

**From Sledgehammer to Scalpel:
Penalties and Enforcement in the New AGOA,
and What it Means for Workers in Sub-Saharan Africa**

**By Janet C. Checkleyⁱ and John A. Hosinskiⁱⁱ
September 2015**

I. Introduction	2
II. Background and History of the Act	2
III. The Sledgehammer: Penalty and Enforcement Mechanism under the Old AGOA	5
a. Terminology and Structure of Conditional Elements in GSP	5
b. Provisions in AGOA	6
IV. The Scalpel: Penalty and Enforcement Mechanism under the Revised AGOA	8
V. Capacity Building and Other Changes	12
VI. Analysis: Strategizing for Empowerment through Programming and Advocacy	13
a. Trade Capacity Building	14
b. Legal Advocacy	18
c. U.S.-Africa Civil Society Engagement	20
VII. Conclusion	22

I. Introduction

The African Growth and Opportunity Act (AGOA) has undergone recent and important revisions that have the potential to increase inclusion of African worker and community voices and improve access to the program benefits. First enacted in 2000, AGOA was renewed through the Trade Preferences Extension Act of 2015 and signed into law by President Obama in June 2015. The program was granted a long-term renewal – ten years – and includes new language designed to enhance its eligibility criteria and eligibility review process, as well as language meant to improve utilization of the law through trade capacity building and perhaps increase the role of civil society and bring more agriculture and women-driven sectors into the market. Most significant to unions and worker rights advocates, impressive changes were made to the enforcement mechanism and review process. The review and reporting mechanisms set the law on a new path for U.S. preferential programs and open avenues for citizen engagement in advance of what is likely to be a more robust push for U.S. – Africa free trade agreements in the post-AGOA future.

These changes to what is promoted as the centerpiece of the United States' foreign policy in Sub-Saharan Africa (SSA) require a closer explanation and evaluation. For worker rights advocates especially, the language in “AGOA 2.0,” as it came to be called by its supporters during the renewal process, raises both exciting possibilities and a number of new questions. Gone is a somewhat ineffective and blunt “sledgehammer” enforcement mechanism in favor of revisions to make the review process more transparent, and non-compliance penalties less drastic and more targeted (the “scalpel”). In addition, a new focus on addressing AGOA’s long-standing utilization problem has prioritized trade capacity building. The new law offers African unions, worker rights defenders and other human rights advocates with an opportunity to increase their engagement in both of these areas, utilizing new reporting procedures to highlight worker rights abuses and engaging with both U.S. and African governments to push for a more socially inclusive and pro-worker approach to trade capacity building.

The shape and implementation of these revisions are still in the early stages, and now is the time for worker advocates to begin determining strategies for engagement. What follows will be an examination of the new language in AGOA, and an analysis of how the law might be used to strengthen the rights of workers in SSA. This exploration is premised upon a somewhat new, but increasingly mainstream notion: that trade arrangements, rather than merely being a means of obtaining access to markets, can be used for much higher aims, such as reducing poverty, increasing global equality, and – as we will argue – improving the lives of workers who contribute to the streams of commerce and trade that flow through the global framework.

II. Background and History of the Act

AGOA’s objective is to encourage economic growth in Africa by offering African-based manufacturers duty-free access to American markets. The purpose of the law is to support “increased trade and investment between the United States and sub-Saharan Africa,” reduce trade barriers, expand Africa’s “regional integration efforts,” encourage rule of law development, economic reforms and eradication of poverty, strengthen and expand the private sector, and “facilitate the development of civil societies and political freedom.”¹ AGOA created some 7,000 new tariff lines and, according to the United States Trade Representative (USTR), virtually all marketable

¹ 19 U.S.C. § 3702.

goods produced in AGOA-eligible countries could enter the American market duty-free thanks to these tariff lines. As a generalized system of preference arrangement (GSP), AGOA is nonreciprocal: goods from the United States do not enjoy the same duty-free access to African markets that are granted to African nations under AGOA. Currently, 39 SSA countries are eligible to receive benefits under AGOA.²

As noted above, the intended effects of AGOA are not limited to increasing economic prosperity in SSA. The Act's eligibility criteria (Section 104) outline the broad policy issues and goals with which countries must comply (or at least demonstrate "making continual progress" on) in order to receive AGOA benefits. The criteria encompass the broader development vision of AGOA and include political goals such as democratic governance, strengthening rule of law, human rights, and respect for international core labor standards.³ These requirements, and the continual progress language, are contained in most U.S. trade agreements, but in the AGOA context encapsulate the United States' policy goals in Africa.

Yet, the Act has been subject to a number of valid criticisms since its enactment. In its first 15 years, it did not meet with anything approaching the success that its drafters and beneficiaries first envisioned. Principle among the critiques were several main complaints: a failure to focus on capacity development, a concentration of the law's benefits among oil and gas exporters, uncertainty about program length, and the ineffective enforcement mechanism.

Trade capacity – the ability to produce and trade competitively in world markets – is generally dependent upon the appropriate economic environment and institutions that attract business and investment.⁴ Included in these factors is a healthy and productive class of workers, working roads and ports, and educated citizens.⁵ Lack of trade capacity is most often due to inadequate economic, legal, and governmental infrastructure. Supply capacity is another such issue: "[o]ne of the intrinsic factors for many potential beneficiary countries – especially least developed countries – is limited supply capacity. If a country lacks the manufacturing capacity to supply value-added goods to a potential export market, then the promise of duty-free treatment in that market is an especially hollow one."⁶

Originally, AGOA made an attempt to reference capacity development through its eligibility requirements. However, no support was provided through the legislation to aid countries in pursuing and maintaining compliance with the requirements. Because of this failure, AGOA tariff lines and preferences were, and still are, enormously underutilized.⁷ For example, Benin qualified for AGOA's textile and apparel benefits in 2004. However, inadequate infrastructure, a very small domestic market, and low investment have prevented Benin from developing a garment industry to take advantage of AGOA preferences.⁸

² Agoa.info, accessed on July 15, 2015. Excluded from this group are the Democratic Republic of Congo, Gambia, South Sudan, and Swaziland, all of which have had their benefits either suspended or removed.

³ 19 U.S.C. § 3703.

⁴ Kevin C. Kennedy, *The Generalized System of Preferences After Four Decades: Conditionality and the Shrinking Margin of Preference*, 20 Mich. St. Int'l L. Rev. 521, 598 (2012).

⁵ *Id.*

⁶ *Id.*

⁷ John P. Banks et al., *Top Five Reasons Africa Should Be a Priority for the United States; Transforming the U.S.-Africa Commercial Relationship*, Brookings Institute, 12 (March 2013).

⁸ Ryan McCormick, *The African Growth and Opportunity Act: The Perils of Pursuing African Development Through U.S. Trade Law*, 41 Tex. Int'l L. J. 339, 381 (Spring 2006).

Furthermore, AGOA's benefits failed to go far beyond oil and gas companies exporting from resource rich nations. Oil and petroleum products almost entirely dominate African exports to the U.S., constituting some 90% of total exports under AGOA. This also means that the benefits of AGOA are largely concentrated in Africa's leading oil suppliers to the U.S., like Nigeria and Angola.⁹ But, the companies utilizing those AGOA preferences would have been able to access the U.S. market without the benefits available under AGOA. Therefore, the AGOA preference structure has not been efficiently utilized. AGOA's "considerably larger trade effects upon certain countries and regions is indicative of the limited role it has played in diversifying African economies."¹⁰

Uncertainty about the length of program was another issue. The most oft-repeated and heavily emphasized critique of AGOA is its temporary nature. "One of the most significant constraints on AGOA's continuing effectiveness is the uncertainty about when it will expire. ... Because of uncertainty about AGOA's future, an estimated 35 percent of apparel orders have been lost as American consumers have sought greater product certainty from other non-African producers. The message is clear: a precondition for AGOA's effectiveness was greater predictability and certainty about its lifetime."¹¹ Previously, AGOA was given short-term, 5-year renewals since its enactment in 2000, creating uncertainty for investors and producers.¹² Especially in the area of agribusiness – a large and dominant sector in the SSA region – short-term renewals discourage long-term investments and production plans.¹³

Finally, AGOA's eligibility requirements – designed to highlight broader political and development objectives – were subject to criticism as well. Some critics pointed out that AGOA defines its eligibility criteria ambiguously, and without reference to international treaties or conventions.¹⁴ Others claimed that eligibility criteria of any kind restrict growth and investment, and should not be included in the law.

Most importantly, the Act's eligibility criteria were upheld by a problematic penalty and enforcement mechanism: total removal from benefits for noncompliance with any criteria in Section 104. This created two issues for beneficiary countries: total removal was so drastic that it left countries dependent on AGOA exports with a great deal economic uncertainty¹⁵; and, because of the drastic nature of removal, enforcement was inconsistent and rarely used.¹⁶ Despite the scope of the eligibility criteria, countries had previously only faced removal under very extreme political circumstances, such as a military coup d'état. Also unclear was the U.S. government's decision-making process about AGOA removal and its dialogue with AGOA beneficiary countries around eligibility issues. Coups were easy enough to track, but it was unclear how the USTR was gathering and using information related to issues of rule of law, economic openness, and worker rights.

⁹ Witney Schneidman, *The African Growth and Opportunity Act: Looking Back, Looking Forward*, Brookings Institute (June 2012), 7.

¹⁰ Simon Mevel, et. al, *The African Growth and Opportunity Act: An Empirical Analysis of the Possibilities Post-2015*, Brookings Institute, 7 (July 2013).

¹¹ Schneidman, *Looking Back, Looking Forward*, at 28.

¹² Matthew G. Snyder, *GSP and Development: Increasing the Effectiveness of Nonreciprocal Preferences*, 33 Mich. J. Int'l L. 821, 836 (Summer 2012).

¹³ Kennedy, *Conditionality*, *supra* at 631.

¹⁴ Snyder, *GSP and Development*, *supra*, at 841.

¹⁵ *Id.* at 842-843.

¹⁶ *Id.* at 842.

It was clear that AGOA had to be improved in order to be effective. Yet, there was very little precedent in US trade law and GSP practices to look to for alternative approaches.¹⁷ Clamoring from the business community to do away with eligibility requirements was loud, while a strong pushback formulated from the labor rights community to retain the requirements and improve them. A common undercurrent flowed through the dialogue: more trade capacity development was necessary in order to improve infrastructure, access, and awareness of how to utilize AGOA. Without that emphasis on development, AGOA would continue to disappoint.

III. The Sledgehammer: Penalty and Enforcement Mechanism under the Old AGOA

a. Terminology and Structure of Conditional Elements in GSP

Before comparing the old and new approaches taken by AGOA to labor provisions, penalty, and enforcement mechanism, a brief introduction and overview of the traditional approach to these elements will be helpful in framing the analysis to follow. Labor provisions in international trade agreements and GSPs are included as “conditional elements” (also called eligibility requirements). They are often included into the body of the law or agreement, although can also be incorporated through a side letter or a separate memorandum of understanding.¹⁸

Conditional elements can be distinguished along two lines: by their substantive content, and by the manner in which they are enforced. Substantively, some trade agreements define their labor provisions through reference to international conventions, to national labor laws, or perhaps by referencing internationally recognized labor standards.¹⁹ Alternatively, labor provisions and other conditional elements might be enumerated or described through a series of benchmarks for progress.²⁰

Enforcement is the other distinguishing characteristic. Ebert and Posthuma describe a distinction between “promotional” labor provisions, which focus on supervision and capacity building, and “conditional” labor provisions, which focus on incentive or sanction-based enforcement.²¹ Promotional labor provisions emphasize a model that focuses on dialogue, cooperation, and monitoring. Conditional provisions emphasize enforcement. An incentivized approach often includes built-in rewards for progress along the eligibility criteria, and conversely, a sanction-based approach penalizes non-compliance through fines or the suspension of benefits.²² In the sanctioning model, the goal of potential penalties should not be to use them, but to establish a disincentive for parties to fall into non-compliance.²³ In addition to acting as a deterrent, the penalty should be proportionate to the violation it is seeking to address, and should – if possible – seek to

¹⁷ See Cambodia Textile Agreement; a brief review of previous enforcement mechanisms in trade laws here might be helpful.

¹⁸ Franz C. Ebert, Anne Posthuma, *Labor Provisions in Trade Arrangements: Current Trends and Perspectives*, International Institute for Labour Studies, 1 (2011).

¹⁹ *Id.* at 2.

²⁰ *Id.*

²¹ *Id.* at 3.

²² *Id.*

²³ Sandra Polaski, *Protecting Labor Rights Through Trade Agreements: An Analytical Guide*, 10 U.C. Davis J. Int'l L. & Pol'y 13, 20 (Fall 2003).

correct or ameliorate the noncompliance issue.²⁴ Trade agreements and GSPs might focus on only one of these approaches, or combine any of them into one arrangement.

b. Provisions in AGOA

Since 1993, the United States has included labor provisions in all of its bilateral and free trade agreements, and the GSP statute has included labor provisions since 1984.²⁵ Prior to that, however, labor provisions in U.S. trade policies were largely unheard of, though they became a topic of frequent and increasing debate within the framework of the WTO.²⁶ Previous iterations of AGOA contained the U.S. GSP standard language on labor standards, and it followed a traditional conditional sanctions-based approach to eligibility criteria and enforcement. Substantively it enumerates its labor provisions, instead of referencing international conventions or a body of treaties or laws, and instead of imposing a fine for non-compliance, it calls for the loss of benefits under the law:

Section 104:

(a) In general

The President is authorized to designate a sub-Saharan African country as an eligible sub-Saharan African country if the President makes the determination that the country –

(1) has established, or is making continual progress toward establishing –

(F) protection of internationally recognized worker rights, including the right of association, the right to organize and bargain collectively, a prohibition on the use of any form of forced or compulsory labor, a minimum age for the employment of children, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

(b) Continuing compliance

If the President determines that an eligible sub-Saharan African country is not making continual progress in meeting the requirements described in subsection (a)(1) of this section, the President shall terminate the designation of the country made pursuant to subsection (a) of this section.²⁷

Under this language, failure to make “continual progress” on meeting “internationally recognized worker rights” as enumerated was grounds for a total loss of benefits under AGOA. “Making continual progress” is a purposefully low bar, designed to ensure that beneficiaries do not find compliance overly difficult or impossible to achieve.

Nonetheless, this penalty and enforcement mechanism was an ineffective means of redressing worker’s rights violations for a number of reasons in the AGOA context. First, the total loss of benefits – while admittedly a substantial deterrent for noncompliance – proved to be such a drastic measure that it was almost never enforced. Indeed, the only cases of the United States using the penalty at all were in instances of extreme societal upheaval, such as the military coup d’état in

²⁴ *Id.*

²⁵ General Systems of Preferences Renewal Act of 1984, P.L. 98-573, 98 Stat. 3019

²⁶ Polaski, *supra* at 13-14; Ebert and Posthuma, *supra* at 1.

²⁷ 19 U.S.C. § 3703 (a)(1)(F) and (b).

Mali in 2012.²⁸ Recognizing the reluctance on the part of the U.S. to use the penalty, many manufacturers and beneficiary governments felt free to fudge – or outright ignore – the eligibility requirements, knowing they would likely not face the penalty. Indeed, core labor standard violations in AGOA beneficiary countries were well documented (such as cases annually examined by the ILO Committee on the Application of Standards) but never resulted in the application of the penalty until it was applied to Swaziland in 2014.

The Swaziland Case

The difficulties and paradoxes of AGOA's enforcement mechanism were especially brought to bear for the Swaziland trade unions when Swaziland, a beneficiary under AGOA since 2000, lost its beneficiary status in June of 2014, effective as of January 1, 2015 over persistent worker rights violations, such as failure to legally recognize the country's main trade union federation. For the first time in the history of the Act, a country's removal was enforced because of refusal to take any reasonable steps to meet international core labor standards. Swaziland's removal from benefits for violating core labor standards was a remarkable measure, though not in any way unjustified given the country's undemocratic and anti-union legal environment and poor working conditions in AGOA-dependent industries.

Yet, the situation in Swaziland put on-the-ground human rights and worker advocates into an unwinnable quandary. The Trade Union Confederation of Swaziland (TUCOSWA) in particular, had consistently referenced the need to keep AGOA benefits in their efforts to press the Swaziland government for worker rights protections and democratic reforms. But, they found themselves facing the loss of thousands of jobs for some of Swaziland's poorest workers – mostly women – when the U.S. government finally used its last and only tool: total removal from eligibility. While the Swaziland government went to lengths to blame human rights advocates and TUCOSWA, this was not the fault of unions. Rather, it was, first: the fault of a completely unresponsive and intransigent government and policymaking apparatus in Swaziland; and second, an unwieldy and blunt enforcement mechanism, which provided only for total removal of benefits for a non-compliant (and non-responsive) country.

The result – unfortunate for Swaziland's economic reputation, and devastating for Swazi workers and families dependent upon income supplied by factories now shuttered – was in danger of repetition and brought the strength of AGOA into question: if the United States is willing to look more deeply at worker rights or human rights eligibility criteria, would countries simply ignore the criticism? Would AGOA's strong but drastic enforcement mechanism discourage worker rights advocates hoping to highlight abuse or improve worker rights in SSA?

Second, the total loss of benefits was ineffective as a penalty for another reason: as the above example illustrates, it most hurt precisely the people it was supposed to help. As was painfully demonstrated when Swaziland lost its AGOA benefits due to sustained and flagrant international core labor rights violations, workers in factories that closed as a result were the first to feel the blow, and those to feel it most acutely. Swaziland's labor force is small: just about 425,000 workers. When its AGOA benefits were withdrawn, nearly 15,000 of those workers lost their employment, most of them women.²⁹ Such an ironic and undesirable outcome for workers highlighted the poor design of AGOA's penalty and enforcement mechanism.

Furthermore, AGOA contained extremely limited language pertaining to reporting and monitoring, placing almost no emphasis on the gathering of information and feedback from

²⁸ AGOA.info, accessed July 15, 2015.

²⁹ United States Trade Representative and Department of Labor, *Standing Up for Workers: Promoting Labor Rights Through Trade*, 38-40 (February 2015).

beneficiary countries.³⁰ The lack of sufficient consultation, dialogue, monitoring or reporting – or resources for that important work – meant that even if labor violations were documented, and even if they were reported up the line, there was still no streamlined access to compliance information, nor a clear statutory requirement to supply it. The paucity of data and information along these lines severely disadvantaged the United States in enforcing its own conditions under AGOA.

Finally, AGOA’s enforcement mechanism undermined the law’s overarching goal: to stimulate economic development in SSA. The loss of benefits could only be applied to all sectors across a national economy under the old language, even if some manufacturers and producers were striving for compliance with the eligibility requirements. The uncertainty for investors and suppliers elsewhere in the supply chain potentially stifled investment when it was unclear whether a country would remain eligible for benefits.³¹ As already discussed, some observers and advocates even argued that this was reason enough to remove eligibility requirements altogether.

IV. The Scalpel: Penalty and Enforcement Mechanism in the New AGOA

The changes in the amended AGOA could be easily missed, or, mistaken as irrelevant. The hallmarks of the original legislation – the eligibility criteria, the third-country fabric provisions, the complex rules of origin, and the duty-free market access – have gone untouched. During revision the drafters focused much of their attention instead on fine-tuning AGOA’s penalty and enforcement mechanism, establishing a formal review system and reemphasizing the law’s purpose as a pathway to development for SSA countries. The revised language in AGOA 2.0 is remarkable for its clarity and comprehensiveness. Equally impressive is the redesigned language guiding compliance, reporting, and evaluation. The new clauses deserve a close look in comparison with the old to appreciate how they may transform the function of the Act going forward.

Under the original language (as quoted in Section II.b above), the President had the right to terminate the benefits of any country that was deemed not to be in compliance with the eligibility criteria of the law. Section 104(b) of the Act provided that if a country was “not making continual progress” towards meeting the criteria, the President “shall terminate the designation of the country.” This language contained no requirement for forewarning, consultation, or negotiation. Rather, the law merely provided that “if the President determines that a beneficiary Sub-Saharan African country is not making continual progress in meeting the requirements described in paragraph (1), the President shall terminate the designation of that country as a beneficiary Sub-Saharan African country for the purposes of this section, effective on January 1 of the year following the year in which such determination is made.”³²

In sharp contrast, the language amending this provision in AGOA 2.0 is as follows:

- Section 506A(a)(3) of the Trade Act of 1974 is amended –
- (1) by striking “if the President” and inserting the following:
“(A) IN GENERAL. – If the President”; and
 - (2) by adding at the end the following:

³⁰ 19 U.S.C. § 3705. “The President shall submit to the Congress, not later than 1 year after May 18, 2000, and annually thereafter through 2008, a comprehensive report on the trade and investment policy of the United States for sub-Saharan Africa, and on the implementation of this chapter and the amendments made by this chapter.”

³¹ Snyder, *supra*, at 842.

³² 19 U.S.C. § 3703(b)

“(B) NOTIFICATION. – The President may not terminate the designation of a country as a beneficiary Sub-Saharan African country under subparagraph (A) unless, at least 60 days before the termination of such designation, the President notifies Congress and notifies the country of the President’s intention to terminate such designation, together with the considerations entering into the decision to terminate such designation.”³³

Thus, a mandatory 60-day notice period has been added to the Act before the President can terminate the benefits of a beneficiary country. Additionally, a reporting requirement has been placed on the President: he or she must inform Congress and the country facing termination of the reasons for the termination and what factors were taken into account in arriving at that decision. This measure should go far to ease some of the uncertainty associated with the eligibility requirements for investors and national governments pursuing investment that will depend on AGOA’s benefits.

In addition to the notice period, the new language goes on to create a completely new penalty, aside from termination of benefits:

Section 506A of the Trade Act of 1974 (19U.S.G.2466a) is amended-

(1) by re-designating subsection (c) as subsection (d), and

(2) by inserting after subsection (b) the following:

((c) WITHDRAWAL, SUSPENSION, OR LIMITATION OF PREFERENTIAL TARIFF TREATMENT. -

"(1) IN GENERAL. – The President may withdraw, suspend, or limit the application of duty-free treatment provided for any article described in subsection(b)(1) of this section or section 112 of the African Growth and Opportunity Act with respect to a beneficiary sub-Saharan African country if the President determines that withdrawing, suspending, or limiting such duty-free treatment would be more effective in promoting compliance by the country with the requirements described in subsection (a)(l) than terminating the designation of the country as a beneficiary sub-Saharan African country for purposes of this section.

"(2) NOTIFICATION. – The President may not withdraw, suspend, or limit the application of duty-free treatment under paragraph (1) unless, at least 60 days before such withdrawal, suspension, or limitation, the President notifies Congress and notifies the country of the President's intention to withdraw, suspend, or limit such duty-free treatment, together with the considerations entering into the decision to terminate such designation.”³⁴

This language drastically changes the nature of the penalty and enforcement mechanism in Section 506(A) of the original AGOA. Instead of terminating a country’s benefits altogether, the United States may now enforce its conditions by *withdrawing, suspending, or limiting* the application of the benefits for non-compliant countries. The same 60-day notice and reporting requirement that exists for termination, exists for the withdrawal, suspension, or limitation of benefits as well.

³³ Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, § 105(a).

³⁴ Trade Preferences Extension Act of 2015, Pub. L. No. 114-27 § 105(b).

Another absolutely critical modification has been made within the text: the new language states that the President may apply this penalty “for any *article* described in subsection (b)(1) of this section” of the Trade Preferences Extension Act, or Section 112 of the original AGOA, which pertains to certain textiles and apparel. Thus – although as yet untested – it appears the drafters intended for the new penalty to be applicable not only to entire countries, but also to specific articles or items utilizing AGOA’s tariff lines. Under this language, the United States arguably has the ability under the law to single out certain industries, sectors, and even perhaps producers or companies, for non-compliance with eligibility criteria, and apply the penalty. It is worth noting that, given the nature of the other AGOA eligibility requirements³⁵, the clause aimed at “articles” under AGOA seems to be addressing the concerns of the labor and human rights advocates specifically.

The amendments in AGOA 2.0 relevant and favorable for labor advocates do not stop there. Section 105(c) of the 2015 Trade Preferences Act adds a public comment and review requirement, and establishes the new petitioning system. The language is quoted in full below:

Section 506A of the Trade Act of 1974, as so amended, is further amended –

- (1) By redesignating subsection (d) as subsection (e); and
- (2) By inserting after subsection (c) the following:

“(d) REVIEW AND PUBLIC COMMENTS ON ELIGIBILITY REQUIREMENTS. –

- (1) IN GENERAL. – In carrying out subsection (a)(2), the President shall publish annually in the Federal Register a notice of review and request for public comments on whether beneficiary sub-Saharan African countries are meeting the eligibility requirements set forth in section 104 of the African Growth and Opportunity Act and the eligibility criteria set forth in section 502 of this Act.
- (2) PUBLIC HEARING. – The United States Trade Representative shall, not later than 30 days after the date on which the President publishes the notice of review and request for public comments under paragraph (1) –
 - (A) hold a public hearing on such review and request for public comments; and
 - (B) publish in the Federal Register, before such hearing is held, notice of:
 - (i) the time and place of such hearing; and
 - (ii) the time and place at which such public comments will be accepted.
- (3) PETITION PROCESS. –
 - (A) IN GENERAL. – Not later than 60 days after the date of the enactment of this subsection, the President shall establish a process to allow any interested person, at any time, to file a petition with the Office of the United States Trade Representative with respect to the compliance of any country listed in section 107 of the African Growth and Opportunity Act with the eligibility requirements set forth in section 104 of such Act and the eligibility criteria set forth in section 502 of this Act.

³⁵ A market-based economy, private property rights, intellectual property rights, respect for rule of law, economic policies designed to reduce poverty, a system for combating corruption, and not undermining the United States’ security interests.

- (B) USE OF PETITIONS. – The President shall take into account all petitions filed pursuant to subparagraph (A) in making determinations of compliance under subsections (a)(3)(A) and (c) in preparing any reports required by this title as such reports apply with respect to beneficiary sub-Saharan African countries.
- (4) OUT OF CYCLE REVIEWS. –
 - (A) IN GENERAL. – The President may, at any time, initiate an out-of-cycle review of whether a beneficiary sub-Saharan African country is making continual progress in meeting the requirements described in paragraph (1). The President shall give due consideration to petitions received under paragraph (3) in determining whether to initiate an out-of-cycle review under this subparagraph.
 - (B) CONGRESSIONAL NOTIFICATION. – Before initiating an out-of-cycle review under subparagraph (A), the President shall notify and consult with Congress.
 - (C) CONSEQUENCES OF REVIEW. – If, pursuant to an out-of-cycle review conducted under subparagraph (A), the President determines that a beneficiary sub-Saharan African country does not meet the requirements set forth in section 104(a) of the African Growth and Opportunity Act, the President shall, subject to the requirements of subsections (a)(3)(B) and (c)(2), terminate the designation of the country as a beneficiary sub-Saharan African country or withdraw, suspend, or limit the application of duty-free treatment with respect to articles from the country.
 - (D) REPORTS. – After each out-of-cycle review conducted under subparagraph (A) with respect to a country, the President shall submit to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives a report on the review and any determination of the President to terminate the designation of the country as a beneficiary sub-Saharan African country or withdraw, suspend, or limit the application of duty-free treatment with respect to articles from the country under subparagraph (C).³⁶

Section 105(c) does three important things that were not present in the original AGOA. First, it invites the participation of the public by commenting on eligibility through the Federal Register and by holding public hearings on eligibility.³⁷ Second, it requires the USTR to establish a formalized complaint and petition process in dealing with non-compliance issues. And, finally, it establishes an “out-of-cycle” review mechanism. Under the old AGOA language, reviews on eligibility were conducted annually,³⁸ but under the new language, a country’s eligibility may be reviewed at any time at the President’s discretion. As we will explore in Section VI, the potential for meaningful engagement by worker rights advocates under this new language is enormous.

³⁶ Trade Preferences Extension Act, Pub. L. No. 114-27, §105(c), internal citations omitted.

³⁷ For a discussion of the Federal Register procedure, see footnote 59.

³⁸ 19 U.S.C. § 3703(b).

Thus, the changes outlined above mark a significant turn in conditionality and enforcement policy for the United States. While still adhering to a traditional sanctioning approach to its eligibility criteria, the new language in AGOA emphasizes monitoring and dialogue and stakeholder consultation, making AGOA more dynamic, flexible, and accessible. Furthermore, the language enhances the United States' ability to act with discretion where non-compliance is concerned. With these important technical changes, AGOA's penalty and enforcement mechanism have been transformed from a sledgehammer to a scalpel, and they set a new precedent for eligibility criteria enforcement in United States trade policy.

Eligibility requirements are a relatively new element of trade arrangements, and they have not evolved far from their traditional formats since their arrival into trade policy. Conditions that require compliance with international labor standards carry significant potential to level the playing field for workers at every stop along the supply chain. But, the past 15 years of AGOA have shown that mere lip service to international labor standards does not accomplish notable progress on the ground in SSA. The new penalty and enforcement mechanisms in AGOA are designed to specifically address this issue, among many others that have plagued AGOA from its beginnings. As the next section will show, the focus on capacity building and reporting/monitoring offers an opportunity to address other challenges for SSA beneficiaries as they strive to take advantage of the law. Therefore, AGOA is a fertile testing ground for worker advocates, with multiple points of entry for advocacy. The new penalty and enforcement mechanism, combined with the traditional eligibility requirements and the strengthened capacity building and monitoring, should be looked at as an invitation for meaningful engagement.

V. Capacity Building and Other Changes

Other changes were made to AGOA that worker rights advocates would be remiss not to note, as they carry interesting implications for potential involvement. First are the biennial utilization strategies.³⁹ This section of the law encourages SSA beneficiaries to “develop utilization strategies” every two years “in order to more effectively and strategically utilize benefits available” under AGOA.⁴⁰ The language encourages “United States trade capacity building agencies” to “work with, and provide appropriate resources to” SSA countries implementing these strategies.⁴¹ Additionally, the same section of the law seeks to encourage regional integration by urging the Regional Economic Communities⁴² to prepare biennial strategies as well.⁴³ Congress urges that the strategies “identify strategic needs and priorities,” “review potential exports ... and identify opportunities and obstacles to increased trade and investment and enhanced poverty reduction efforts,” identify obstacles to regional integration that “inhibit utilization of benefits,” and develop a plan to take advantage of opportunities, address obstacles, and increase awareness of AGOA.⁴⁴ The Act finally urges beneficiaries to “utilize United States Agency for International Development regional trade

³⁹ Pub. L. No. 114-27, § 107.

⁴⁰ Pub. L. No. 114-27 § 107(a)(1).

⁴¹ Pub. L. No. 114-27 § 107(a)(2).

⁴² East African Community (EAC), Common Market for Eastern and Southern Africa (COMESA), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Southern African Development Community (SADC).

⁴³ Pub. L. No. 114-27, § 107(a)(3).

⁴⁴ Pub. L. No. 114-27, § 107(b)(1)-(3).

hubs,” and develop strategies for eliminating obstacles to regional trade and establish a plan to implement the Agreement on Trade Facilitation of the WTO.⁴⁵

Section 108 of the Act clearly establishes that U.S. trade policy going forward will be to seek to negotiate TIF agreements, bilateral investment treaties, and free trade agreements with both individual SSA countries and regional economic communities. Sections 106 and 109 are particularly interesting, as they single out women and agriculture as targets for development. The Statement of Policy in the original AGOA – Section 103 – contains a list of development priorities that the United States supports and seeks to bolster through AGOA. The new amendments in AGOA 2.0 add an important item to this list: “promoting the role of women in social, political, and economic development in sub-Saharan Africa.”⁴⁶ Additionally, Section 109 of the Trade Preferences Extension Act modifies a previous AGOA amendment by increasing the amount of agricultural imports available under the law and emphasizing “particularly those from businesses and sectors that engage women farmers and entrepreneurs.”⁴⁷

These changes can be looked at as broad improvements on the old language. The emphasis on trade capacity building reflects a growing understanding of the realities on the ground in many SSA countries, where access to markets is impeded by infrastructural difficulties and overall lack of information about how to utilize AGOA. The provisions on the promotion of women reflect a core theme in development methodology today: that women’s social and economic contributions must no longer be overlooked and must be specifically targeted for development assistance. Taken together, these changes set AGOA apart from other GSP arrangements: it is, and was always intended to be, a development platform for SSA. Yet while trade can and should lead to economic and social development, the U.S. government’s inevitable push for free trade agreements in SSA should raise concerns about repetition of the closed and non-transparent manner past and present agreements have been negotiated in other areas of the world. AGOA’s reporting and review mechanisms and newly prioritized emphasis on trade capacity building open a door to building worker, citizen, and community engagement and integrating it into trade policy moving forward.

VI. Analysis: Strategizing for Worker Empowerment Through Programming and Advocacy

In February 2015, the USTR and the Bureau of International Labor Affairs (ILAB) published a joint report about the intersection of international trade and labor rights. The report concluded that “trade policy tools can be used [...] to support the aspirations of workers in this country and in trading partner countries around the world to earn a decent living in a safe and healthy workplace, enjoy fundamental labor rights and share in growing prosperity.”⁴⁸ This statement describes the premise laid out at the outset of this research: that trade is not only a tool for economic development, but that it can and should be used as a means to simultaneously promote labor rights.

The question now becomes, what does that engagement look like? As explained above, the new penalty and enforcement mechanism in AGOA adds teeth to what was before an ineffective method of ensuring progress along development lines and promoting rights. However, the new penalty alone does nothing to increase the capacity of workers, businesses, and governments to take

⁴⁵ Pub. L. No. 114-27, § 107(b)(5)

⁴⁶ Pub. L. No. 114-27, § 106.

⁴⁷ Pub. L. No. 114-27, § 109(1)(b).

⁴⁸ United States Trade Representative and Department of Labor, at 53.

advantage of AGOA’s offerings and stimulate their own economic and social development. Unions, business associations, small and medium enterprises, women entrepreneurs, and informal worker organizations all must be empowered to utilize AGOA’s benefits. Development professionals, organizers, and funders alike should consider designing programming that will dovetail with AGOA’s new effort to monitor capacity building through its AGOA-utilization strategy requirement.

For unions and worker rights advocates, this effort should be focused on prioritizing workers—particularly informal workers and women workers—and promoting social inclusion through three potential levels of advocacy: (A) Trade Capacity Building, (B) Legal Advocacy, and (C) Civil Society Engagement.

a. Trade Capacity Building

A very strong push is currently underway to rectify AGOA’s utilization problem through improved and targeted efforts to help countries streamline trade laws, improve infrastructure, and assist manufacturers and small and medium enterprises in efforts to access the U.S. market. Much of this work is focusing on sub-regional “trade hubs” focused on regional economic groupings such as the East Africa Community (EAC).⁴⁹ But to better include workers in AGOA’s effort to shrink the inequality gap in SSA, an AGOA-specific long-term trade capacity building (TCB) program focused on worker rights and social inclusion should be based in SSA local, country-level, and regional institutions that have a track record of including citizen input into decision-making, delivering education and training at the workplace and community level, and adding economic value, input, and dialogue to trade and development policy. Five platforms for a pro-workers trade capacity building that focus on workers and tripartite social dialogue include:

- A focus on the informal economy and efforts to integrate informal workers into the benefits of trade.
- Efforts to build the strength and voice of women workers in both formal and informal workplaces.
- Supply chain transparency and worker rights capacity building programs focused on the interrelationship of key economic sectors along the upstream-to-downstream points of the supply chain. Key sectors would include mining, oil and gas, agriculture, textiles and garments, construction, and transportation nodes.
- Strengthening of country-level labor relations dialogue centered on tripartite systems of dialogue, labor law reform, and bolster labor federations.
- Support for regional labor standards harmonization centered around existing or yet-to-be-created sub-regional trade areas.

(1) Informal Workers

The role of informal workers in facilitating trade in and within SSA cannot be overstated. Goods moved intra-regionally and internationally often move on the work of informal traders and

⁴⁹ Helen Castell, *Private sector joins push to raise African incomes through trade*, Devex Impact, April 8, 2015 (<https://www.devex.com/news/private-sector-joins-push-to-raise-african-incomes-through-trade-85573>).

transporters. Street vendors are a vital cog in market networks that move products quickly and efficiently from rural to urban environments and across borders. Manufacturing hubs are often serviced by informal markets and traders and, at the workplace level, many workers – particularly in light manufacturing sectors such as textiles – find themselves working on “semi-formal” arrangements characterized by short-term contracts and irregular pay.

The large size of the informal economy in most African countries and growing forms of “flexible” labor subcontracting pushes downward on wages, benefits, and social protection. The informal economy is economically productive but lacks the legal and structural linkages to the mainstream economy that can provide workers with access to skills training, access to loans, and safe workplaces. The extension of social protection in the form of pensions, healthcare, and childcare is increasingly seen as a means to integrate informal workers into the economy.⁵⁰

In the past 15 years, the growth of informal economy organizations, often structuring themselves as workers unions, have made strides to organize the most vulnerable workers and advocate for legal protection and government service delivery that meet informal workers’ needs and extend rights to them. In some countries, formal union structures like the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA), and the Tanzanian Union of Industrial and Commercial Workers (TUICO) have robust informal economy organizing and outreach programs. Others are organized from the ground up, such as the street vendors union *Syndicat National des Vendeurs et Vendeuses et Assimiles des Marche du Benin* (SYNAVAMAB) in Benin and the Zimbabwe Cross Border Traders Association, an informal trucking and transport workers union. These organizations span the divide between the small businesses and trade unions, self-employed and contingent workers.⁵¹

Often the needs of informal worker associations correspond to the needs of small businesses: access to commercial space, a clear regulatory and tax environment, an end to petty corruption, and legal rights/access to fair judicial structures. For example, TUICO has worked with informal workers to develop innovative models of worker advocacy and bargaining with municipal authorities over issues of market zoning, access to commercial space, and the rights of informal workers. Taking these elements and examples into account, an informal economy trade capacity building program would include:

- Informal worker organizing activities with trade-linked informal economy organizations such as street vendors, transport workers, and day-laborers/migrant workers in agriculture or light manufacturing. Additionally, training on organizing and bargaining would be paired with business skill development to improve organizational access to trade and overall professional competence.
- Advocacy education for informal worker organizations and unions to promote labor law reforms that extend labor law coverage to informal economy workers and raise both wages and social protections for informal workers.

(2) *Building strength and voice of women workers in both formal and informal workplaces.*

⁵⁰ See Southern African Social Protection Experts Network – SASPEN, “Social Protection for those working informally – International Conference,” September 16-17, 2013, Johannesburg, South Africa, <http://www.saspen.org/home/en/conferences/informal-economy/>; and Women in the Informal Employment: Globalizing and Organizing (WIEGO), Programme on Social Protection, 2015, <http://wiego.org/wiego/core-programmes/social-protection>

⁵¹ I need to add a note here. Will send tomorrow.

The role of women in African economies overlaps with the issues presented by the prevalence of employment informality. Women workers dominate much of the informal economy, from domestic work, to market and street vending. Light manufacturing such as garments and textiles, and many agricultural sectors are also predominantly women.

In recent years, a great deal of development policy has focused on the role of women as entrepreneurs, with efforts to teach women and young girls about microcredit, savings, and educational advancement. While the overall focus on women's political and legal rights are a positive trend, a corrective is needed in that the majority of women do not have the social capital (such as access to finance, legal rights, family resources, social safety nets) to be entrepreneurs. For those who are formal employees, contingent informal workers, or are informal workers laboring in formal enterprises, a women's empowerment program aimed at integrating women into the benefits of trade must look at women's collective organizing strength as workers. Building women's skills to demand both the wage and non-wage benefits of work increases their stake in the economic benefits of trade and helps integrate women into the advocacy networks of union and worker rights organizations.

A TCB program for women workers should continue the overall focus already outlined on the informal economy, but with the following additional projects:

- Programs focusing on women's organizing in the informal economy with training on organizing, bargaining, and advocacy.
- Women's rights programs focusing on light manufacturing and agricultural sectors with high and predominantly female workforces focused on economic literacy, organizing, and developing collective bargaining agreements with formal enterprises.

(3) *Supply chain transparency in key economic sectors*

Supply chains are at the core of efforts to make AGOA a more useful and economically transformative tool for African countries. Enterprises that occupy points on the supply chain have a great stake in improved processes that will increase trade to the U.S. and beyond. Supply chain transparency has generated a great deal of policy focus in recent years, with initiatives in counter-trafficking, conflict minerals, and extractive industries. Responses to severe abuses in textiles, electronics, and seafood processing have been driven in part by a stream of horrifying headlines. The role of migrant workers, in search of work and good pay but severely vulnerable to abuses and xenophobia, is also a concern in a number of countries and regional markets in Africa.

Supply chain monitoring and advocacy, when coupled with worker efforts to advocate for change, can have an enormous impact on operations and productions. However, worker organizing and advocacy as a starting point is a departure from many current supply chain monitoring programs, which focus around corporate-run and/or voluntary workplace monitoring protocols. These programs often exacerbate the sub-contracting trend by treating workers as entrepreneurs rather than promoting cooperative and collective action by workers with shared interest. Rather, supply chain monitoring programs that are based on rank-and-file workers and unions, with links to international union networks and monitoring organizations that can play a watchdog role if necessary, are the best guarantors of a well-monitored and transparent supply chain. These programs would focus on key trade-impacted sectors, such as forestry, palm oil, rubber, floriculture, sugar, textiles, food processing, mining/extraction, oil and gas, transport and infrastructure. They would seek to:

- Develop strong worker organizations in trade-impacted sectors, and train workers in collective bargaining; and

- Promote supply chain transparency through monitoring and links to other unions and worker associations along the commerce stream.

(4) *Strengthening existing systems of tripartite labor dialogue*

Tripartism functions to set the broad legal parameters of labor relations: setting rules on wages and hours, facilitating the settlement of industrial disputes, empowering inspections and adherence to law and agreements, and promoting cooperation between workers and management. Tripartite dialogue often exists in varying forms and in varying models and most African countries have a long-established system of labor relations that center around tripartite social dialogue between government, organized labor, and business associations. South Africa's National Economic Development and Labor Advisory Council (NEDLAC) and Ghana's National Tripartite Committee (NTC) are two examples.

Tripartite dialogue can also exist at the sector or industrial levels in some countries and to varying degrees at provincial levels. Particularly at the sector level, tripartite bodies have the capacity to establish agreed-upon norms and take a "big picture" approach to a sector's growth by monitoring wage and benefit levels, worker training level needs, workforce trends, and health and safety. Especially in terms of wages, tripartite dialogue can ensure that pay and benefits keep pace with productivity and company growth. In Lesotho, for example, the ILO's Better Work program (which has its origins in the US-Cambodia textile agreement) focuses on the textile and apparel sector. While critics of the program note that underfunding and a disorganized labor movement damage the potential success of the program, the program has helped distinguish Lesotho from the many labor issues that have plagued nearby Swaziland.

Trade capacity programming should focus on building dialogue structures, particularly in the textile and apparel sector, and the agricultural and floriculture sectors. Where established national-level dialogue bodies exist, programming should seek to ensure that national union federations are involved in trade policy discussions and have adequate institutional space to meet with government ministries and employers to make sure workers are benefitting from trade policy.

(5) *Regional labor standards harmonization.*

Just as tripartite dialogue at the national and sector level is an established medium for worker, employment, and government dialogue on economic policy and labor relations, regional institutions of tripartite dialogue are emerging in SSA and have tremendous potential to facilitate trade and harmonization of labor. In both the East African Community (EAC) and Southern Africa Development Community (SADC), institutionalized civil society input exists with functional space for worker rights advocates to promote worker and human rights. In the SADC, the Southern Africa Trade Union Coordinating Committee (SATUCC) works to inform and advocate on behalf of member-state labor federating at the SADC secretariat in Gaborone, Botswana. In recent years, SATUCC has been effective in marshaling support for election monitoring and union-NGO dialogue before national elections and/or SADC summit meetings. SATUCC has also been active in support of the SADC Labor and Employment Protocol, which seeks to harmonize labor laws across the SADC. Having won approval of the protocol, SATUCC is now helping member federations develop country strategies to win its ratification at the country level.

In the EAC, the East Africa Trade Union Confederation (EATUC) has similar standing as its counterpart SATUCC at the SADC, but with more established labor-business-government dialogue at the EAC secretariat level. EATUC has worked for a number of years to promote labor standards within the EAC's "Common Market Protocol." EATUC has been at the lead in

supporting two key “freedoms” within the protocol, namely free movement of labor and free movement of peoples. It has advocated for a removal of visa fees, a harmonization of labor laws, and an ongoing initiative, in cooperation with the East Africa Employers Organization (EAEO), to make pension benefits portable, so that migrant workers within the EAC hold on to a key social safety net despite their migration status. EATUC and the EAEO jointly submitted a draft social security portability bill to the East Africa Legislative Assembly in May 2015.

Activities to bolster regional tripartite structures would focus initially and primarily on the EAC, where these structures are already in existence. They could be further bolstered by a trade-specific program focusing on harmonizing labor standards, making progress in initiatives like portable social benefits, and having greater tripartite dialogue on trade issues such as customs modernizations. These efforts could lead to greater labor oversight and support for policies geared at promoting economic growth.

These recommendations form the basis of a pro-worker and socially inclusive trade capacity building program that seeks to address development and inequality gaps by integrating key stakeholders in SSA economies (informal workers, women workers, in particular) and critical sectors such as extractives, garments, and agriculture into a less typical or traditional trade capacity program focused only on business promotion. A critical piece of these recommendations are that they are grounded in existing membership-based organizations (such as unions) and systems of national and regional dialogue that are established and respected methods of economic policymaking. These suggested programs can form the basis of union dialogue and advocacy with national governments and development agencies as countries and sub-regional blocs work to develop AGOA utilization strategies in the near future.

b. Legal Advocacy

Opportunities for complaints have always been available to workers in SSA countries under the international legal framework governing labor standards.⁵² AGOA adds one more layer of potential pressure that worker advocates may utilize on their behalf. In addition to opportunities for capacity building, which will empower workers in AGOA’s trade stream from the ground up, a viable top-down approach is now available to advocates through the redesigned penalty and enforcement mechanism. The revised AGOA opens up new avenues of engagement for legal advocacy on behalf of workers and worker associations. Under the old language, as described, holding beneficiary countries accountable for worker rights violations was extremely difficult given the damaging nature of the penalty available. Under the new language, it appears possible to hold beneficiary countries *or* various individual sectors accountable for rights violations without risking total loss of benefits (and therefore, jobs and livelihoods). It is in this area that the legal community should begin testing the new penalty and enforcement mechanism while they work to hold SSA governments and producers accountable under the eligibility requirements.

AGOA’s eligibility requirement on labor standards requires that beneficiaries be able to demonstrate that they are making continual progress on the right of association, the right to organize and bargain collectively, a prohibition on the use of any form of forced or compulsory

⁵² The ILO Committee of Experts on the Application of Convention and Recommendations annually reviews the application of international labor standards and issues comments and direct requests. Additionally, the Committee on Freedom of Association may always investigate violations of the freedom of association and right to collective bargaining at the request of an employer or worker association. Finally, complaints may be filed by member states against another for failure to comply with a ratified convention.

labor, a minimum age for the employment of children, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. While such issues can and should be addressed legislatively, implementation and enforcement – and resources for that work – is often severely lacking. Rather than attempt to tackle such broad issues collectively, advocates should narrow their focus to one area or one sector and begin to apply pressure through AGOA’s newly-created channels.

For example, in 2003 an issue arose in the Ugandan textile sector. A Sri Lankan textile company, Tri Star, relocated its factory to an export processing zone (EPZ) in Uganda in order to take advantage of Uganda’s AGOA benefits, and almost immediately began running into labor violations. Workers accused the company of violating both Ugandan labor laws and international labor standards, including poor working conditions, low wages and long hours without overtime pay, restrictions on freedom and communication among workers, verbal, physical and sexual abuse, and a failure to recognize employee unions.⁵³ When the employees, all women, went on strike against their working conditions, Tri Star summarily terminated their employment without paying their wages, and this process has repeated itself many times since then.⁵⁴ The “AGOA Girls,” as they came to be called in the media, have been left entirely without justice.⁵⁵

In this case, it would have been extremely difficult for labor advocates from the Uganda Textile, Garments, Leather and Allied Workers Union to advocate on behalf of the AGOA girls under the old AGOA language. If any action had been taken on the part of the United States government, the only action available would have been to remove Uganda from benefits entirely, destroying Uganda’s opportunity to pursue exports from other sectors that would have otherwise been eligible under AGOA. Under the new language, however, the President is empowered to “suspend” the application of duty free treatment to textiles being exported to the United States under AGOA, or “limit” the application of duty free treatment to other sectors, preserving their benefits. Under the new notice requirements, another level of engagement exists for labor advocates in this scenario: the opportunity to participate in tripartite dialogue during the sixty-day notice period in order to devise a strategy for moving towards compliance, and retaining benefits. The newly-added out-of-cycle reviews in AGOA empower the President to review the decision to apply the penalty at any time. This new flexibility offers all the parties involved – the workers, the producers, and the government – the opportunity to find a pathway forward that will bring them into compliance with the eligibility requirement, and possibly prevent the application of the penalty altogether.

Thinking creatively, the newly flexible penalty can be applied under other scenarios as well. Swaziland, for example, lost its eligibility under AGOA due mostly to serious violations of freedom of association and the right to organize.⁵⁶ Under the new penalty, the ability to pressure the

⁵³ Esther de Haan & Myriam Vander Stichele, *Footloose Investors: Investing in the Garment Industry in Africa*, SOMO- Centre for Research on Multinational Corporations, 44 (August 2007) (http://somo.nl/html/paginas/pdf/Footloose_Investors_aug_2007_EN.pdf).

⁵⁴ Ephraim Kasozi and Kukundakwe, “AGOA Girls Ask for Museveni’s Intervention Yet Again,” *The Daily Monitor*, April 27 2011 (accessed July 15, 2015).

⁵⁵ De Haan & Stichele, *supra*, at 44. *See also* “Uganda AGOA Girls,” at http://www.ilo.org/global/about-the-ilo/multimedia/video/video-news-releases/WCMS_074352/lang-en/index.htm.

⁵⁶ Press Release, United States Trade Representative, President Obama Removes Swaziland, Reinstates Madagascar for AGOA Benefits (June 2015). Available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/June/President-Obama-removes-Swaziland-reinstates-Madagascar-for-AGOA-Benefits>.

government by “withdrawing” – instead of terminating – duty-free treatment until Swaziland could demonstrate progress might have been a more effective method of advocacy. Again, the sixty-day notice requirement and the out-of-cycle review process provide the opportunity for advocates to work on reforms through tripartite dialogue.

Legal expertise necessary to these efforts will depend upon the petition process that is yet to be promulgated under Section 105(c), but the need would very likely include drafting and submitting compelling and persuasive petitions, describing international labor standard violations, recommending the most effective or appropriate penalty, and then following the petition through the process. Additionally, labor experts consulting with national governments and worker associations during tripartite dialogue and reform efforts at a national level are necessary to help countries establish stronger labor laws and regulations.

This legal expertise would be most effective coming from African unions and worker associations themselves, though it is not limited in any way to this source. Global union federations (GUFs) might be able to provide the resources for such legal expertise if it is unavailable to unions or worker associations seeking to file a petition. Legal capacity building for lawyers representing workers could be undertaken by United States, international counterparts, or affiliated unions through on-the-ground trainings and seminars. A number of civil society organizations and various NGOs already operating in relevant fields might also contribute to petition and reform efforts, perhaps through gathering information and data on specific violations, or providing their organizational expertise to highlight certain key areas for improvement (for example, an organization like Oxfam could bring on a labor consultant to draft a petition on violations in the agricultural/floriculture sector; local women’s empowerment associations might focus on sectors dominated by women, such as the garment industry).

Finally, USAID’s trade hubs are naturally positioned to aid in providing legal consultation and expertise to labor and trade unions in the SSA region. Labor issues could be easily incorporated into many of the programs the trade hubs oversee, enhancing the type of technical support the trade hubs provide to their regions. The hubs can service both employers and workers in this respect; trainings on international labor standards, the labor provisions within AGOA, collective bargaining and tripartite dialogue would be valuable additions to any trade capacity building program. A labor legal expert posted at each hub could also provide support to those organizations involved in ongoing tripartite dialogue and petitions processes. This type of role would further emphasize the effort at partnership, collaboration, and social dialogue that AGOA’s new provisions seem to reflect.

In conclusion, the new penalty and enforcement clauses and the emphasis on monitoring, dialogue, and reporting, provide ample opportunity for legal advocacy on behalf of workers in SSA under AGOA. Labor experts, legal advocates, unions, worker associations, and their allies should look at these provisions as an invitation to engage proactively and constructively with the United States and beneficiary governments. The reforms should be tested strategically, with a dual purpose: first, of advancing the cause of worker rights in SSA; and second, of creating a body of information, knowledge, and experience that can be utilized by all of the stakeholders involved in AGOA’s next renewal in 2025.

c. U.S. – Africa Civil Society Engagement

During the year leading up to AGOA’s renewal in June 2015, a particularly lively dialogue developed amongst the many interested parties and stakeholders, which included the labor community, business associations, Afrocentric NGOs, and the African diaspora community among others. While these diverse and various groups generally supported AGOA’s renewal, they naturally conflicted with one another on certain key issues such as the usefulness of eligibility criteria or the need to

remake AGOA into a more reciprocal arrangement resembling a free trade agreement. A key aspect of this debate and dialogue is that it was among U.S.-based organizations, all speaking in various ways for partner or constituency groups based in Sub-Saharan Africa. For AGOA's new provisions to work, this level of U.S. – Africa dialogue and coordination going forward is important.

Efforts to spur AGOA's renewal was boosted by the hosting of the U.S. – Africa Leaders Summit in Washington, DC on August 4-6, 2014, in parallel with the annual AGOA Forum which is mandated as part of the legislation. A major criticism of the Summit was that in its efforts to promote AGOA as well as business and investment relationships, it sidelined African civil society activists in favor of a governments and business approach.⁵⁷ While the Summit's planners were able to hastily organize a very effective and well-run Civil Society Forum, it has been a consistent shortcoming of the AGOA process the way African civil society organizations, including unions, have been avoided by key stakeholders and government agencies in the U.S. and SSA.

As noted, changes to the new AGOA open considerable opportunities for worker advocates, African unions, and their allies to integrate themselves in emerging dialogue. There is no way to make AGOA work for workers if workers directly impacted by trade do not engage or are not properly represented by their unions and union allies at the international level.

One of the most powerful options for engagement in this way is through participating in the newly created annual public comment and hearing on country eligibility. As described above (see p. 8), AGOA now requires that the President publish a notice of review and request for public comment through the Federal Register⁵⁸ “on whether beneficiary Sub-Saharan African countries are meeting the eligibility requirements” enumerated in Section 104. Public comments are reviewed by the requesting agency and made available to the public through the Federal Register. Then, within 30 days of publishing the notice of review, the USTR is required to publish the time and place of a public hearing for discussion on the comments that were submitted to the Federal Register, and ultimately hold such a hearing.

These new procedures are a critical opportunity for unions in Africa (and allies in the U.S.) to advocate on behalf of workers, explain labor issues in the AGOA context to the relevant United States agencies and other civil society organizations, and make sure that labor issues do not go overlooked. This is an excellent forum not only for highlighting problematic sectors or specific labor rights violations, but also for calling attention to particular examples of achievement or success that certain countries have experienced in “making continual progress” along international labor standards. Most importantly, it keeps labor issues front and center in the conversation around AGOA for the next ten years: a critical step in ensuring that they remain a component in AGOA revisions and potential bilateral negotiations in the future.

Another avenue for civil society engagement is on the ground in SSA, as countries develop their biennial AGOA utilization strategies. While participating in the public comment and review process engages the United States government in the push for greater labor protections, this is an opportunity for African organizations to engage their own governments. They should lobby to make sure that the issues of the SSA labor community are included in the biennial strategy reports and that the assets and advantages of each country's workforce are described as well. The needs of the

⁵⁷ Jeffrey Smith, Todd Moss, “Obama should embrace Africa's democratic standard-bearers,” Al-Jazeera America, July 31, 2014, <http://america.aljazeera.com/opinions/2014/7/us-africa-summitbarackobamaforeignpolicydemocracytradeinvestment.html>

⁵⁸ The Federal Register is an online forum for official publications, notices, and comments by United States agencies and the public. Notices of review and requests for comments (public or otherwise) are updated daily and kept open for a designated amount of time (<https://www.federalregister.gov/>).

workforce – better wages, safer working conditions, the right to organize sector, the need for better technical training or capacity building, etc. – should be outlined comprehensively in these reports so that the issues they present to utilization are clear upon submission to the USTR.

Additionally, NGOs, unions, and worker rights advocates should engage proactively with other civil society organizations to ensure dialogue and cooperation. As noted above, the AGOA legislation mandates an annual AGOA Forum to be jointly with U.S. and SSA governments in a different beneficiary country. While billed as a stakeholder consultation gathering at which AGOA governments, the private sector, and CSOs meet to discuss a particular theme each year, the forum has traditionally excluded unions, human rights activists, and other civil society groups beyond business associations and academics, with this year's 2015 AGOA Forum in Gabon being no exception. African unions and worker rights advocate should demand to be heavily involved in these consultations every year, putting the issues of the labor community front and center. Unions and labor advocate groups should also incorporate themselves into existing CSO networks. Finally, there is nothing to prevent worker associations, unions, and labor advocates from forming their own AGOA network. Such an effort could go far in bringing worker issues to the front of policy discussions at the AGOA Forum and elsewhere.

VII. Conclusion

In the preceding analysis, the new AGOA has been shown to have key changes that improve the law in terms of eligibility criteria, reporting, and sanctions for non-compliance, as well as initiatives to better encourage utilization of AGOA's trade preferences through trade capacity building. Both of these changes hold tremendous opportunities to generate greater dialogue about worker rights in Sub-Saharan Africa, the role of workers in trade-impacted sectors, and to analyze whether trade preference programs like AGOA are truly promoting more broad-based development agenda. For unions and worker rights advocates, the new AGOA opens greater opportunities for engagement. We have noted a number of ways unions and worker rights advocates can utilize the new AGOA's provisions to highlight abuse, press for worker rights protections, increase capacity building to promote greater economic opportunities, and positively impact the lives of workers contributing to AGOA-created trade streams.

The premise for our argument is that trade arrangements – whether in the form of GSPs, or bilateral negotiations – should provide a means of ensuring worker protections. AGOA is a convenient example of this premise, but it should by no means be considered the only area of trade ripe for the implementation of this principle. The international labor movement should take notice of this emerging area of law, and insist on inclusion in trade policy discussions. The main and most vocal proponents of AGOA in Washington, DC policymaking circles have not hidden their intentions of making AGOA a foundation for free trade agreements with regional economic blocs or individual countries in Sub-Saharan Africa. Expertise and input from unions in Africa and worker rights advocates internationally are critically needed to integrate worker rights and decent work perspective into the very structures of U.S.-Africa trade policy. The current AGOA presents an excellent opportunity for capacity development in this respect.

ⁱ Janet C. Checkley is an attorney-at-law and holds a J.D. from the University of Pittsburgh School of Law, where she focused her studies on labor, international law, and dispute resolution. She is currently based in Washington, DC.

ⁱⁱ John A. Hosinski, is the Senior Program Officer in the Solidarity Center Africa Department and works on the development and implementation of Solidarity Center programs in Sub-Saharan Africa. Among his specific areas of research interest are the role of unions in democracy and the informal economy. He holds a B.A. in history from the University of Notre Dame and a M.A. in international affairs from Elliott School of International Affairs at George Washington University.