligible SSA countries to expand and produce for the available market and in so doing cater for the economic challenges they face such as creating jobs and alleviating poverty. AGOA has had a huge impact on energy and the textile and apparel sector which have consistently been expanding

⁵⁶ J Hickel 'U.S. economic policy toward Africa has done little to promote democracy, transparency, or sustainability' (2011) http://fpif.org/trading_with_the_enemy/ (accessed on 26 March 2016)

⁵⁷ 'What they don't tell you about AGOA' <http://www.pambazuka.org/> (1 April 2016)

since inception of the trade arrangement. SSA countries are yet to realise their untapped potential products that are accorded with preferential treatment under the scheme. The new extended AGOA 2015 creates another opportunity with greater predictability over the eligible SSA countries export to the US market.

To fully utilize the AGOA scheme, African countries need to put real effort to understand the importance of exporting value added products to a multifaceted market such as the US. These include improving their methods of production and meeting the required technical standards.

CHAPTER 4

CHALLENGES FACING TANZANIA FIRMS FROM LEVERAGING TRADE OPPORTUNITIES UNDER AGOA

4.1 Introduction

The African Growth and Opportunity Act (AGOA) is a component of the US trade and investment policy in Africa that was enacted in 2000. The objective of the Act is to increase the market access of the products from Africa and improve the US foreign direct investments (FDIs) in sub-Saharan Africa (SSA). AGOA is open for 48 members of SSA. For the past 15 years that AGOA has been in existence, the Act served as an accelerator to facilitating the growth of USA-African trade and investment relationship.

Tanzania fulfilled its eligibility to export to US under AGOA in 2002.¹ Tanzania trade performance under AGOA is poor compared to most SSA countries that are also eligible to export under AGOA. There are challenges preventing Tanzanian firms from fully leveraging the trade opportunities that AGOA provides.

Firstly, this chapter examines the series of Tanzania economic policies that led to country's thorough development path and the dynamics in the current business environment. Secondly, it provides an overview of Tanzania experience under AGOA. Thirdly, it identifies the challenges that Tanzania firms face in trading and attracting potential investments across economic sectors.

4.2 Economic policies underpinning trade performance in Tanzania

When AGOA came into effect in 2000, Tanzania was still at an early stage of adjusting to the change of the economic policies, that is, from the planned economy to the free market-led economy. Tanzania after independence in 1961 has followed path through different economic policies that has significant effect in the country's development growth.

From 1961 to 1967, the country carried out market led policies inherited from colonial period. There was minimum involvement of the public sector as a source for private sector growth.² These policies had limited success on the country's economy.

¹ 'AGOA Country Eligibility' <http://agoa.info/about-agoa/country-eligibility.html> (accessed on 3 April 2016)

² HP Ngowi 'Economic development and change in Tanzania since independence: the political leadership factor' (2007)

From 1967 to 1983,³ the government embarked on African Socialism policy. This policy entailed a public sector led economy where there was extensive intervention of state in the socio-economic activities. Several privately-owned companies were nationalised; central decision making was centralised, exports were restricted, prices of commodities were strictly controlled, and state-owned industries were created to eradicate trade dependency. This government approach eroded incentives to produce. In the social sector, the government highly subsidised and extended institutions such as marketing boards, crop authorities and co-operatives to control and sector agricultural production. There was increase of government institutions that generated 25% of non-agricultural employment. However, these enterprises repressed innovations and entrepreneurship were inefficient. Eventually they became a burden to the government since they contributed less to production. It became clear that the development strategy was unsustainable and the economy situation continued to worsen. In 1983, the government introduced structural adjustment programme.

From 1983 to date, with the support of the IMF in the early 1990s, the government embarked on promoting economic recovery reforms and trade liberalisation policies.⁴ Over the years, the country has made progress in opening up its economy to international markets. Significant changes that took place is restriction on imports tariff which was gradually reduced, the tariff structure is simplified; foreign exchange increased, and a private sector was allowed to compete in trading. Since 1993, the government began privatising state monopolies and reforms on government parastatals. However, privatisation of the state monopolies has not been entirely successful. For instance, the textile industry collapsed following privatisation. The new firms were unable to compete with cross border players in the liberalised market conditions. In the agricultural sector, small scale farmers were forced out of production following privatisation of fertilizer enterprise which forced prices of fertilizer to increase.

Change of economic policies in the country partly contributed to slow growth of trade in Tanzania and it specifically led to slow start for Tanzania firms to exploit the AGOA trade opportunities.

³ OECD 'Overview of progress and policy challenges in Tanzania' in OECD *Investment Policy Reviews: Tanzania* (2013) <http://dx.doi.org/10.1787/9789264204348-6-en> (accessed on 10 April 2016)

⁴ R Nord et al 'Tanzania: the Story of an African Transition' IMF (2009) <https://www.imf.org/external/pubs/> (accessed on 14 April 2016)

4.3 Tanzania trade profile

Tanzania national trade policy aims to diversify its export sector by encouraging creation of local industries that are competitive in the global trading system. The country operates under free market policies and it is an active member in various international economic co-operations. It is a member to the WTO and signatory to most of its multi-lateral trade regulatory agreements. Regionally, Tanzania is a member to the EAC and SADC. Moreover being an LDC, Tanzania is a beneficiary to several preferential arrangements such as the AGOA, and the Generalized System of Preferences (GSP).

Most of products exported from Tanzania enjoy low most-favoured nations tariff and trade preferential rates. Generally, the country exports over 150 products to various countries.⁵ The top export products of Tanzania are agricultural produce, gold, oily seeds, precious metal ore and copper ore. The major export destinations of Tanzanian products are India, South Africa, China, Japan, and Kenya. Tanzania suffers from chronic negative trade deficit balance. The country imports twice as much as its exports,⁶ the major imports are refined petroleum, motor vehicles, fertilisers, bulk coal, industrial chemical, garments and fabric, wheat, raw material and machinery.

Tanzania's low custom duties and less restriction to trade make the country accessible for international trade. Economic integration and granted preferential market access to the country creates favourable trading environment for its exports. However, the continuous negative balance of trade of the country indicates Tanzania is failing to consolidate benefits of improved market access due to weak productive capacity of the economy, low production and inadequate enabling infrastructure to enhance production reduces trade competitiveness.

4.4 Tanzania experience under AGOA

A review of Tanzania's overall bilateral trade pattern with the US under the AGOA regime over the past 15 years shows a trend of slow export growth with periodic stagnation. In 2002, Tanzania's total export to the US under AGOA regime valued at about USD 3 million.⁷ The bulk of the exported products consisted of textile and apparel. From 2005, value of exports

⁵ <http://atlas.media.mit.edu/en/profile/country/tza/> (accessed on 4 April 2016)

⁶ As above

⁷ AGOA Background? <http://www.aweptanzania.com/2012> (accessed on 6 April 2016) Bilateral Trade by Sector: United States - Tanzania <http://agoa.info/profiles/tanzania.html> (accessed on 6 April 2016)

gradually declined reaching about USD 50,000 in 2009.⁸ The reasons for the export decline are partly attributed to the global economic changes. The expiration of the Multi-Fibre Agreement (MFA) in 2005, removed quantitative restrictions imposed imports of garments in the developed countries.⁹ Tanzania's textile and apparel exports in the US market suffered under competition from other trading partners that produce the same products at lower costs for instance China and India. In addition, the 2008 global financial crisis affected Tanzania's apparel firms.¹⁰

Exports under AGOA gained rebound from 2010 with a modest increase in export volume record. The increase in the exports is partly due to the global recovery from financial crisis and growth of foreign investment firms in Tanzania that produce for exports, taking advantage of the strategic geographical location of the country and AGOA's use of third country fabric benefits.¹¹ Tanzania is eligible for duty free preference for garments containing inputs from non-AGOA beneficiaries.

About 80% of Tanzania's exports under the preferential regime are apparel and textile products. Other products include handicraft items and horticulture produce.¹² Notably, Tanzania exports various products to the US such as agricultural produce, mineral extracts, spices, and fish products but not through AGOA regime.

An overall review of trade performance of all the SSA beneficiaries under AGOA reveal that Tanzania's exports under the AGOA scheme is poor compared to other beneficiaries such as Ethiopia, Kenya, Lesotho and Mauritius.¹³ The country has the potential to improve its export performance under the AGOA. AGOA grants preferences for about 7000 products and yet Tanzania exports less than 10 products. Tanzania is rich of natural resources, arable land and enough human resources. There is considerable untapped potential in other AGOA product sectors. With the extension of AGOA to 2025, the country has another term to utilize the opportunity that AGOA provides.

⁸ As above

⁹ E Naumann 'The Multi-Fibre Agreement – WTO Agreement on Textiles and Clothing' (2006) <http://www.tralac.org> (accessed on 15 April 2016)

¹⁰ (n 7 above)

¹¹ As above

¹² Workshop to Increase Tanzanian Exports to United States under AGOA' <http://tanzania.usembassy.gov> (accessed on 6 April 2016)

¹³ Aggregate Bilateral Trade between AGOA Countries and the United States' <http://agoa.info/data/total-trade.html> (accessed on 6 April 2016)

4.5 Why has Tanzania failed to leverage significant AGOA benefits?

The rather unsuccessful story of AGOA in Tanzania is contributed by various factors, for example, just like most other African countries, especially in sub-Saharan Africa, Tanzania's GDP is heavily reliant on Agriculture and as a matter of fact this greatly imposes several limiting elements that impede the realization of noteworthy outcomes from preferential arrangements like AGOA¹⁴. However the one most important factor that is somewhat ignored but has greatly limited AGOA's success in Tanzania is the legislative and regulatory inadequacies. These inadequacies are identified and discussed below:

- Business enabling Laws

Tanzania's business environment is identified as being cumbersome due to shortcomings prevailing in legislations and regulations on trade, commerce, employment, and investments. The costs of establishing and running a business in Tanzania is high due to prerequisite license requirement, multiplicity of government taxes, levies and charges that traders are required to pay.¹⁵ There is uncertainty on investment incentives and also limited access to land in the country affect trade.¹⁶ In addition, slow implementation of policies and at times inconsistent implementation of policies affects trade performance. For instance, implementation of The Export Processing Zone (EPZ) and Special Economic Zone investment policy suffered inconsistency for quite some time the same confused both respective authorities and potential investors.¹⁷

- Poor trade facilitation

Tanzania's customs laws have not addressed issues of trade facilitation; there are still protracted and convoluted customs processes. Such complicated processes make it hard for Tanzania to conform to AGOA visa provisions. It is important to note that these obstacles not only affect AGOA but other important sectors of the economy which in the end has a ripple effect on AGOA because the success of AGOA would largely depend on the level of general productivity.

¹⁴ E Naumann & L Mtango 'Tanzania and AGOA: Opportunities missed'(2003) (accessed on 24 April 2016)

¹⁵ World Bank Group 'Doing Business: Tanzania' <http://www.doingbusiness.org/> (accessed on 29 April 2016)

¹⁶ 'An investment guide to Tanzania (2005)' http://unctad.org/en/Docs/iteiia20053_light_en.pdf (accessed on 12 April 2016)

¹⁷ '2011 good year for EPZA but stiff challenges remain' (2012) <http://www.businesstimes.co.tz> (accessed on 12 April 2016)

Awareness of AGOA

Tanzania firms' lack of awareness of the AGOA trade opportunity is a constraint. Private sector involvement in trade is still in infancy stage.¹⁸ This sector lacks awareness of AGOA preferences so that they can plan for strategies that can enable them to trade competitively in a multifaceted market such as the US. In early 2000s, most Tanzanians understood AGOA to be only a textile and apparel agreement. In addition, there is limited awareness on market information. Producers lack information of consumer preferences and other international marketing practices including standards of goods required and the desired packaging for the goods.

For instance, Artisan products are valid for export under AGOA yet Tanzania is missing this opportunity because Artisans producers in Tanzania operate on small units from different parts of the country with no coordination among them and lack awareness of AGOA market.

Inadequate trade networks

There is lack of adequate networking system between the US and Tanzania's business sector in relation to AGOA opportunities.¹⁹ It is costly for individuals to travel and participate in the foreign market trade show

- Poor institutional capacity

Tanzania lacks a country AGOA strategy like such which countries like Lesotho and Kenya have in place. Tanzania suffers from poor institutional capacity for economic transformation for policy analysis, review, implementation and coordination among the government bodies and private sectors as well from independent bodies acting as intermediaries for the government.²⁰ Weakness in policy analysis, implementation and coordination among responsible institutions hampers the effectiveness of trade facilitation.

- Limited access to finance services

Financial legislations are not well developed to accommodate the reality of standard of living in Tanzania.²¹ For a country with 67.9% of the population living below the poverty line²²

¹⁸ J Mwangakala 'Trade Policy Review: Tanzania' (2007) www.tralac.org/ (accessed on 22 April 2016)

¹⁹ 'Failure to tap AGOA market irks ministers' Daily News 10 May 2015 <http://dailynews.co.tz/> (accessed on 11 November 2015)

²⁰ WA Anderson & JM Philemon Opportunities and challenges of AGOA for Tanzania firms (2013) in *Promoting Trade Competitiveness in developing countries*

²¹ PL Makoni 'Finance and firms characteristics in Tanzania' (2014) <http://businessperspectives.org>; Economy Rankings <http://www.doingbusiness.org/rankings> (accessed on 22 April 2016)

financial services impose stringent rules making it difficult for firms to afford Access to afford credit facilities to finance businesses. Specifically for the small hold farmers and the SMEs there access to credit is limited in Tanzania due to high interest rates imposed and collateral requirements.

- Land laws

Any successful Investment would largely depend on favourable land law, however in Tanzania such investment that would stimulate increased production for successful realization of AGOA is limited by the country's Land Act and other inflexible obstructions that are considered to be "inimical" to investors. Despite all other efforts, such hostile legislation creates hindrances to improving the agricultural and other sectors that form the backbone for production for AGOA yet they depend on land.

- High cost of production

Transportation infrastructure network such as roads and railways suffer from neglect and decay.²³ It is difficult for businesses to operate outside Dar es Salaam city because roads from production area to distribution sites and ports are inaccessible. The cost of transportation is high. For instance, to transport a container from Arusha to Dar es Salaam is roughly the same price that will cost one to transport the container from Dar es Salaam to Europe.²⁴ Also, the country suffers from poor post-harvest handling facilities, cold chain facilities, power, irrigation, water and sanitation.

Moreover, there is no direct flight and sea transport from Tanzania to the US.²⁵ This discourages traders from exporting to the US. Most SMEs can only afford to export in small consignment thus incurring high transportation cost for small consignment discourages traders to export to the US.

- Nature of AGOA product coverage benefits

Tanzania's export trade is dominated by agricultural produce. Although AGOA offers duty free market access for over 7000 products to the US market, tariffs imposed on the excluded products under AGOA by the US is relatively high. Agricultural products that are of export

²² 'Tanzania Population below poverty line' <http://www.indexmundi.com/> (accessed 8 November 2016)

²³ (n 11 above)

²⁴ UNCTAD 'Review of progress in the development of transit transport Systems in eastern and southern Africa' <http://unctad.org/en/Docs/poldcd115.en.pdf> (accessed on 15 April 2016)

²⁵ (n 17 above)

interest to Tanzania are excluded from AGOA and for some that are included in the AGOA are subject to quota limits.²⁶

- Stringent rules of origin

For non-textile and apparel products to be eligible for AGOA benefits, products must be grown, produced, or manufactured in one or more of the beneficiary countries and exported directly from an AGOA beneficiary country to the United States.²⁷ With these conditions, most of the products from Tanzania cannot access the US market. Furthermore, unless “wholly obtained” from a single AGOA country, goods are subject to a 35% value content rule. Fish produce, such as tuna, has difficulty achieving the 35% value addition due to lack of advanced processing technology. Thus, it cannot be exported to the US under AGOA. The restrictive rules of origin also do not reflect Tanzania current market realities.

- Other Technical Barriers

Tanzania agricultural fresh produce fail to meet the required SPS standards and to comply with the US custom procedures, thus unable to export to the US market. The country lacks skilled personnel to manage issues related to sanitary and phytosanitary standards.²⁸

- Limited production capacity

Production in Tanzania is low because of limited access to modern technology, efficient manufacturing equipment, and the use of poor value inputs.²⁹ Thus producers fail to produce the large quantities demanded in the export market and transportation cost increase where producers fail to fill the containers for shipment.

These challenges are explored in more detail below by discussing the trade supporting policies along with the enabling legal and regulatory framework in the context of the identified challenges.

4.6 Trade supporting policies

In Tanzania, there are a number of policies that have a direct bearing on trade growth in the country. The primary objective all the trade supporting policies is to enhance Tanzania’s trade competitiveness. The country’s trade supporting policies include but not limited to the National Trade Policy of 2003 and the Investment and Promotion Policy 1996. The success

²⁶ ‘Tobacco, cashew nuts Tanzania’s potential AGOA export bailout’ (2013) <http://dailynews.co.tz/> (accessed on 12 April 2016)

²⁷ ‘AGOA Product Eligibility’ <http://agoa.info/about-agoa/product-eligibility.html> (accessed on 15 April 2016)

²⁸ (n 17 above)

²⁹ USTR AGOA Competitiveness Report (2005) http://agoa.info/images/documents/2974/US_-_Africa_competitiveness_report.pdf (accessed on 10 April 2016)

to achieving the intended objectives of these policies depends on the adequacy of the strategies set to achieve the goals and how such strategies are pursued. These policies are discussed below;

4.6.1 National trade policy

Tanzania national trade policy 2003, states the country strategy to achieve growth in production, efficiency and international competitiveness through trade. Under the policy export-led growth was identified as an instrumental driver for economic development and eradication of poverty.³⁰ Moreover in 2010, Tanzania adopted a National Strategy for Growth and Reduction in Poverty (NSGRP) which provides a framework for the country to achieve MDGs and Tanzania Development Vision, which strongly emphasizes on participation of private sector in the economy growth and identifies agriculture as an important economic driver. Despite of having several trade related policies the country still suffers from various challenges that hinder full exploitation of its potential to benefit from trade.

- Legal Framework

In general, there are over 50 laws and regulations that make up Tanzania's trade legal framework. The business laws are well drafted and easy to use. However, not every legislation is accessible online and not consistently available from a particular area. Moreover, most of business laws and regulations are not available in Kiswahili language thus limiting access to information on the legal framework.³¹

- Institutional set up

The Ministry of Industry, Trade and Marketing (MITM) is the lead trade-policy making institution and oversees implementation of the trade regimes in the country with the Ministry of Finance (MOF). Other supporting institutions and agencies play a secondary role in support of trade policy making and implementation of the policies such as the Tanzania Chamber of Commerce, Industry and Agriculture.

³⁰ MITM 'National trade policy' (2003) <http://www.tzonline.org/pdf/> (accessed on 26 April 2016)

³¹ Business Climate Legal & Institutional Reform 'Tanzania Agenda for Action' (2008) <http://www.tzdpq.or.tz/fileadmin/migrated/content/uploads> (accessed on 26 2016)

4.6.2 National investment policy

Following major economic reforms influenced by trade liberalisation in 1996, Tanzania adopted a National Investment Promotion Policy that opened almost all economic sectors to private and foreign participation.³² The policy aims to achieve increase on export growth, facilitates use of new technology in production process, and influences equitable and sustainable balanced development in the country. It also led to the enactment of the Tanzania Investment Act of 1997. Both the investment policy and the Act were put in place to rectify various aspects of previous national investment promotion and protection policy of 1990 that restricted investors from investing in the country.³³

- Legal framework

Tanzania Investment Act, 1997 is the principal enabling legislation that provides a legal framework within which to implement the investment promotion policy. It provides investment incentives and protection on non-discriminatory basis to local people and foreigners. For the purpose of investment incentives, the Act categorizes investment areas into lead and priority sectors. Lead sector includes agriculture, mining, agro-industries, tourism and economic infrastructure. In these sectors, investors may be given additional incentives beyond rights and incentives awarded to the holder of certificate of incentives. Priority sector includes manufacturing, export processing zone, natural resources such as forestry and fisheries, aviation, commercial buildings and financial services.³⁴

The Act has provisions providing for how to establish enterprises, guarantees investment against expropriation, transfer of capital, investor's rights and incentives guarantees, and dispute settlement.³⁵ However, the provisions of the Act are not applicable to Zanzibar. Investment in Zanzibar is regulated by a separate legislation.³⁶ Also, investment in extractive industry is regulated by separate laws such as the Mining Act of 2010, the Petroleum Act of 2015 and the Tanzania Extractive Industries (Transparency and Accountability) Act 2015.

There are also independent legislations regulating investment in economic zones which is the EPZ (the Export Processing Zone) Act of 2002 and SEZ (Special Economic Zones) Act of

³² 'The national investment promotion policy' <http://www.tanzania-gov.de/investment/investing-in-tz/2-stories/documents/14-the-national-investment-promotion-policy> (accessed on 25 April 2016)

³³ CUTS 'Investment Policy in Tanzania – Performance and Perceptions' (2003) Centre for Competition, Investment & Economic Regulation http://www.cuts-international.org/CR_tanAB.pdf (accessed on 26 April 2016)

³⁴ 'Investment Opportunities' <http://www.tanzania.org.za> (accessed on 25 April 2016)

³⁵ Sections 21, 22 and 23 of the Tanzania Investment Act 1997

³⁶ Zanzibar Investment Promotion and Protection Act, 2004

2006. Initially, the EPZ scheme was initiated in the country to promote export-oriented manufacturing investment to utilize the available preferential markets access such as AGOA,³⁷ while SEZ were initiated later on to promote multi sector investment that taps into both domestic and foreign markets.

Despite the fact that Tanzania Investment Act is the principal legislation for the present investment regime together with the EPZ Act and SEZ Act, there are other laws that directly affect any investment establishment in the country such as land laws, employment and labour law, taxation law and sector specific legislation such as the Petroleum Act of 2015; together they form Tanzania Investment Framework.

- Institutional Set Up

The 1997 Investment Act established the Tanzania Investment Centre (TIC). It is the primary implementing institution for investment facilitation. The Centre has the mandate to promote, coordinate and facilitate investment activities in the country.³⁸ It also serves as a “one stop agency” for investors. Furthermore, the Centre assists all investors to obtain all the necessary license, permits, and authorization and related matters required by law to set up and operate their establishments. Moreover, the Act requires relevant government agencies and public authorities to process any application lodged by TIC within a period of 14 days of receipt.³⁹

TIC grants certificate of incentives to investors that register projects with working capital from USD 100,000 for projects that are fully-owned by citizen investors and USD 300,000 for projects that are fully owned by foreigners or in a joint venture. The holder of certificate of incentives is conferred with recognition and protection against non-commercial, package of fiscal incentives, immigration and land access. In Tanzania, land belongs to the state, and investors acquire land by obtaining a granted right of occupancy for the local investors. Conversely, foreigners acquire land through obtaining TIC derivative right or through sub-lease granted out of right of occupancy.⁴⁰

The Act guarantees fiscal incentives to investors through the TIC certificate of incentives.⁴¹ In addition, strategic or major investor may be eligible for additional investment benefits from the government through the National Investment Steering Committee (NISC).⁴² To attain

³⁷EN Mtweve (2011) ‘Tanzania’s experience in AGOA’ <http://satradehub.org> (accessed on 27 April 2016)

³⁸ Section 24 of Tanzania Investment Act 1997

³⁹ Section 16 of Tanzania Investment Act 1997

⁴⁰ (n 33 above)

⁴¹ Section 17 of Tanzania Investment Act 1997

⁴² Section 20 of Tanzania Investment Act 1997

strategic investor status, one has to fulfil stated criteria such as, investing project with a minimum capital of USD 20 million. Such project would generate employment to citizens, produce exports, brings new technology and it is located in a marginalized area in the country. Such investor may be eligible for more incentives.

There are other supporting institutions to the TIC in the implementation of its mandates. These include the Ministry of Lands, Housing and Human Settlement Development which assists investors to obtain right to land; TRA for tax identification; BRELA for business registration; Immigration Department for work permits and the Ministry of Industry, Trade and Marketing for various required business licenses.⁴³

Meanwhile, Investment in the assigned economic zones is facilitated by the Export Processing Zone Authority (EPZA) which is an independent investment promotion agency mandated to coordinate and facilitate investment in the economic zones only. Thus, an investor intending to invest in sectors outside the economic zones goes to register with the TIC and investors that intend to invest in economic zones or manufacture for exports register with the EPZA.

4.7 Challenges facing implementation of trade and investment policies

Countries that reap real benefits from trade competitiveness utmost have a favourable regulatory climate in place so that firms could achieve success.⁴⁴ For the past two decades, Tanzania has embarked on revising and reforming its trade and investment-related laws and implementing institutions so as to create a suitable environment of doing business. However, the processes take so long to be concluded and even longer to be implemented.⁴⁵ The existing legal and regulatory regimes supporting trade-related activities in Tanzania suffers from various shortcomings when to a large extent in a country escalate trading non-competitiveness of businesses.

Inadequate regulatory framework for investment

To a great extent, Tanzania Investment Framework is convoluted.⁴⁶ Investment incentives guaranteed to investors are dispersed over several legislations rather than compiled within a single legislation. Thus, it creates uncertainty to both domestic and foreign investors. For instance, investment incentives are set out in the Tanzania Investment Act, Export Processing

⁴³ Section 16 of Tanzania investment Act

⁴⁴ ITC 'National Trade Policy for Export Success' (2011)

⁴⁵ (n 31 above)

⁴⁶ OECD (n 3 above)

Zone Act of 2002, and Special Economic Zones Act of 2006, also in the sector specific laws such as the Mining Act of 2010. Moreover, investment incentives limited by sector and size threshold in the country are unpredictable. Recently, the government amended the monetary limitation scope to qualify for as a strategic investor by increasing the amount to USD 50 million for foreign investors and USD 20 million for local investors.⁴⁷

In addition, for projects that qualify for strategic or major investment status are eligible for additional investment above what is provided by the Investment Act. The said additional benefits are decided on case by case basis and granted at the discretion of the NISC.⁴⁸ The NISC has wide discretionary power to award additional investment benefits to investors. There is lack of transparency in awarding additional incentives; this increases risk of corruption and overlap of incentives.

Poor coordination of policies

Trade activities regulatory framework suffers from poor coordination of policy among government bodies and between government and private sector agencies. For instance, the country failed to maintain a consistent policy environment in which investors could develop long-term plans.⁴⁹ Policy implementation confusion was caused when the EPZ scheme was launched in 2002 followed by the SEZ scheme in 2006. These schemes are regulated by separate legislation and they are under different ministries; yet the requirements to invest in both zones are similar. Such confusion resulted in long-term damage to the schemes; not only did it confuse investors but also led to slow development of the zones.⁵⁰ Moreover, the private sector involvement in the economic zones retards the growth of the zones. Renting space in the zones managed by private developer is very expensive, thus making the economic zones unaffordable to potential investors.⁵¹ Private players operate for their private benefits and ignore the overall objective of the zones.

Trade liberalisation in Tanzania has resulted into significant removal of tariff and non-tariff barriers on export products such as elimination of export registration requirement, removal of

⁴⁷ ‘Investment Climate Statement – Tanzania’ (2013) <http://www.state.gov/e/eb/rls/othr/ics/2013/204744.htm> (accessed on 27 April 2016)

⁴⁸ (n 46 above)

⁴⁹ ‘Getting Special Economic Zones to Work in Tanzania’ <http://fsi.stanford.edu/sites/default/files> (accessed on 30 April 2016)

⁵⁰ (n 40 above)

⁵¹ UNCTAD ‘Report on the implementation of the investment policy review’ (2011) <http://unctad.org/en/Docs/> (accessed on 28 April 2016)

nuisance export licensing and elimination of taxes on export commodities.⁵² However, in practice, semi-autonomous crop boards operating under the Ministry of Agriculture, Food Security and Cooperatives continue to charge fees on the exports to fund their research, trainings and development activities.⁵³ Such regulatory requirements increase cost to producers and uncertainty to investors.

Moreover, taxes imposed by local government authorities at the point of sale and at every point of goods transit are also an impediment to exports. Legally, district taxes are not to exceed 5% of the goods values.⁵⁴ For goods produced distant from ports, the cumulative taxes at every point of transit in addition to the high transportation cost due to poor roadways, railways and freight charges, affects the produce quantities and discourage export production.

Lack of a defined strategy to promote AGOA

For the 15 years that Tanzania has been a beneficiary under AGOA preferences, the country has no formal strategy that would enable it to take advantage of the AGOA preferences. The potential products that the country would export under AGOA remain fragmented across various country strategy documents such as Integrated Industrial Development Strategy (IIDS).⁵⁵ Lack of national AGOA strategy makes it difficult for the government to support business linkage, conduct training, to promote export production for the available market, to quantify benefits, if any, from exporting under the preferential scheme, organize SMEs to gain awareness on how to produce for export under AGOA.⁵⁶

The Tanzanian government has done little to promote AGOA, unlike Kenya where an enabling environment (such as Export Processing Zones) has encouraged the private sector and foreign investors to take advantage of AGOA-induced opportunities. The lead role in raising awareness about AGOA has since been undertaken by various US agencies, mainly through seminars and information dissemination sessions forming part of local trade capacity-building programmes.⁵⁷

⁵²O Kanaan 'Tanzania's Experience with Trade Liberalisation' (2000) <http://www.imf.org/external/pubs/> (accessed on 30 April 2016)

⁵³ (n 40 above)

⁵⁴ Section 6 of the Local Government Finance Act 1982

⁵⁵ S Woolfrey 'Special economic zones and regional integration in Africa' <http://paulroos.co.za/> (accessed on 29 April 2016)

⁵⁶ M Kimenyi & Z Lewis 'Strategies to Enhance Gains of AGOA' (2013) <http://www.afdb.org/en/blogs/integrating-africa/> (accessed on 30 April 2016)

⁵⁷ E Naumann & L Mtango 'Tanzania and AGOA: Opportunities missed?'(2003)

Tanzania's compliance with the special provisions relating to apparel, which require certain administrative customs procedures (AGOA visa system) to be in place, was also only achieved more than a year after AGOA's inception.⁵⁸

Institutional and regulatory gaps in the economic zones

Tanzania's economic zones (EPZs and SEZs) schemes are still on early stages of development. Although significant progress has been made over the past five years, the schemes have limited impact on exports.⁵⁹

The EPZ was initiated in 2002 to promote investment for export-oriented manufacturing where investors are required to export 80% of the produce. However, the EPZ scheme has not succeeded because the government failed to create an attractive climate for manufacturing. As a result, investments in the zone were scarce and few jobs were created as the government failed to facilitate growth of the zone.⁶⁰ For instance, in 2003 a foreign-owned textile and apparel invested over two million dollars in Tanzania EPZ and was exporting under AGOA.⁶¹ The company operated on a stand-alone factory unit in a privately owned EPZ business area. The government had promised the company that it would acquire the rented property and reduce the rents. The government failed to keep to its promise and eventually the company went out of business due to high cost of doing business, high rent, and poor supply of utilities such as water and electricity and government stifling bureaucracy.

In 2006, the government initiated the SEZ scheme to promote investment in various sectors such as manufacturing, agriculture, tourism, forestry and free trade zones. In the SEZ, investors are allowed to produce for domestic consumption and exports. The government established the EPZA to facilitate and promote investment in both the EPZ and SEZ schemes. These schemes are regulated by separate legislation and they are under different ministries; yet the requirements to invest in both zones are similar. Such climate created uncertainty not only to the government agencies involved but also to potential investors due to the overlapping of government administrative functions. Thus, it resulted to slow start for the SEZs.

⁵⁸ As above

⁵⁹ T Farole & J Kweka 'Institutional Best Practices for Special Economic Zones: An Application to Tanzania' (2011) <http://siteresources.worldbank.org> (accessed on 2 May 2016)

⁶⁰ (n 49 above)

⁶¹ 'Tanzania: AGOA Textile Update' (2005) <http://iipdigital.usembassy.gov/st/english/article/> (accessed on 30 April 2016)

The Economic Zones Laws (Miscellaneous Amendments) Act, 2011 was enacted to rationalize the working of the schemes. It unified the schemes by making the EPZ part of the SEZ and mandated the EPZA to oversee roles and functions of the economic zones.⁶²

The Tanzanian government is not doing enough to enhance export performance of the economic zones particularly to international destinations (non-African markets). In addition, investment climate in the economic zones is not as favourable to compete with other African economic zones in attracting regional and international investors.⁶³ The zones operate under inadequate infrastructure, for example; power outages in the zones average up to 50 hours per month compare to power outages in Bangladesh economic zones where it is less than four hours per month average.⁶⁴ Also, there is lack of developed buildings in the zones.

Economic zones are not effectively managed. The EPZA roles are not well clarified;⁶⁵ it is an independent regulator of the economic zones; yet it also develops and manages the Benjamin William Mkapa (BWM) zone. The EPZA is not strengthened and not coordinated with other government agencies. In several cases, EPZA is forced to intervene to fast track necessary customs and taxation permits and certificates from Revenue Authority (TRA) for the EPZ and SEZ investors.⁶⁶ It would not be the case if the one-stop agency for EPZA was effective. Also, goods clearance institutions in the zones are worse than the wider economy,⁶⁷ it is only a few companies in the zones gain access to the on-site custom clearances. Moreover, customs officials fail to recognize a shipment to or from zone investors, requiring additional proof before giving clearance.⁶⁸

Additionally, the EPZA lacks budgetary autonomy.⁶⁹ Its budget is allocated from the MITS, and such funding source is risky because it is unpredictable and mostly insufficient. Experience is indeed the best teacher. For instance, in the early years of its inception, the EPZA was not able to promote investment in the EPZ adequately and to facilitate the investments effectively because of shortage of funds and the same had implications on the functioning of the EPZ in those early years. Preferably, the EPZA should operate with appropriate resources and capacity to implement its functions.

⁶² Preamble of the Tanzania Economic Zones Laws (Miscellaneous Amendments) Act, 2011

⁶³ S Woolfrey (n 55 above)

⁶⁴ (n 59 above)

⁶⁵ As above

⁶⁶ (n 63 above)

⁶⁷ As above

⁶⁸ (n 46 above)

⁶⁹ T Farole & J Kweka 'Institutional Best Practices for Special Economic Zones: An Application to Tanzania' (2011) <http://siteresources.worldbank.org> (accessed on 2 May 2016)

Impediments to land access

In Tanzania, all land is considered public land, which the President holds as a trustee for the people.⁷⁰ Land is classified into reserved land, village land and general land. The land (Amendment) Act 2004 governs the reserved land and the general land, whereas the village land is regulated by a Village Land Act 1999. Citizens acquire right of occupancy formally through registration from the state and in principle, such right may be bought, sold, leased and mortgaged.⁷¹ Foreigners may only acquire land for investment purposes.⁷²

About 3% of the land is registered and most of the registered land is from the urban areas. Registering land takes a lengthy process and it is costly.⁷³ The land market is constrained by government regulations. For a formal land to be transferred, it requires one to issue a presale notification to the land commissioner for the intended transaction. Commissioner's approval is a conditional requirement for the same to be registered.⁷⁴ Moreover, land received through grant must be held for at least three years before one can transfer his rights on the land. Holder of customary right of occupancy right to sell their land is subject to approval and limitations from the village council. Due to regulation complexities, land registration in the country remains low.

Although the governance structure should foster decentralization of land administration, the central government continues to exercise significant authority over land through the Land Commissioner. The Commissioner of Lands has the power to transfer village land to general land even if complaints have been filed by affected local communities.⁷⁵ Also, land rights can be confiscated if the land is not developed as agreed in the certificate.

Governance in land administration at all levels, but particularly at the local level, remains weak due to limited financial and material resources, weak human capacity, complex procedures and multiple reporting requirements.⁷⁶ This reduces effective oversight and control, transparency and accountability within institutions, and provides space for

⁷⁰ Section 1 of the Tanzania Land Act 2004

⁷¹ Part IV, V & VI of the Tanzania Land Act 2004

⁷² Section 20 of the Tanzania Land Act 2004

⁷³ (n 46 above)

⁷⁴ Part VI & VIII of the Tanzania Land Act 2004

⁷⁵ Part IV of the Land Act

⁷⁶ (n 41 Above)

corruption. Thus, land tenure security for those land rights that have been registered is often low.⁷⁷

Moreover, it is problematic for foreign investors to acquire land because land data in the country is incomplete. Consequently, investors face difficulty accessing information on land availability and quality. Foreigners obtain land through TIC derivative rights on general land only. Thus, if a foreigner investor is interested in a village land, the same has to be transferred into general land before it is allocated to them. Meanwhile, the designated investment land which is brokered by the TIC under the Land Bank scheme created under the Investment Act has been unsuccessful because the land parcels it holds are small and scattered. Thus, they are not much of interest to investors particularly to large scale investors.⁷⁸

Limited access to finance

According to the doing business report series,⁷⁹ a major issue for doing business in Tanzania is limited access to financial services to facilitate business activities. The financial sector has grown quickly in the economy over years. However, half of the population in the country and in particular SMEs and rural-based businesses remain excluded from financial services. Only 8% of the rural population has access to formal financial services such as banks and insurance companies.⁸⁰

Limited access to financial services to facilitate business activities in Tanzania is partly due to the high interest rates which discourage loans. But also is the attitude of the people towards financing business by loans; they take it as living in debt. While mortgaging is a common business in most countries, in Tanzania, few literate people opt for loans to run the business. Most SMEs and rural people lack awareness about lending business provided by financial sector.

The Land Act of 2004⁸¹ facilitates granting of mortgage to secure loans, and empower lenders to take possession of mortgaged land and sell it in the event of default on loan by the borrower. Financial institutions demand collaterals to secure loans. Most small scale farmers and SMEs are unable to use land as collaterals because most land in Tanzania is not surveyed and registered particularly in areas outside the city and the process of registration for land is

⁷⁷ Cuts (n 33 above)

⁷⁸ As above

⁷⁹ World Bank Group 'Doing Business' <http://www.doingbusiness.org/reports> (accessed on 2 May 2016)

⁸⁰ (n 31 above)

⁸¹ Part IV, V & VI of the Tanzania Land Act 2004

lengthy and costly.⁸² Most financial institutions have maximum loan limits for SMEs which is lower than needed by the borrower.⁸³

Moreover, financial services from microfinance and Savings and Credit Cooperative Societies (SACCOS) have great potential to expand credit supply to facilitate business growth; yet their impact in the society is very limited and they remain unregulated resulting in high variation in management and service quality.⁸⁴

4.8 Conclusion

Reflecting on Tanzania-AGOA trade performance and impact, the country has not attained any significant gains from the preferential scheme unlike other AGOA beneficiary countries such as Kenya, Lesotho and Ethiopia. Despite the shortcomings of the AGOA particularly on the agricultural products restrictions and SPS measures. The trade scheme has been the single most important driver of exports to the US market to most beneficiary countries and its impact has been considerably positive in their economic growth in terms of revenue, taxes, investment growth and creation of jobs. Kenya and Lesotho are great example as the largest apparel exporter under AGOA.

The reality for Tanzania, AGOA provides a much needed trade opportunity that the country is failing to utilize because of the supply side constraints that are limiting trade undertakings in the country. These include lack of trained and skilled personnel in the public and private sector, weak institutional management of trade and investment policies, low technology transfer and an overall inadequate business environment. If this challenges are left unaddressed the new extended AGOA 2015 will leave the benefits envisaged as a chimera.

⁸² (n 46 above)

⁸³ EM Richard & N Mori 'SMEs Access to Financial Services: Bankers' Eye'(2002)

⁸⁴ J Volschenk et al 'Problems affecting the growth of microfinance institutions in Tanzania introduction'(2005)

CHAPTER 5

KENYAN EXPERIENCE UNDER AGOA: AGOA COUNTRY SUCCESS STORY

4.1 Introduction

This chapter presents a case study of Kenya experience under AGOA in an attempt to draw lessons for Tanzania. The choice of Kenya for a case study is motivated by the fact that both Tanzania and Kenya are beneficiaries of AGOA preferences and the fact that they belong to East African Community (EAC), a fast growing regional economic bloc in Africa¹ together with Uganda, Rwanda, and Burundi. Kenya is a one of the top leading apparel exporter to the US from (SSA).²

4.2 Overview of Kenya experiences under AGOA

Kenya was declared eligible for AGOA preferences in October 2000. It was among the first few SSA countries to qualify for and commence exports under AGOA's wearing and apparel provisions by 2001.³ The country is also qualified for AGOA special rule on use of third country fabric for clothing products and for products that are hand-loomed or handmade.⁴ Since the inception of AGOA, bilateral trade between Kenya and US has increased and such trade pattern has played a decisive role in Kenya's economic growth. The bilateral trade profile consists of agricultural products, forest products, and textile products from Kenya to the US and machinery, vehicles, chemical and energy products from the US to Kenya.⁵ Kenya is among the few SSA countries that have been able to avail herself the preferences provided under AGOA initiative and the leading exporter country under AGOA from the East African region.⁶

¹ 'Overview of East Africa Community' <http://www.eac.int/about/overview> (accessed on 10 May 2016)

² 'Kenya; Economic Background' <http://agoa.info/profiles/kenya.html>

³ 'List of AGOA Beneficiaries' <http://agoa.info/about-agoa/country-eligibility.html> (accessed on 15 May 2016)

⁴ (n 3 above)

⁵ M Odongo 'The Africa Growth and Opportunity Act, Challenges and Opportunities' (2013) Institute of Economic Affairs www.ieakenya.or.ke/downloads (accessed on 16 May 2016)

⁶ C Onyango & M Ikiara 'Reflections on Kenya's experience under AGOA: Opportunities and Challenges' in Africa Growth Initiative at Brookings 'Improving AGOA: Toward a New Framework for U.S.-Africa Commercial Engagement' (2011) <http://www.brookings.edu/> (accessed on 15 May 2016)

4.2.1 Kenya export performance under AGOA

Kenya exports to the US market immensely increased through AGOA preferences.⁷ Through AGOA, Kenya exports product such as nuts, coffee, tea, cut flowers, handicrafts, textile and apparel.⁸ The bulk of exported products comprise of textile and apparel products. This sector composes about 80% of the total exports to the US.⁹ From 2000 to 2004, Kenya experienced a dramatic rise in exports to the US from USD 30 million to about USD 260 million respectively. The following years from 2005 exports from Kenya to the US witnessed a decline in volumes levelling to about USD 100 million on overall products only to regain momentum from 2012.¹⁰ Like the rest of the SSA countries, Kenya's exports rate declined following the expiration of the Multi-Fibre Agreement (MFA) in 2005. This agreement enabled developed countries such as the US and Europe to impose import restriction on apparel and textile products from developing countries. Hence, through AGOA, African exports enjoyed a competitive advantage over the like products from other developing countries in the US market. The expiration of MFA exposed African textile and apparel products to a stiff market competition from the Asian countries producing the similar products at a cheaper cost of production. In 2001, Kenya's textile and apparel products constituted about 90% of the country's exports following expiration of the MFA in 2007. As a result, the record declined to about 80%.¹¹

Furthermore, with the 2008 global financial crisis and recession period, exports from Kenya dropped more. During this period, some manufacturing firms had to restructure operations to remain afloat while some companies were put out of business.¹² In 2008, while Kenya experienced a decline of exports at an average of 0.3%, other SSA countries such as Lesotho, Mauritius and Uganda experienced a decline at average of 10.7%, 15.2% and 37.6% respectively.¹³

⁷ M Leboo 'Determinants of Kenya's export performance under AGOA trade preference regime' Masters Dissertation, University of Nairobi, 2015, <http://erepository.uonbi.ac.ke/bitstream/handle/11295/93678> (accessed on 18 May 2016)

⁸ (n 5 above)

⁹ 'Kenya national AGOA strategy 2012' http://www.eatradehub.org/kenya_national_agoa_strategy (accessed on 18 May 2016)

¹⁰ M Leboo (n 7 above)

¹¹ M Chemengich 'Impact of AGOA on the textile industry in Kenya' (2010) http://www.actifafrika.com/documents/ACTIF_report (accessed on 20 May 2016)

¹² As above

¹³ As above

4.2.2 Investment performance

AGOA influenced the growth of investments in the apparel sector in Kenya from both national and foreign investors. Most firms exporting under AGOA from Kenya operate in the EPZ's schemes. The preferential market access provided by AGOA attracted foreign investors to invest in Kenya evidently in the apparel sector. The previous uncertainty on the life of AGOA preferences by large had an impact on the foreign investment pattern in Kenya. Initially, AGOA was set to last until 2008 before it was extended to 2015. Therefore, most foreign investors made temporary investment plans in the country under the belief that AGOA was a short-lived market initiative and by 2008 most foreign firms relocated from Kenya.¹⁴ However, by 2012, more textile and apparel foreign firms invested in the EPZs.¹⁵ The manufacturing sector contributes about 10% of the GNP in Kenya; the textile and apparel manufacturing sub-sector from EPZs as a whole benefits from the preferential market access under AGOA.¹⁶ As of 2015 AGOA related business investment valued at Kshs 15 billion.¹⁷

4.2.3 Employment creation

AGOA has resulted to an increase in job creation in Kenya. More than 30,000¹⁸ people are directly employed in the textile and apparel firms operating in the country and produce for export through AGOA.¹⁹ Indirect employment generated from the textile and apparel companies are from complementary services and value chains in the country such as banking, transportation, farmers, and customs.²⁰ In addition, employment has been generated in the agricultural sector and small-scale entrepreneurs such as handicrafts producers.

¹⁴ M Chemengich 'Impact of AGOA on the textile industry in Kenya' (2010)
[http://www.actif africa.com/documents/ACTIF report](http://www.actif africa.com/documents/ACTIF_report) (accessed on 20 May 2016)

¹⁵ Odongo (n 5 above)

¹⁶ As above

¹⁷ 'US, Kenya trade gets boost with renewal of AGOA deal' Business Daily June 29 2015

<http://www.businessdailyafrica.com> (accessed on 18 May 2016)

¹⁸ 'Why Kenya textile sector needs new and expanded AGOA trade pact' Business Daily 24 May 2015

<http://www.businessdailyafrica.com> (accessed on 18 May 2016)

¹⁹ Odongo (n 5 above) & Chemengich (n 11 above)

²⁰ Odongo (n 5 above)

4.3 Kenya's strategies that enhanced accruable benefits from AGOA

AGOA has been a panacea for the Kenya-US trade relationship, significantly strengthening and increasing Kenya's export to the US over the last 15 years. During this period, 90% of Kenya's exports to the US benefits from preferential market access provided by the US- AGOA and GSP.²¹ The bulk of the Kenyan exports to the US through AGOA comprises of textile and apparel products. AGOA has been remarkable in the economic life of Kenya EPZs where textile and apparel firms flourish. Undoubtedly, Kenya has reaped economic benefits accruing from AGOA.

Following trade liberalisation from the 1980s, imports from developed and developing countries into Kenya increased tremendously while Kenyan exports recorded a low volume. In particular, imports into Kenya from Asian countries accelerated over the years accounting for about 80% import value in 2011.²² From early 1990s, the government of Kenya initiated export promotion schemes such as Export Processing Zone (EPZ), Manufacturing under Bond (MUB), and duty remission facility to accelerate export growth and manufacturing industry in the country. Despite the schemes in operation, export growth progressed slowly in Kenya. However, the textile and apparel sector witnessed growth of exports following the inauguration of AGOA in 2000.

For the past 15 years, exports from Kenya under AGOA have remained substantially competitive despite their exports weathering various economic ripples such as the 2005 expiration of the MFA, and the 2008 financial global crisis. There are several factors that attribute to the country's export growth under AGOA. These include but not limited to availability of export incentives in the country. The legal and regulatory reforms carried out to improve doing business in Kenya made the country a favourable place for doing business in the eastern African region and other available resources such as high participation of the private sector in the economy, the availability of educated and skilled human capital, as well as easy access to ports and airport infrastructure. These strategies are discussed below:

²¹ (n 17 above)

²² T Fukunishi 'The Kenyan Garment Industry: Is it able to revive in the economic boom?' in Dynamics of the Garment Industry in Low-Income Countries: Experience of Asia and Africa (Interim Report). Chousakenkyu Houkokusho, IDE-JETRO, 2012. <http://www.ide.go.jp> (accessed on 20 May 2016)

4.3.1 Export promotion schemes

The government of Kenya has established various schemes to promote manufacturing of export-oriented goods in the country. One of the schemes is EPZs where manufacturing is under bond in which designated factories are permitted to import raw materials, equipment, and machinery used for production free of duty with an additional favourable income tax incentive on capital expenditure in the country; exemption of duties and VAT on imported plant, machinery and equipment used in the production of goods for export.²³ These plans were introduced in the country before AGOA came to fruition. Conversely, with the inception of AGOA in 2000, investments in the designated EPZ increased and some manufacturing firms located outside EPZ enjoyed the same status as firms located in the zones.

- Export Processing Zone (EPZ)

Export Processing Zone Act, 1990 Cap 517²⁴ established EPZ to promote and facilitate export-oriented production in Kenya as well as the EPZ authority to administer investment activities under the EPZ.²⁵ EPZ are specific gazetted areas by the government for the purpose of facilitating incentives for export production. These areas are treated as being outside the Kenya's customs territory for the purpose of certain fiscal advantages.²⁶

Firms investing in the EPZ enjoy from fiscal incentives and smooth business operation incentives. These firms are awarded 10 years tax exemption on corporate income tax and a 25% reduction in tax for a further 10 years after that, 10 years holiday on withholding tax. Firms are exempted from payment of stamp duty fees and VAT on local goods and services supplied from Kenyan domestic market. These companies are also guaranteed an exemption from customs import duty on inputs such as raw materials, machinery, and other supplies used in the zones. These also include 100% deduction on new investment buildings and machinery brought to the zone.²⁷

The EPZA is a one-stop shop investment facilitator reducing bureaucratic and administrative procedures that an investor would otherwise have to go through to set up and operate in the

²³ MJ Ogeri 'Export promotion schemes and export performance in East African community: a comparative analysis' (2013) Masters Dissertation, University of Nairobi.

²⁴ <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20517> (accessed on 25 May 2016)

²⁵ Sec 3 of Kenyan EPZ Act Cap 517

²⁶ Export Processing Zones Authority <http://www.epzakenya.com> (accessed on 25 May 2016)

²⁷ Section 29 of Kenya EPZ Act

country. Thus, through the EPZA, investors are saved from compliance with various business laws such as the Industrial Registration Act, the Factories Act, and the Import, Export and Essential Supplies Act and begin to operate in the zone essentially with a single license from the EPZA.²⁸ Investors enjoy a liberalised monetary exchange control in the EPZ; firms are guaranteed with easy repatriation of profit and access to local and offshore borrowing.²⁹ In every zone, there is an efficient resident custom office to process onsite custom documentation and clearance of goods.³⁰

Moreover, the physical infrastructure development in the zones provides the necessary facilities to support export production. The designated areas are equipped with serviced land and ready factory buildings that are available for sale or lease to interested firms, and ample supply of amenities to support production. Zone developers are obliged to provide 24 hours security and landscaping in the zones with well-developed storage warehouses available for lease in most zones.³¹

As of 2014, there were 52 EPZs operating in various parts of the country, with about 86 investing firms operating in the zones.³² The public sector develops and manages only two Zones out of the 52 Zones with the rest being maintained and developed by the private sector under license from the EPZA.³³ Out of the 52 enterprises operating in the EPZ, 40.7% are fully owned by foreigners from Germany, USA, Singapore, Taiwan, Qatar, and Tanzania while 33.7% are owned by Kenyans, and 25.6% are owned on joint venture basis³⁴ with different industrial sectors operating in the EPZ in Kenya. The textile and apparel sector dominates production from the EPZs. It has employed most people and over half of the exports generated from EPZs are garments products.³⁵ The US remains the leading market for textile and apparel products exported from Kenya due to the available preferences under AGOA provisions.

²⁸ <http://www.epzakenya.com/index.php/investment-information/incentives.html> (accessed on 25 April 2016)

²⁹ (n 24 above)

³⁰ (n 25 above)

³¹ As above

³² Export Processing Zones program annual performance report, 2014

<http://www.epzakenya.com/UserFiles/June2016/EPZ%20Annual%20Report%20Performance%20Report> (Accessed on 26 May 2016)

³³ (n 32 above)

³⁴ As above

³⁵ As above

Contrary to the Kenyan EPZs fiscal and regulatory environment, the Tanzania EPZ Act 2002³⁶ provides fiscal incentives to firms investing in the EPZs similar to those provided in Kenya EPZ. These include additional incentives such as EPZ firms receiving reduced transit cargo charges and being allowed to sell 20% of produced goods to the domestic market.³⁷ As of 2014, there were 16 firms operating in the EPZ³⁸ from different parts of the country. Almost half of the total firms are owned by Tanzanians.

4.3.2 Business environment

The government of Kenya has not been reluctant to adopting business initiatives, legal and regulatory reforms aimed at creating a sustainable and an enabling business environment that improves the trade competitiveness. For instance, in the country's 15 years, the government, in collaboration with the private sector has identified cross-cutting challenges that affect the growth of trade and investment in the country such as prevalence of inefficient bureaucracy, costly and ineffective certifications, permit and license, long delays and complex procedures to set up and operate business in the country, access to electricity supply and access to credit to fund business.³⁹

- Reforms in business license regulations

In recognising business licenses as one of the most important regulatory impediments to doing business, the government in 2005, established a working committee on regulatory reforms for business activities with the mandate to review and make recommendations on all the business licenses and fees in the country.⁴⁰ The Committee adopted the regulatory guillotine,⁴¹ a system to remove redundant licenses and simplify licenses that are necessary. By the end of 2007, the Committee completed the task and made recommendations of which the government acted upon accordingly. The government enforced the Licensing Laws (Repeals and Amendments) Acts of 2006 and 2007 respectively that repealed certain statutes and also made amendments to most of

³⁶ The Export Processing Zone Act 2002 as amended by the Export Processing Zone (Amendments) Act 2006 and the Economic Zones Laws (Miscellaneous Amendments) Act 2011

³⁷ As above

³⁸ 'Country Profile' www.epza.go.tz (accessed on 20 May 2016)

³⁹ 'Kenya business reforms key to new Africa growth' May 2015 <http://www.businessdailyafrica.com> (accessed on 16 April 2016)

⁴⁰ 'Kenya Regulatory Reforms Report (2008)' <http://www.bmmusau.com> (accessed on 21 April 2016)

⁴¹ The guillotine system is a manner of rapidly reviewing regulations, and eliminating those that are no longer necessary, without the need for lengthy and costly legal action on each regulation.

laws business license.⁴² Consequently, the government eliminated about 315 business licenses while 379 licenses were simplified.⁴³ As a result of the business licensing reforms, Kenya was ranked nine^{out} of 178 economies reforms in the Doing Business Report 2008.⁴⁴

- Reform to improve access to credit

Most economic activities in the SSA countries come from small and medium enterprises (SMEs). However, in many developing and least developed countries such as Kenya and Tanzania, SMEs have limited access to formal credit. In Kenya, SMEs is the fastest growing sector and contributes 30% of the national GDP.⁴⁵ By 2006, there were about 2.2 million SMEs⁴⁶ operating in Kenya of which about 10% had received credit from formal financial institutions.⁴⁷ This limitation to access credit is due to difficulties in assessing SMEs business risks, thus financial institutions address the same by requiring collaterals for security, by charging high-interest rates and at times not giving credit to SMEs. By and large, conditions imposed by the financial sector in issuing credit hinder the growth and competitiveness of the SMEs in the country. In recognizing this problem, the government of Kenya enforced the Banking Act of 2007 and issued regulations thereto which permit for credit information sharing. Financial institutions in Kenya are allowed to share both positive and negative credit information among banks through licensed credit reference bureaus (CRBs) in the country.⁴⁸ In due course, various financial laws were amended to expand the mechanism in the country such as the Central Bank of Kenya Act.⁴⁹ Reports from CRBs assist in providing credit to many people, borrowers can negotiate for sufficient and better credit facilities, flexible repayment terms and may request not to issue any

⁴² Kenya Licensing Laws (Repeals and Amendments) Act of 2006 and 2007 respectively

⁴³ Kenya Association of Manufacturers(KAM) 'Licensing reforms in Kenya 2008: Impact on doing Business & Kenya's competitiveness' <http://www.businessadvocacy.org/downloads/brief%20KAM%20Licenses.pdf> (accessed on 19 April 2016)

⁴⁴ Doing business 2008 'Comparing Regulations in 178 economies' http://www.doingbusiness.org/~media/GIAWB/Doing_Business/Documents/Annual-Reports/ (accessed on 28 May 2015)

⁴⁵ Kenya launches SME training to increase AGOA exports portfolio' <http://agoa.info/news/article/5922> (accessed on 22 May 2016)

⁴⁶ In Kenya most formal financial institutions define SMEs as businesses employing six to fifty people, or that attains annual revenue of less than 50 million Kenyan shilling. http://fsdkenya.org/wp-content/uploads/2015/08/08-11-24_Credit_Scoring_for_SME_lending-1.pdf (accessed on 10 May 2016)

⁴⁷ 'The potential for credit scoring for SME lending in Kenya' 2008 http://fsdkenya.org/wp-content/uploads/2015/08/08-11-24_Credit_Scoring_for_SME_lending-1.pdf (accessed on 10 May 2016)

⁴⁸ O Obare 'How CIS works' <http://www.tatuacenter.co.ke/how-cis-works/> ; Business reforms in Kenya <http://www.doingbusiness.org/reforms/overview/economy/kenya> (accessed on 11 May 2016)

⁴⁹ As above

collateral for loan security.⁵⁰ Such report also enables lenders to assess risks and fraud associated in the SME business.

In the last 15 years, the government of Kenya has been successful in fast-tracking reforms to improve the business environment in the country. It has reduced the cost of doing business through reforming license requirement and simplified regulatory procedures, reduced the time required and cost of registering a business, registering property and paying taxes. By improving access to credit for entrepreneurs, the government has made cross border trading easier through the expansion of the country's large ports and enforcing ports administrative reforms by adopting modernised mechanisms that enable traders to send documents online, store data and track goods in turn reducing the number of inspection points along borders. After these improvements, it takes an average of two days down from five days for transit cargo clearance.⁵¹ The government's focus on increasing electricity supply has resulted in reduction of industry electricity cost consumption by about 25%, making Kenya a more competitive location for manufacturing investment.⁵²

- Training of SME's to increase exports under AGOA

Kenya has been able to export less than 10 products out of about 7000 products eligible for preferential treatment under AGOA.⁵³ The bulk of the exported products are dominated by textile and apparel products of which most are manufactured from the EPZs. The government in collaboration with the private sector seeks to diversify exports under AGOA preferences; they launched training to SMEs aiming at increasing exports volume and exports product diversification through AGOA. Entrepreneurs are informed on how to trade under the AGOA, and on the required global market standards permits on products that add credibility and makes approval process in the US market easier.⁵⁴ Moreover, the GOK in partnership with the US government established cold chain facilities in Kenya aiming at increasing export and import between the two countries. Perishable (agro-processed products) exports from Kenya to the US were limited due to lack of efficiency to transport such goods for a greater distance while preserving its novelty nature. The modernised cold facility infrastructure in Kenya save exporters

⁵⁰ As above

⁵¹ (n 39 above)

⁵² As above

⁵³ (n 32 above)

⁵⁴ As above

from extra costs and ensures compliance with the US product standards requirements on perishable exports.⁵⁵

4.2.3 Role of private sector in economy

The collaboration between the public sector (Government of Kenya) and the private sector in economic activities has been eminent. Kenya's private sector is developed and dynamic in the economy which makes it possible for the country to adapt to competitive market forces.⁵⁶ Kenya's strong private sector evolved from the country having consistent market-led economic policies since after attaining their independence in 1963. In contrast, Tanzania has been through different economic ideologies after independence. The aftermath of the African socialism 'Ujamaa' ideology which undermined the growth of the private sector in the country by making people dependant on the government to carry out all economic activities in Tanzania is still prevalent in the current market-led economy; socialism ideology undermined growth of the private sector activities in the country. Thus, the government plays a significant role in the economic activities due to less participation of the private sector.⁵⁷

4.3.4 Human capital

Education plays a vital role in increasing productivity and economic growth in a country. Kenya ranks high on adult literacy rate and the quality of education as compared to Tanzania. Adult literacy is at 87% in Kenya compared to 72% in Tanzania.⁵⁸ The 2013-2014 Global Competitive Index ranks Kenya at number 44 for quality of education and availability of research and training services while Tanzania ranks 100 for the quality of education and 117 for research and training services out 148 countries.⁵⁹ The quality of skilled labour is also better in Kenya. Most firms in Tanzania outsource skilled employees from Kenya especially at management level and expertise that Tanzania has yet to develop. The majority of the workforce in Kenya is educated thus making it easier to train employees, placing Kenya in a better position to attract investment than Tanzania. Moreover, in 2012, the government of Kenya enacted Universities Act, which aimed

⁵⁵ Kenya, US Partner in Setting Up Cold Chain Infrastructure for Trade' <http://www.industrialization.go.ke/index.php/> (accessed on 28 May 2016)

⁵⁶ MS Kimenyi & J Kibe 'Africa's powerhouse', 2014 <http://www.brookings.edu/research/opinions/2013/12/30-kenya-economy-kimenyi>; UNCTAD (2002) 'Investment policy review: Tanzania' United Nations Publication, http://unctad.org/en/docs/iteipcmisc9_en.pdf (accessed on 25 May 2016)

⁵⁷ As above

⁵⁸ (n 56 above)

⁵⁹ 'The Global Competitiveness Report 2013-2014' <http://www3.weforum.org/docs> (accessed on 15 May 2016)

at improving the quality of education at all levels in the country by separating governance of university and tertiary institutions so as to strengthen its technical sector.⁶⁰

4.4 Kenya's specific AGOA plan framework

Kenya's national committee on AGOA led by the Ministry of Trade and Industries in collaboration with the USAID initiated the development of Kenya's AGOA strategy aiming to support the ability of Kenyan firms to export to the US market through AGOA and leverage opportunities that the scheme provides.⁶¹ In 2012, the country's clear AGOA strategy framework was published.⁶² The plan identifies the potential products that Kenya exports through AGOA. It focuses on the identification of challenges that frustrates Kenyan firms from exporting to the US. In addition, it pinpoints institutions that are available to assist businesses to export under AGOA and lastly identifies strategies to address the challenges so as to enhance utilization of AGOA.⁶³

- Product sector profiles

The products identified for exports under the AGOA are textile and apparel products, coffee, nuts, cut flowers and home and fashion accessories. Kenya had already exported the identified products under AGOA before the national strategy was drafted. The plan analysed the nature of the exports competitiveness in the US market and compared them with other countries exporting the same products to the US. The country identified the status of such products market competitiveness without AGOA preferences. For instance, apparel products from Kenya compete globally based on the US trade preferences policy thus without the preferences such products are likely not to remain competitive.

- Challenges facing exports to the US

At the country level, the policy challenge they face is that it will come a time that AGOA will end. Thus, there will be no more tariff preferences available. Kenya firms exporting to the US market are encouraged to develop an export sector that competes internationally based on firm and country level competitive advantage and not on trade preferences benefits. Thus, with the

⁶⁰ Kenya's Universities Act, 2012 <http://www.kenyalaw.org> (accessed on 15 May 2016)

⁶¹ 'Kenya national AGOA strategy' 2012 http://www.eatradehub.org/kenya_national_agoa_strategy (accessed on 15 May 2016)

⁶² As above

⁶³ As above

AGOA preferences, Kenyan firms should build a reliable product competitive profile that will enable them to compete internationally without preferences.

The strategy also identified the challenges faced by export-oriented producers in the economy. These include high electricity rates which affect manufacturing activities; limited access to finance for SME in Kenya; and customs administration at ports and trade regulation in the country. All these factors frustrate the export-oriented growth in Kenya.

In the context of exporting to the US market, challenges faced by the trading firms in penetrating the US market include lack of knowledge on buyer's needs, knowledge about compliance with the US market entry regulations especially for agriculture products, and lack of service providers to access US market and financial institutions. Also, transportation cost to the US market is relatively high and risky for perishable products such as cut flowers.

- Supporting institutions

There are a number of institutions that support exporters in Kenya to leverage trade opportunities under AGOA. Institutions identified in the Kenya-AGOA regime range responsible for enhancing business firms to take advantage of the AGOA opportunities are such as Export Promotion Council (EPC), East Africa Trade and Investment Competitiveness Hub (ECA Hub) and the African Cotton & Textile Industries Federation (ACTIF).

- Strategic framework to address challenges

Kenya's AGOA strategy identified various problems faced by Kenyan firm exporting to the US market. The challenges identified related to Kenya trade policy, general business environment support and supporting business firms focused on exporting to the US. The suggested strategy framework to address the challenges was categorized into short-term and long-term actions to be implemented in the country so as to increase utilization of AGOA. Kenyan National Committee on AGOA and all supporting institutions were to focus and carry out actions such as, to advocate for the extension of the AGOA post-2015 and the Act's unique provision on use of third party fabric rule. Concerning the US market-focused business, Kenya should establish a shortlist of priority sectors that qualify for preferences under AGOA. The government should assist firms to export by identifying market opportunities, facilitate seller-buyer linkage, connect traders with service providers, promote for a direct flight to the US, arrange for international trade fairs and

develop training programmes to address on the elimination of non-tariff barriers for the priority sectors identified. Implementing institutions need to annually review progress and make adjustments where necessary, keep track of progress made, source fund to carry out important tasks such as training programmes and conducting product and market research.

AGOA and other trade preferences available to the country do matter in achieving increase in exports. Their AGOA strategy focused on addressing challenges that traders face to export to the US and solutions to be implemented by various AGOA supporting institutions so that the Kenyan firms may leverage opportunities offered under AGOA.

4.5 Conclusion

From the discussion above, there is no doubt that Kenya is among the few SSA countries that are effectively utilizing the market access opportunity under AGOA. More than 80% of Kenya's exports enter the US market under AGOA provisions. Kenya's textile and apparel industry is excelling due to AGOA existence. Although the bulk of the exports consist of textile and apparel products, the country is also experiencing growth of exports to the US in other non-textile and apparel sectors such as coffee, nuts and cut-flowers. Beside increase of volumes of exports to the US, through exporting under AGOA, employment opportunities were generated for more than 30,000 people, and Kenya has also seen the growth of foreign direct investment.

Nonetheless, AGOA provides an opportunity for eligible SSA countries to expand their export and produce more for the available market. However, for beneficiary country to achieve the same, it is left for each country to adjust in implementing the existing preferential trade arrangement and compete at the international level. Kenyan government has not been reluctant in carrying out legal and regulatory reforms to improve ease in doing business in the country such as streamlining the customs administration and strengthening infrastructure. This partly explains why Kenya manages to remain competitive under AGOA.

Kenya is focused on utilizing the opportunities offered under AGOA. The national AGOA strategies identify key institutions in the country that are to support exports to the US and the short-term and long-term roles that each institution should perform to implement the available trade arrangement. Kenya is in a better position to benefit more from utilizing the available

market opportunities post the extended AGOA 2015. The 10 years extended period creates certainty to exporting firms and policy makers to plan to execute their plans.

CHAPTER 6

CONCLUSION AND RECCOMENDATIONS

6.1 Recap of the research problem statement

Over the years, Tanzania trade performance under the AGOA preferential trade arrangement has dropped gradually from 18.8% 2002 to 4.1% in 2015 despite the country's potential of being one of the biggest exporters in Africa. The reasons for the poor trade performance include but not limited to lack of sufficient information about AGOA to public institutions, private sector and business firms. Unfortunately, the few that are aware of AGOA opportunity fail to take advantage of the available opportunity due to the high cost of production as a result of existing gaps in the legal, regulatory and institutional framework in the country. For instance, to date Tanzania lacks a national policy to support business firms from taking advantage of the enhanced market access under the AGOA trade preferential arrangement as the one established in Kenya. The national trade policy acknowledges that export-driven production is potentially a powerful means of raising the standard of living, generating employment and eradicating poverty in the country. However, the country has not established incentives or strategies to enable traders to benefit under AGOA.

It is against this backdrop that this legal research argued that lack of a sound regulatory framework is partly responsible for the poor trade performance of Tanzania under the AGOA preferential arrangement and that with a sound regulatory framework, Tanzania's trade potentials would be greatly enhanced, and its export-led trade capacity will be unleashed under the AGOA opportunity.

6.2 Summary of findings

Chapter one provides an outline of essential considerations of this study. It presented a synopsis of the relevance of AGOA trade opportunity to SSA countries and established that since AGOA came into effect in 2000, Tanzania has a history of poor performance under the trade arrangement partly caused by weakness in the existing legal and regulatory framework governing trade. Moreover, the chapter uncovered contentious views with regard to the impact of AGOA on SSA countries and a view that preferences accorded to exports from developing and least developed countries are not effective to countries that are yet to acquire the necessary maturity

production and regulatory structure in order to enhance their capacity to compete with industrialized countries. The author recognises that regardless of the impact of AGOA to the SSA countries, the Act offers more favourable preferential treatment on exports from Africa and it is an important trade arrangement to SSA countries aiming to improve their economic growth, increase the standard of living and alleviate poverty.

In the second chapter, this study traces the evolution of the current world trading system. During the 19th Century, international trade evolved autonomously, not under any multilateral instrument. The aftermath of the First World War and the Second World War, developed countries realized political cooperation primarily depended on international economic cooperation. Major trading countries then in the 1940,s led by the USA, embarked on construction of post-war new economic order based on financial stability, economic integration and trade liberalisation. This led to the inception of the GATT 1947, and through cooperation of all member countries to the agreement in the trade rounds the present multilateral trading agreements were formed. Member states to the multilateral trade agreements are not prohibited from forming PTAs, thus for the past 20 years the world has witnessed proliferation of PTAs of different kinds and scope.

Furthermore, this study attempted to explore the rationale behind the special and differential treatment offered exclusively to SSA countries under AGOA initiative in the multilateral trading system. It found that as far as the WTO legal binding provisions are concerned, AGOA is not a Regional Trading Agreement (RTA) or Free Trade Area (FTA) permitted under the WTO. Moreover, it is in violation of the non-discrimination principle (MFN) under Article 1 of the GATT 1994. However, the US applied for waiver to the WTO secretariat to enforce AGOA only to SSA countries in exclusion of other WTO members. The WTO granted the same subject to annual review of the preferential trade scheme. In addition, this chapter provide for a general understanding of AGOA provisions and the benefits of the trade arrangement to the SSA countries.

The AGOA initiative provides Tanzania with an opportunity to expand its trade and investment growth. In any case, Tanzania lacks an effective regulatory structure to support firms from leveraging the available opportunity. Tanzania investment framework is unduly complex and suffers from lack of inadequate co-ordination of policy. Both the public and private sector lack

clear understanding of AGOA. In addition, access to land and finance is limited due to bureaucratic procedures. Tanzania has poor trade performance under the initiative unlike Kenya.

Kenyan traders have been able to take advantage of the export opportunities. AGOA influenced growth of investment, job creation and increase of export volume in Kenya. Kenya investment regime offers both fiscal and non-fiscal incentives to traders aiming to promote export production growth. The government of Kenya is active in carrying out necessary reforms aiming to improve the business environment in order to enhance the country's trade competitiveness. Kenya's National AGOA Plan seeks to promote the capacity of small, micro and medium enterprise (SMEs) firms so they can exploit opportunities provided under AGOA.

6.3 Final conclusion

AGOA was enacted aiming to reduce tariff and non-tariff barriers between the US and SSA trade relationship. The Act accords duty free and quota free to virtually all eligible products from SSA countries entering the US market. Such special treatment gives the beneficiary country a competitive advantage over non-AGOA countries trading at the US market. It also promotes export diversification through its wide range of product and encourages regional trade integration among beneficiary countries. In addition, through AGOA, the US offers assistance to beneficiary countries to strengthen and expand their private sector focusing on firms owned by women and SMEs. Opportunities offered under AGOA give sense on the importance of AGOA scheme to the beneficiary countries.

AGOA was recently renewed for another 10 years, to 2025. There is a speculation as to whether Tanzania can take advantage of this market access opportunity, considering the challenges that the country faced in utilizing AGOA in the past 15 years which made it fail to attain significant benefits from the initiative. Firstly, for Tanzania to achieve meaningful gains from AGOA, the country should focus on reducing the standard cost of doing business by improving its trade and investment regulatory framework and customs burdens.

Generally, preferences alone are not a panacea. Beneficiary countries need to adjust their available resources so that they can implement existing provisions in preferential schemes granted to them and take advantage of opportunities. Also, they should establish strategies that

determine costs and benefits of adjustment so that trade preferences can be more effective in making development impact.

6.4 Recommendations

- I. For the 15 years of AGOA has been in-force, benefits of AGOA to SSA beneficiary countries are limited. AGOA has significant impact on petroleum and apparel exports from the beneficiary countries of which not even half of the SSA countries produce such products. African countries especially SSA countries depend on Agriculture trade. Thus the US to reform the AGOA policy to accommodate SSA beneficiary countries market realities through;
 - Eliminating tariffs on Agriculture exports from SSA beneficiary countries;
 - Eliminating or further reduce quotas imposed on Agriculture exports from the SSA beneficiary countries or at least from such countries in SSA that are least-developed countries (LDCs);
 - AGOA trade hubs to assist SSA countries Agriculture ministry through training and funding so as to support firms to meet US-SPS standards.

- II. Tanzania to form a National-AGOA strategy that identifies the following:
 - To recognise that AGOA provides more trade opportunities for Tanzania firms.

Both national and foreign companies in the country can benefit from favourable market access initiative but they cannot do so due to lack of awareness of AGOA and lack an understanding of the technical provisions of the initiative such as required products standard, and rules of origin contents. They lack knowledge of market demand and preferences and most firms are discouraged from exporting to the US market because of high production and transportation costs in addition to the limitation of trade finance.

- Diversification of exports to the US market

Tanzania needs to make use of the AGOA opportunities to increase diversification of exports to the US market. There are currently about 7000 product lines under the initiative and Tanzania exports less than 10 products. Moreover, the country will become more competitive in terms of

her exports to the US market by encouraging producers to improve the quality of the goods and packaging.

- National AGOA enabling institutions

Specifically, the government institutions and other trade-related private sectors that are responsible for supporting traders to take advantage of the AGOA initiative must be identified and the roles and functions of each institution should be clearly specified to avoid confusion to the interested business firms. Ministry of Trade and Industry together with all trade supporting institutions in the country should organise seminars to create awareness of AGOA opportunities and the technicalities of the trade arrangement. Moreover, the government should invest in modern infrastructures for plant and animal health in order for producers in Tanzania to meet the sanitary and phytosanitary requirement.

- Public-private cooperation

The government in collaboration with the private sector should identify best-prospect items that are eligible under AGOA preferences and design a clear strategy to promote production and export of such products. Furthermore, the government could establish ways that connect small-scale producers that are scattered in various regions of the country to consolidate volumes and fill the large orders demanded by US consumers. Without improved infrastructure, there will be no growth of trade and investment. The government should focus on improving infrastructures particularly electricity supply and transportation system in the country.

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