

## SYMPOSIUM ON AFRICA AND THE FUTURE OF INTERNATIONAL TRADE REGIMES

### THE NEXT GENERATION OF U.S.-AFRICA TRADE INSTRUMENTS

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This essay examines the challenges and opportunities for regional trade lawmaking in the U.S.-Africa relationship. On the eve of the conclusion of an African continental free trade agreement, the U.S. trade law relationship with the continent remains focused on regional groups. Questions remain as to whether the existing trade law regime offers the flexibility necessary to accommodate alternative models to free trade agreements that may best serve the needs of African and U.S. constituencies. The essay proceeds in four parts. First, I sketch the current state of play in U.S.-Africa trade relations. Next, I outline how the U.S. and African approaches to trade lawmaking have differed. I then turn to two sets of challenges—one domestic and one international—that may impede innovation in developing a U.S.-Africa trade law relationship consistent with African interests. Finally, the essay concludes with an exploration of possible alternatives and issues not yet considered in the transcontinental dialogue on trade.

#### *Background on U.S.-Africa Trade Relations*

On May 5, 2017, the African Union Commission announced the conclusion of the latest round of negotiations toward a Continental Free Trade Area (CFTA). The work to negotiate the CFTA comes as part of a larger continental initiative begun in the 1990s with the Abuja Treaty—an ambitious instrument setting out a roadmap toward a highly integrated African Economic Community, similar to the European Union, by 2028. The roadmap has given way to an Action Plan on Boosting Intra-Africa Trade that identifies priority actions and that encourages subcontinental initiatives as building blocks toward a continental community. In some respects, it may be said that no encouragement is needed for subcontinental economic communities to flourish in Africa. The African Union recognizes eight such communities already.

Each of these subcontinental communities has some degree of a relationship with the United States. Alongside these interactions, U.S.-African economic relations are driven largely by the [African Growth and Opportunity Act \(AGOA\)](#),<sup>1</sup> which creates bilateral trading privileges between African countries and the United States, reducing tariffs and creating opportunities for African products in the U.S. market where the exporting country is deemed eligible for such treatment. The United States also has eleven trade and investment framework agreements (TIFAs) with sub-Saharan African countries and regional economic organizations; a Trade, Investment, and Development Cooperative Agreement with the five countries of the Southern African Customs Union (SACU) and bilateral investment treaties with six sub-Saharan African partners. The Obama Administration put into place two additional initiatives—Power Africa and Trade Africa—to further expand economic ties with the African continent.

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<sup>1</sup> [Trade and Development Act of 2000](#), Pub. L. No. 106-200, §§ 101-107, 114 Stat. 251 (2000).

In 2015, the U.S. Congress [extended](#) the AGOA program until 2025.<sup>2</sup> At that time, the U.S. executive will need to work with Congress to review the future of U.S.-Africa trade policy-making. Regardless of the state of play in 2025, the elements put in place in the near term will shape the options available eight years from now. These developments merit further attention from policy-makers and from the academic community. While scholars and practitioners have focused heavily in recent years on the significance of regional trade agreements by the United States and others, they have not examined fully U.S.-Africa relations through that lens.

As more regional and bilateral trade agreements have been negotiated and proposed by the leading economies in the world, some commentators have suggested that trade lawmaking is characterized by a “megaregionalism,” which has taken as its focal point the Trans-Pacific Partnership Agreement (TPP) negotiated by the United States and eleven partners in the Asia-Pacific region between 2009 and 2016. Alongside the TPP negotiations, the United States also undertook negotiations toward a free trade agreement with the European Union called the Transatlantic Trade and Investment Partnership, with a view to creating a new era of deep and faster national regulatory alignment outside the World Trade Organization (WTO).

It is unclear as yet where African regionalism fits in this trend. On the one hand, we may expect the initiatives of the United States that seek to build trade regulatory capacity in Africa to serve as a catalyst for continental integration toward a more robust U.S.-Africa economic instrument. Alternatively, if certain African subcontinental economic communities move more quickly than others with respect to regulatory goals and standards advanced by the United States, this disparity across the continental groups could further decelerate momentum for a larger cooperation project.

#### *U.S. Uniformity and African Variation in FTAs*

Compared with most features of the international legal system, the preferential trade law system is in the early stages of its reinstitutionalization with the United States and the African continent taking certain leading steps in that process. The growth of regional and bilateral trade arrangements is not unique to the United States and Africa, however. The WTO reports [274](#) preferential trade agreements in force among its members as of May 5, 2017.<sup>3</sup> That number, especially its recent and continued increase, leaves no doubt that this type of trade agreement negotiation is alive and well, and that this trend is the most important global trade law development since the creation of the WTO. Regional and bilateral agreements have eclipsed the WTO in some elements of importance, not all economic.

The United States has free trade agreements (FTAs) with twenty countries, including countries in North and South America, Northern Africa, the Asia-Pacific region, and the Middle East. Important for this analysis is that nearly all those agreements have taken a similar form and contain similar content, especially in certain chapters, although they have grown in length and scope over the last twenty years. In some subject areas, the same text is repeated across all or almost all recent agreements.

By contrast, African trade agreements internal to the continent and beyond vary significantly. The eight regional economic communities recognized by the African Union have considerable overlap in membership but diversity in activity: the East African Community (EAC); the Economic Community of West African States; the Southern Africa Development Community (SADC); the Arab Maghreb Union; the Intergovernmental Authority on Development; Common Market for Eastern and Southern Africa (COMESA); the Community of Sahel-Saharan States; and the Economic Community of Central African States. Other institutions of regional integration complement those officially recognized: the SACU; the Central African Economic and Monetary Community; the West African Economic and Monetary Union; and a planned Tripartite Free Trade Area among COMESA, EAC, and SADC. Unlike the

<sup>2</sup> The extension was part of the [Trade Preferences Extension Act of 2015](#), Pub. L. No. 114–27, 129 Stat. 362 (2015).

<sup>3</sup> See [Regional Trade Agreements](#), WORLD TRADE ORGANIZATION.

relative uniformity across the U.S. trade agreements, the founding instruments of these regional economic arrangements contain far fewer similar elements. There is considerable variation in their scope and implementation.

With this variegated terrain in mind, what are the possibilities for a U.S.-Africa or a U.S.-region-of-Africa FTA? As has been noted, [no African government has stated publicly](#) that it is prepared to meet the obligations set out in the U.S. framework legislation for U.S. FTAs.<sup>4</sup> Those obligations are extensive, based on past practice with other U.S. trading partners, and call for advanced regulatory developments in the international economic regime. Those obligations that the United States is likely to require of African partner communities pose the first of two major challenges to a U.S.-Africa or U.S.-region-of-Africa FTA in the coming years. The second major challenge is the international dimension: FTAs are converging around the same obligations, led by the U.S. model. I review both challenges below before considering the prospects for an alternative framework.

### *Challenges to a U.S.-Africa FTA*

Although the AGOA Extension and Enhancement Act of 2015 declares that it is the policy of the United States to promote the negotiation of trade agreements with individual sub-Saharan African countries as well as with the regional economic communities, it does not provide a clear blueprint to reach this goal. The traditional path taken by the United States with trading partners over the last twenty years of expansive, binding, and enforceable multi-sector agreements may not be appropriate or preferred by African trading partners. At the same time, an alternative vision of an FTA, with at least some of the fundamental features of an FTA, may not be possible. The first reason an alternative FTA model could be challenging has to do with the relationship between the U.S. Congress and the U.S. executive branch. Since 1974, nearly every U.S. trade agreement has come into force through what is known as the “trade promotion authority” (TPA) process. TPA creates a political and constitutional balance through which the Congress authorizes the President to negotiate and enter into agreements. Congress grants the President this authority for a limited period of time, although the President is not bound with respect to trading partner selection. With the exception of one agreement that entered into force in the Clinton Administration (the U.S.-Jordan FTA), the U.S. Congress has implemented only agreements negotiated under the TPA mandate. Thus, TPA has become the de facto singular way for the United States to negotiate and conclude trade agreements, notwithstanding that the TPA is time-bound.

TPA legislation includes strategic negotiating objectives contemplated by the Congress for the executive. Over the years, Congress has added lengthy substantive objectives specific to each chapter. The most recent (2015) TPA legislation includes fourteen pages of congressional objectives for the executive. While the negotiating objectives provided by Congress are ostensibly intended to serve as guidelines for the executive in negotiating FTAs, in some instances, the language of the final agreement matches the language of the TPA “objectives” verbatim. In certain elements of U.S. trade agreements, the congressional negotiating objectives in TPA or other congressionally sanctioned language set out in TPA have become the floor and the ceiling for the text agreed with U.S. trading partners.<sup>5</sup> Congress thus shapes the language of U.S. trade agreements in a way unmatched by other legislatures around the world. The prospect for improvements and creative changes in future FTAs is significantly tempered by this path dependence, and, as a result, U.S. trading partners must be prepared to meet these congressionally-identified obligations if they wish to conclude a traditional FTA with the United States.

A second reason innovation in or a creative alternative to a U.S.-Africa FTA could be limited is the centripetal force of the international trade law system. Across the proliferation of trade agreements over the last twenty years, there is notable convergence in normative principles. Many of the same provisions in U.S. agreements also appear

<sup>4</sup> U.S. Trade Representative, [2016 Biennial Report on the Implementation of the African Growth and Opportunity Act](#) 80 (June 2016).

<sup>5</sup> See Kathleen Claussen, *Separation of Trade Law Powers*, 43 YALE J. INT'L L. (forthcoming 2018).

in European, Canadian, and Asian agreements, for example (with a notable exception of [EU-African Economic Partnership Agreements](#)),<sup>6</sup> which do not share the same level of complexity as the agreements to which I refer). Borrowing language from other legislation or international instruments is not a new phenomenon. Taken together, the present generation of trade agreements exhibits signs of convergence in respect of shared principles across agreements and across geographic areas. Those strong forces are likely to influence the ability of both U.S. and possibly some African state negotiators to move away from widely accepted norms and threshold principles in discussions regarding future agreements.

While trade lawmakers have adopted wide-ranging FTAs as the preferred vehicle in the current generation of the international trade system, FTAs have limitations, not least among them the fact that most remain untested in dispute settlement as very few disputes have been adjudicated. Given these limitations, it may be prudent to explore other economic instruments that could provide greater flexibility for U.S.-Africa trade and investment engagement, other than a traditional FTA. Moreover, [some evidence suggests](#) that alternative instruments may be preferable to certain African policy-makers who seek flexible rather than compliance-driven arrangements and concrete projects rather than elaborate schemes such as those in the U.S. template trade agreement.<sup>7</sup>

#### *Alternatives to an FTA*

In 2016, the Office of the U.S. Trade Representative published a report setting out possible alternatives to FTAs for African trading partners, including “alternative reciprocal agreements” and “collaborative arrangements.” The alternative instruments would have a significantly narrower focus than an FTA, dealing primarily with tariffs and other matters related to trade in goods, and would operate asymmetrically. The United States and some African partners already have in place “collaborative arrangements,” such as a [U.S. cooperation agreement with the EAC](#) negotiated in 2014 to build capacity with respect to customs and trade in the EAC in return for commitments to meet certain benchmarks.<sup>8</sup> Whatever the direction of the Trump Administration or future U.S. administrations, alternatives to FTAs that come under consideration ought to take account of both the substantive aims of and the underlying differences in ideologies on regulations among trading partners and distinct economic frameworks across different regional economic groups. Negotiators may also wish to account for the significant disparities in market power between the United States and some of the poorest African economies in designing the structure and reciprocal nature (or alternatives thereto) of any trade instrument.

There may be still further options that have not been robustly discussed. In U.S. trade law, there is no shortage of other instruments regularly used by the executive. The executive branch engages in daily contract-making, convenes transnational and bilateral regulatory development meetings, and delivers messages to foreign partners on a range of matters that have been brought under the widening umbrella of ancillary economic issues. On the more formal side, the United States uses TIFAs to cooperate on trade and investment issues with a view to enhancing reciprocal opportunities. In some instances, TIFAs have been used as precursors to FTAs, but that is not always the case. Negotiators must consider whether a robust binding agreement is the best instrument to achieve shared policy interests on issues such as market access, trade facilitation, and reductions in trade barriers.

Other “trade law” instruments concluded by the U.S. executive include nonenforceable jointly agreed action plans, memoranda of understanding, and other multinominal documents by U.S. executive agencies in negotiation with foreign agencies. Is an enforcement mechanism an important element to ensure all partners live up to their commitments?

<sup>6</sup> See [Blown Off Course: A Trade Deal Between the EU and East Africa Is in Trouble](#), *ECONOMIST* (May 25, 2017).

<sup>7</sup> JAMES THUO GATHIL, [AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES](#) 2 (2011).

<sup>8</sup> [Cooperation Agreement Among the Partner States of the East African Community and the United States of America on Trade Facilitation, Sanitary and Phytosanitary Measures, and Technical Barriers to Trade](#), Feb. 26, 2015.

Have trade norms reached a stage of development where codification is no longer necessary in certain chapters? The trend is certainly in the opposite direction, but creative lawyering and a willingness to work outside traditional frames for meaningful engagement may become increasingly important as political climates evolve on both continents.

An additional foundational question is whether the African regional economic communities can usefully serve as laboratories for larger collaborations. In seeking to avoid an unhealthy competition that disadvantages vulnerable populations, governments may wish to consider on the fringes of the CFTA negotiations rethinking the regional economic communities or at least not taking the preorganized regions as the default working units for trans-Atlantic economic dialogue. The original 2002 [U.S. Trade Representative Comprehensive Report](#) on AGOA implementation<sup>9</sup> noted challenges with overlapping and conflicting regional entities already at that time, just as some scholars<sup>10</sup> have noted. The regions' variable geometry both allows each to move at its own pace, but also to become stagnant along outdated political lines. In many respects, the regions are driven not by economic advantage but rather by historical and strategic interests.

A final question is whether the regions are indeed the best conduits for the African markets of the twenty-first century or whether other layers of governance should be considered. The present international trade law system does not engage directly with local and subnational entities, for example. One effect of the current structure is that municipal level actors often lose out on foreign direct investment opportunities, in addition to having a limited opportunity to contribute to trade lawmaking. In a world in which local communities play an increasingly prominent role in transnational commerce, and, moreover, where some of the most innovative and successful approaches to development and investment are occurring at the local and subnational levels, it may be time for an updated international legal approach and for the African continent to lead that charge among international trade lawmakers. In many respects, cities are economic focal points, even though bilateral and multilateral texts do not take account of diagonal and multilayered governance. At a minimum, the U.S. government, African trading partners, and legal scholars could do more to acknowledge and manage this tapestry.

### *Conclusion*

If past trends continue, the proliferation of FTAs around the world is likely to persist. As more countries seek more rules-based arrangements with more trading partners, there is potential to craft important and appropriate instruments that advance international law values. Most signs suggest African governments will continue making progress toward a CFTA. When it enters into force, the CFTA will constitute the world's largest free trade area in terms of number of participants. It will bring together fifty-four African countries with a combined population of more than one billion people and a combined gross domestic product of more than US \$3.4 trillion. It will be truly a "megaregional." At the same time, the African regional economic communities are likely to continue to deepen their partnerships. In this way, the continent provides a reasonable proxy for similar trends on the world stage. Disparate but productive legal developments draw from common norms to harmonize regulatory standards. The larger normative cascade is producing universal principles for trade law instruments that will continue to be tested as the United States and regions of Africa engage further in reducing barriers to trade.

<sup>9</sup> U.S. Trade Representative, [2002 Comprehensive Report on U.S. Trade and Investment Policy Towards Sub-Saharan Africa and Implementation of the African Growth and Opportunity Act](#) (May 2002).

<sup>10</sup> GATHII, [supra note 8](#), at 67.