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Feature Articles

Student Articles

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International Focus at
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Curriculum

Loyola University Chicago School of Law provides an environment where a global perspective is respected and encouraged. International and Comparative Law are not studied only in theoretical, abstract terms but primarily in the context of values-based professional practice. In addition to purely international classes, courses in other disciplines – health law, child and family law, advocacy, business and tax, antitrust, intellectual property – have strong international and comparative components.

International Centers

The United Nations has designated Loyola Chicago School of Law as the home if its Children's International Human Rights Initiative. The Children's International Human Rights Initiative promotes the physical, emotional, educational, spiritual, and legal rights of children around the world through a program of interdisciplinary research, teaching, outreach and service. It is part of Loyola's Civitas ChildLaw Center, a program committed to preparing lawyers and other leaders to be effective advocates for children, their families, and their communities.

Study Abroad

Loyola's international curriculum is expanded by its foreign programs and field study opportunities:

International Programs

– A four-week summer program at Loyola's permanent campus in Rome, Italy, the John Felice Rome Center, focusing on international and comparative law
– A three-week summer program at Loyola's campus at the Beijing Center in Beijing, China focusing on international and comparative law

International Field Study

– A ten-day, between-semester course in London on comparative advocacy, where students observe trials at Old Bailey, then meet with judges and barristers to discuss the substantive and procedural aspects of the British trial system. Students also visit the Inns of the Court and the Law Society, as well as have the opportunity to visit the offices of barristers and solicitors.
– A comparative law seminar on *Legal Systems of the Americas*, which offers students the opportunity to travel to Chile over spring break for on-site study and research. In Santiago, participants meet with faculty and students at the Law Faculty of Universidad Alberto Hurtado.
– A one-week site visit experience in San Juan, Puerto Rico, students have the opportunity to research the island-wide health program for indigents as well as focus on Puerto Rico's managed care and regulation.
– A comparative law seminar focused on African legal systems. The seminar uses a collaborative immersion approach to learning about a particular country and its legal system, with particular emphasis on legal issues affecting children and families. The most recent trip was to Tanzania.

Wing-Tat Lee Lecture Series

Mr. Wing-Tat Lee, a businessman from Hong Kong, established a lecture series with a grant to the School of Law. The lectures focus on an aspect of international or comparative law.

The Wing-Tat Lee Chair in International Law is held by Professor James Gathii. Professor Gathii received his law degree in Kenya, where he was admitted as an Advocate of the High Court, and he earned an S.J.D. at Harvard. He is a prolific author, having published over 60 articles and book chapters. He is also active in many international organizations, including organizations dealing with human rights in Africa. He teaches International Trade Law and an International Law Colloquium.

International Moot Court Competition

Students hone their international skills in two moot competitions: the Phillip Jessup Competition, which involves a moot court argument on a problem of public international law, and the Willem C. Vis International Commercial Arbitration Moot, involving a problem under the United Nations Convention on Contracts for the International Sale of Goods. There are two Vis teams that participate each spring in an oral argument involving an international moot arbitration problem. One team participates in Vienna, Austria against approximately 255 law school teams from all over the world, and the other team participates in Hong Kong SAR, China, against approximately 80 law school teams.

Acknowledgments

We would like to recognize friends and alumni of the law school who have contributed within the past year to our international law program at Loyola University Chicago by their support of the Willem C. Vis International Commercial Arbitration Moot Program:

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To the Subscribers of the *Loyola University Chicago International Law Review*:

Please find the corrected author credits for an article written by Dr. Obiajulu Nnamuchi, Dr. Simon U. Ortuanya, and Dr. Edwin O. Ezike, Millennium Development Goal 4, Children's Health and Implementation Challenges in Africa: Does a Human Rights Based Approach Suffice?, published in Volume 11, Issue 2 of the Loyola University Chicago International Law Reivew. In the initial production of the article, Dr. Simon U. Ortuanya and Dr. Edwin O. Ezike were inadvertently omitted from the author line.

We apologize to the authors for any embarrassment this regrettable error may have caused. We apologize for any inconvenience or confusion this error may have caused to the subscribers of the Loyola University Chicago International Law Review. Within this issue, please find a reprinted version of the article, printed in its corrected form.

Millennium Development Goal 4, Children's Health and Implementation Challenges in Africa: Does a Human Rights Based Approach Suffice?

Dr. Obiajulu Nnamuchi*, Dr. Simon U. Ortuanya**, and Dr. Edwin O. Ezike***

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Every disadvantaged child bears witness to a moral offense: the failure to secure her or his rights to survive, thrive and participate in society. And every excluded child represents a missed opportunity – because when society fails to extend to . . . children the services and protection that would enable them to develop as productive and creative individuals, it loses the social, cultural and economic contributions they could have made.

— Anthony Lake: UNICEF Executive Director

As the 2015 deadline for the Millennium Development Goals draws closer, the challenge for improving . . . newborn health goes beyond meeting the goals; it lies in preventing needless human tragedy. Success will be measured in terms of lives saved and lives improved.

— Ann M. Veneman: Former UNICEF Executive Director

To look into some aspects of the future, we do not need projections by supercomputers. Much of the next millennium can be seen in how we care for our children today. Tomorrow's world may be influenced by science

* LL.B. (Awka), LL.M. (Notre Dame), LL.M. (Toronto), LL.M. (Lund), M.A. (Louisville), SJD (Loyola, Chicago), Assistant Professor of Law, University of Nigeria; President and Chief Consultant, Centre for Health, Bioethics and Human Rights (CHBHR) Enugu, Nigeria. Many thanks to the various children's rights organizations in Africa whose demand for our opinion on various aspects of health and wellbeing of children spurred the writing of this paper, as well as AdaObi Nnamuchi, our able assistant. All errors and omissions remain our sole responsibility.

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and technology; but more than anything, it is already taking shape in the bodies and minds of our children.

— Kofi A. Anan: Former UN Secretary-General

Abstract

That the state of children's health in Africa is abysmal is incontrovertible. Proof, if there is need for one, is the perennial underperformance of the vast majority of countries in the region in key dimensions of children's health and wellbeing. Nonetheless, the point of interest in health policy literature is not on the underperformance per se but on the underlying causes and possible antidotes – a reason Millennium Development Goal (MDG) 4 (on reducing child mortality) holds special significance for countries in the region. This paper advances scholarship in this very critical area by projecting human rights as holding the key that could unlock the suffocating stranglehold ill-health irrepressibly wields over the lives of millions of children in Africa.

I. Introduction and Preliminary Background

The adoptions of the United Nations Convention on the Rights of the Child ("CRC") in 1989[1] and the African Charter on the Rights and Welfare of the Child ("ACRWC") the following year[2] were significant achievements in the global protection of the health and wellbeing of children throughout the world. Remarkably, the CRC has received more signatures, ratifications or accessions than any other human rights treaty – a total of 193 countries as of March 2014.[3] The ACRWC has also been widely endorsed in Africa. With 42 of the 54 countries in Africa being signatories to the ACRWC (46 of them ratifying it),[4] it is clear that vulnerability of children and the need for their protection is a commonly shared value in the region.[5] Ratification binds these countries to, among other things,

[1] Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GOAR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49, at 167 (Nov. 20, 1989) [hereinafter CRC]. The CRC is unique in more ways than one. Aside from being the most highly ratified human rights instrument, it entered into force sooner following adoption than any other treaty and it set a record in the number of States Parties that participated in the signing ceremony (60) amongst treaties adopted under the auspices of the United Nations. *See* Thoko Kaime, The African Charter on the Rights & Welfare of the Child: A Socio-Legal Perspective 1 & n.2 (2009). See also Cynthia Price Cohen, *The United Nations Convention on the Rights of the Child: Implications for Change in the Care and Protection of Refugee Children*, 3 Int'l J. Refugee L. 675, 676 (1991).

[2] African Charter on the Rights and Welfare of the Child, July 11, 1990, OAU Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1999) [hereinafter ACRWC].

[3] *Status of Convention on the Rights of the Child*, United Nations Treaty Collection (Mar. 24, 2014, 8:03 PM), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=EN; *see* UNICEF, The State of the World's Children 2012: Children in an Urban world 16 (2012) (listing Somalia, South Sudan and the United States of America as the only nations that have not ratified the treaty).

[4] *See* African Comm. of Experts on the Rights of the Child, List of Countries which have Signed, Ratified/Acceded to the African Union Convention on the Rights and Welfare of the Child, *available at* http://acerwc.org/wp-content/uploads/2011/03/French-and-English-ACERWC-Updated-Status-of-the-ACRWC.pdf.

[5] ACRWC, *supra* note 2, para. 4, 6 (noting "that the situation of most African children remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circum-

ensure the right of children in their respective jurisdictions to "the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health."[6] As to how this goal would be attained, the CRC mandates States Parties to adopt appropriate legislative and administrative measures to diminish infant and child mortality, ensure the provision of necessary medical assistance and health care for all children, combat disease and malnutrition, and develop preventive care.[7]

This vital human rights obligation closely mirrors the commitment explicit in Millennium Development Goal ("MDG") 4, to reduce child mortality or, more specifically, to "[r]educe by two-thirds, between 1990 and 2015, the under-five mortality rate" ("U5MR").[8] In fact, it can be said that MDG 4 is encapsulated within the CRC and ACRWC obligations and, on that basis, can be construed as a policy reformulation of extant legal obligations. But there are differences. In contrast to these treaties, there are time constraints and measurable targets attached to MDG 4.[9] Moreover, MDG 8 – to develop a global partnership for development – is a multilateral compact between affluent and low income nations explicitly demanding action from the former to facilitate the latter's progress toward meeting their MDG obligations, making MDG 8 (and other MDGs) unique in international development relations.[10] Strikingly, neither the CRC nor the ACRWC has such financial teeth.

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stances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs special safeguards and care" and recognizing "that the child, due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security.").

[6] Convention on the Rights of the Child, *supra* note 1, art. 24, para. 1; ACRWC, *supra* note 2, art. 14, para. 1.

[7] Convention on the Rights of the Child, *supra* note 1, art. 24, para. 2; ACRWC, *supra* note 2, art. 14, para. 2.

[8] U.N. Statistics Div., Official List of MDG Indicators (2008), *available at* http://unstats.un.org/unsd/mdg/Resources/Attach/Indicators/OfficialList2008.pdf.

[9] *See id.* Aside from the target of reducing by two-thirds, between 1990 and 2015, the U5MR, there are three indicators or benchmarks that were designed to assess country progress (or lack thereof) toward the goal, namely, U5MR, the infant mortality rate, and the proportion of one-year-old children immunized against measles. *See id.* These are the crucial tools that will be employed in determining whether the MDG will be attained in 2015. *See id.*

[10] World Health Org., Health and the Millennium Development Goals 63 (2005). Subsequent multilateral agreements attest to the obligatory dimension of assistance toward achieving the MDGs. For instance, signatories to The Global Compact for Achieving the Health Millennium Development Goals, adopted under the auspices of the International Health Partnership in 2007, explicitly commit themselves to be held accountable "in implementing this compact" and to hold an annual meeting for the purpose of reviewing progress against the commitments. *See* International Health Partnership, *A Global 'Compact' for Achieving the Health Millennium Development Goals*, World Health Org. (Sept. 5, 2007), http://www.who.int/healthsystems/IHP_compact.pdf. *See also* Obiajulu Nnamuchi & Simon Ortuanya, *The Human Right to Health in Africa and its Challenges: A Critical Analysis of Millennium Development Goal 8,* 12 Afr. hum. Rts. L. J. 198 (2012); The Accra High Level Forum, *The Accra Agenda for Action on Aid Effectiveness*, (2008), http://www.ppdafrica.org/docs/accra.pdf; Fourth High Level Forum on Aid Effectiveness, *The Busan Partnership for Effective Development Co-operation,* (2011), http://www.oecd.org/dac/effectiveness/49650173.pdf; United Nations High-level Event on the Millennium Development Goals, July 25, 2008, *Committing to Action: Achieving the Millennium Development Goals*, ¶ 1 (Sept. 25, 2008), *available at* http://www.un.org/millenniumgoals/2008highlevel/pdf/commiting.pdf.

Given this disparity, the question that arises is whether this advantage or the new commitment itself has resulted in better health for children in the region? Or, rather, does MDG 4 hold potential for improving the health of African children? What is the current situation and what are the factors sustaining the status quo? What strategies and initiatives are needed in order to position the region toward meeting the targets and benchmarks of the MDGs? These are some of the critical questions that are confronted in this paper.

This paper consists of five sections. Following the introduction, Part II of this paper considers the state of infant and child health in Africa. By examining recent data on key indicators relating to children's health such as the U5MR, infant mortality rate ("IMR"), and proportion of 1 year-old children immunized against measles, the section shows that the state of health of children in the region is abysmal and in urgent need of remedial measures. In Part III, the paper explores critical challenges militating against securing the health of African children. Its focus is on five factors it considers paramount: early or child marriage, maternal illiteracy, parental poverty, dearth of skilled health professionals, and institutional poverty and leadership deficit. The section also enumerates a number of interventions it projects as holding the key to reversing the trend and positioning the region toward attaining MDG 4. While not claiming that the list is exhaustive of the factors militating against health of children in the region, it argues that they are the most vital, and addressing them via the interventions identified is indispensable to success. Part IV casts challenges in the realm of children's health as human rights issues and posits that a human rights based approach is foundational to any sustainable eradication program. Specifically, the section demonstrates the inextricable relationship between human rights and children's health, contending that the indivisibility and interdependence paradigm invites a comprehensive and multifaceted response to the health quandary in Africa. In other words, other needs that are linked with the health of children, such as maternal health and literacy, must receive priority attention in policy frameworks designed to catapult nations in the region toward attaining the objectives of MDG 4. The conclusion – Part V – rejects resource constraints as explanatory of the dismal state of children's health in Africa; instead, it identifies what it calls "political cabalism" as the main culprit. Relying on the pro-poor vision of Pope Francis, it calls upon the citizenry to jettison docility and demand good governance as a human right.

II. State of Infant and Child Health in Africa

Examining the state of infant and child health in Africa involves making one critical assessment – determining whether progress has been made or is being made on three crucial fronts, namely, (i) U5MR, (ii) IMR and (iii) proportion of 1 year-old children immunized against measles. These are the indicators for monitoring progress toward MDG 4. In other words, the indicators are proxies for assessing the health status of infants and children within particular health systems or jurisdictions. Positive numbers in any of these three areas indicate

progress and, of course, the reverse is equally true. So, how are countries in Africa faring?

In all these key areas, sub-Saharan Africa is not on par with other regions. Not only does the region account for 38 percent of neonatal deaths globally and the highest neonatal mortality rate (34 deaths per 1,000 live births in 2010), it remains the region with the least improvement over the last two decades, a record it shares with Oceania.[11] In 2011, there were 24 countries with an U5MR above 100 deaths per 1,000 live births, 23 of them in sub-Saharan Africa.[12] Even worse, one in every nine children born in the region dies before age five.[13] The U5MR in Africa, at 107 deaths per 1,000 live births, is astronomically high in comparison to other regions; America and Europe suffer just 16 and 13 deaths per 1,000 live births, respectively.[14]

But the region has also witnessed some progress. Although not by any means contained, the region's U5MR is on a downward trend. From 175 per 1,000 live births in 1990, the U5MR declined to 153 in 2000, and even further to its current level of 107.[15] The IMR is also falling; it now stands at 68 deaths per 1,000 live births, compared to 106 in 1990.[16] Disaggregated figures reveal a deep gulf between the performances of individual countries. The U5MR in Botswana plummeted from 53 deaths per 1,000 live births in 1990 to 26 in 2011, and its IMR fell from 41 in 1990 to 20 in 2011.[17] Some nations have fared even better. Liberia has cut its U5MR at least two-thirds since 1990 whereas Ethiopia, Madagascar, Malawi, Niger, and Rwanda have achieved reductions of at least 60 percent.[18] But although Sierra Leone also showed some progress, its U5MR having dropped from 267 in 1990 to 185 in 2011 and IMR declining from 158 in 1990 to 119 in 2011, the numbers are still unacceptably high.[19] High mortality among children in Africa is rooted in several factors, including malnutrition,[20] pneumonia, diarrhea, malaria, under-nutrition, and measles.[21]

A critical issue worth noting is that most of these conditions and pathologies are easily preventable and treatable and yet, inexplicably, have continued to rav-

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[11] U.N. Dep't of Econ. & Soc. Affairs, The Millennium Development Goals Report 2013 26, U.N. Sales No. E.13.I.9 (2013), *available at* http://www.un.org/millenniumgoals/pdf/report-2013/mdg-report-2013-english.pdf [hereinafter U.N. MDG Report 2013].

[12] *Id.* at 25.

[13] *Id.*

[14] World Health Org., World Health Statistics 2013 59 (2013) [hereinafter World Health Statistics 2013].

[15] World Health Statistics 2013, *supra* note 14, at 59.

[16] *Id.*

[17] *Id*. at 51.

[18] U.N. MDG Report 2013, *supra* note 11, at 25.

[19] World Health Statistics 2013, *supra* note 14, at 57.

[20] African Union, *The African Health Strategy: 2007 – 215, Third Session of the African Union Conference of Ministers of Health, Johannesburg, South Africa*, ¶ 9, CAMH/MIN/5(III) (2007) [hereinafter The African Health Strategy] (reporting that in some parts of Africa, malnutrition accounts for as much as 60 percent of deaths of children less than five).

[21] U.N. MDG Report 2013, *supra* note 11, at 26.

age the lives of children in the region. The fact that Africa leads the rest of the world in child morbidity and mortality powerfully demonstrates a lack of capacity to take appropriate remedial actions which, in most cases, is the direct result of unwillingness to commit resources that would strengthen health systems in the region and enable them to swiftly respond to the needs of this vulnerable segment of society.[22] This is a governance issue. It is less taxing to explain malnutrition of children in countries prone to climatic vagaries (droughts in particular) such as Niger[23] and Ethiopia[24] than in the vast majority of countries, which are dissimilarly situated. Still, 31 percent of children less than five years old in Africa were underweight in 1990; that number marginally improved to 27 percent in 2008.[25] Although recent data shows further decline to 21 percent, the number is still unjustifiably high, as there are 30 million underweight children in sub-Saharan Africa.[26] Thus, like other easily surmountable challenges in Africa, being underweight (the inevitable result of malnutrition or undernourishment) continues to pose a major threat to children's health in the region.[27] The cure is simple – adequate nutrition.[28] It is one that cannot elude any responsible government, in Africa or elsewhere. Yet, in what is best described as an ironic twist of fate, undernourishment remains a stark reality in many households despite the fact that 60 percent of the world's uncultivated arable land is in Africa.[29]

Aside from the high number of underweight children, there is also the problem of measles. Measles are easily and cheaply preventable with timely inoculation but remain a pervasive killer disease in several African countries. Together with Southern Asia, sub-Saharan Africa accounts for 90 percent of all measles deaths globally.[30] And notwithstanding affordability (the cost of measles vaccination is a paltry $1),[31] weak health systems and institutional misprioritization combine to deny this life-saving measure to millions of children in the region. Obviously, accelerating the pace of immunization coverage is possible with stronger political

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[22] U.N. MDG REPORT 2013, *supra* note 11, at 24 (reporting that one in nine children in sub-Saharan Africa die before age five, more than 16 times the average for developed regions).

[23] *Niger Drought Leaves Millions on the Brink of Starvation,* Huffington Post (June 9, 2010, 2:15 PM), http://www.huffingtonpost.com/2010/06/09/niger-drought-leaves-mill_n_606085.html (reporting that as a result of severe drought in Niger, almost half of the country's population of 15 million are battling malnutrition, three million of them on the brink of starvation).

[24] Luc Van Kemenade, *Ethiopia: Hunger during Worst Drought in 60 Years*, Huffington Post (Aug. 17, 2011, 12:03 PM), http://www.huffingtonpost.com/2011/08/17/ethiopia-hunger-drought_n_928989.html (blaming severe drought for rising number of people, up to 700,000, in need of food aid).

[25] U.N. DEP'T OF ECON. & SOC. AFFAIRS, THE MILLENNIUM DEVELOPMENT GOALS REPORT 2010 13, U.N. Sales No. E.10.I.7 (2010), *available at* http://www.un.org/millenniumgoals/pdf/MDG%20Report%202010%20En%20r15%20-low%20res%2020100615%20-.pdf. Only Southern Asia fares worse. *Id.*

[26] U.N. MDG REPORT 2013, *supra* note 11, at 11.

[27] The African Health Strategy, *supra* note 20, ¶ 9.

[28] *See* UNICEF, *State of the World's Children 2009: Maternal and Newborn Health*, at iii, U.N. Sales No. E.09.XX.1 (2009).

[29] J. O'S., *Farming in Africa: Cold Comfort Farms,* The Economist (Sept. 4, 2013, 6:10 PM), http://www.economist.com/blogs/baobab/2013/09/farming-africa.

[30] U.N. MDG REPORT 2013, *supra* note 11, at 27.

[31] *Measles Pre-Elimination*, WORLD HEALTH ORG., (http://www.afro.who.int/en/clusters-a-programmes/mte/measles-pre-elimination.html (last visited Mar. 31, 2014).

and financial commitment in countries lagging behind.[32] But whether this commitment will be made is a different question altogether. True, the rate of immunization against measles is increasing but not at a fast enough pace to annihilate the menace posed by the disease any time soon.[33]

Measles immunization coverage for one-year-old children in Africa is lower than in any other part of the world, at 75 percent, compared to 92 and 94 percent respectively in the Americas and Europe.[34] There are also wide differences amongst countries. Seven countries in the region – Seychelles, Mauritius, Malawi, Cape Verde, Eritrea, Rwanda, and Swaziland – achieved coverage rates of 95 to 99 percent in 2011.[35] Others do not fare as well. Chad, for instance, managed to provide coverage to just 28 percent of children within its territory.[36] Still another menace is malaria. Children can be protected from this disease by increasing ownership and use of insecticide-treated mosquito nets; and where prevention fails, by treatment with appropriate anti-malaria therapy.[37] On these two counts, progress has been slow.[38] But there are other factors obstructing the march toward optimal health for infants and children in Africa.

III. Key Challenges and Necessary Interventions

The abysmal state of infant and child health in the vast majority of countries in Africa is a strident testament to the multifarious nature of the difficulties confronting the region. Akin to maternal health in Africa,[39] there is never a shortage of challenges in the realm of children's health. What is lacking – critically, in some cases – is the means, or rather the will, to surmount these difficulties. Indeed, even in affluent regions of Europe and North America, lingering resource constraints remain the primary bane to complete victory, in the sense of universal access to health care and availability of social health determinants. Nonetheless, the near total inertia in deploying the kind of resources needed to lessen the health burden on the citizenry in Africa is not explained solely on the basis of finite resources. Even amidst scarcity, there are a number of resource-friendly, low cost interventions that could have enormous remedial impact but have, inexplicably, been relegated to the back burner. In many cases, what political leadership in the region unabashedly packages and sells to the global community as "resource constraints" is nothing more than evidentiary of governance vacuum in

[32] U.N. MDG Report 2013, *supra* note 11, at 27.

[33] *See id.* (noting that as of 2011, 74 percent of children in sub-Saharan Africa had received at least one dose of measles-containing vaccine compared to 53 percent in 2000).

[34] World Health Statistics 2013, *supra* note 14, at 104.

[35] *Id.* at 95-102.

[36] *Id.* at 96.

[37] Obiajulu Nnamuchi, *Millennium Development Goal 6 and the Trifecta of HIV/AIDS, Malaria and Tuberculosis in Africa: A Human Rights Analysis,* 40 Denv. J. Int'l L. & Pol'y (forthcoming 2014).

[38] *Id.*

[39] *See* Obiajulu Nnamuchi, *Millennium Development Goal 5, Human Rights, and Maternal Health in Africa: Possibilities, Constraints and Future Prospects*, 23 Annals Health L. 92, 97 (discussing the challenges Africa is confronting in its effort to attain MDG 5 and suggesting remedial measures).

the region. To put it differently, the atrocious state of the health of children in sub-Saharan Africa is the direct result of the failure of various governments in the region to meet their obligations to children and the rest of the population.

There are, of course, multiple areas of difficulty in protecting children's health in Africa but, for the sake of brevity, this section focuses on the major ones, namely, early marriage, maternal illiteracy, parental poverty, unavailability of skilled health personnel, institutional poverty, and leadership void in the region.

A. Early Marriage

A statement credited to an organization whose professed mission centers on women empowerment, advancing gender equality, and fighting poverty in the developing world aptly summarizes the circumstances surrounding early or child marriage in many third world countries:

> Child marriage most often occurs in poor, rural communities. In many regions, parents arrange their daughter's marriage unbeknownst to the girl. That can mean that one day, she may be at home playing with her siblings and the next, she's married off and sent to live in another village with her husband and his family – strangers, essentially. She is pulled out of school. She is separated from her peers. And once married, she is more likely to be a victim of domestic violence and suffer health complications associated with early sexual activity and childbearing.[40]

This is not a uniquely African problem. Instead, it is a challenge confronting many countries in poorer regions of the world. In fact, Africa is not the worst affected. A study on women aged 15 to 24 reveals that in South Asia, 48 percent (equivalent to 9.7 million girls) were married before reaching 18 years old whereas in African and the Caribbean, the figures are 42 and 29 percent respectively.[41] Although the rate is high in Africa, disaggregated figures show that the numbers are unevenly spread amongst countries in the region, ranging from as low as 8 percent in South Africa to as high as 77 percent in Niger.[42]

The geographic prevalence of this practice suggests a causal link with poverty. The regions implicated in this menace are poorer than the rest of the world. In fact, cross country analysis shows the practice to be most prevalent among the poorest 20 percent of the population.[43] Thus, it is no coincidence that the African country in which the practice is most common, Niger,[44] ranks amongst the

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[40] *Child Marriage*, INTERNATIONAL CENTER FOR RESEARCH ON WOMEN, http://www.icrw.org/what-we-do/adolescents/child-marriage (last visited Mar. 31, 2014).

[41] UNICEF, EARLY MARRIAGE: A HARMFUL TRADITIONAL PRACTICE 4 (2005), available at http://www.unicef.org/publications/files/Early_Marriage_12.lo.pdf [hereinafter EARLY MARRIAGE: A HARMFUL TRADITIONAL PRACTICE].

[42] *Id.* at 4 (limiting the study to women aged 20–24 married by the exact age of 18).

[43] EARLY MARRIAGE: A HARMFUL TRADITIONAL PRACTICE, supra note 41, at 6, 12.

[44] *Id.* at 4.

poorest in the world,[45] as do Chad[46] and Mali,[47] two other nations with high rates of child marriage.[48] A useful way to evaluate the link between poverty and child marriage is to see the latter as a consequence of the former, a symptom of a much deeper social pathology. In every country where early marriage is common, poverty is a perpetuating factor.[49] And just as a therapeutic intervention targeting symptomatic manifestations of an illness, in isolation of the underlying pathology, is bound to fail, efforts at eliminating the menace of early marriage risk failing in the absence of incorporating credible and sustainable antipoverty strategies in eradication frameworks. This is a lesson that needs to be imbibed by countries committed to meeting its MDG obligations relating to child health, in Africa and elsewhere.

Aside from economic difficulties, there are other factors contributing to high rates of child marriage in affected countries, including tradition, family honor, sexual purity, and out-of-wedlock pregnancy protection strategy.[50] There is no gainsaying that these rationales are sensible. Reasonable persons would agree that sexual purity is a moral value parents should desire for their children. The same is true, at least in conservative societies, of the need to protect young girls from premarital pregnancy. Nevertheless, these seemingly well-grounded rationales would quickly evaporate when weighed against the adverse consequences that would inevitably befall these children on account of early marriage.

There are several deleterious consequences resulting from early marriage. These problems may be subsumed under a number of headings such as physical violence, adverse health consequences, psychological, emotional, and human rights abuses. The key to understanding the health risks of early marriage is to pay attention to the end result: early or teenage pregnancy, which in itself is an adverse health factor.[51] The younger a girl is at the time of pregnancy, the greater the health risk for the baby and herself.[52] Teenagers are more likely than adult women to die as a result of childbirth or other pregnancy-related complica-

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[45] UNDP, Human Development Report 2013: The Rise of the South: Human Progress in a Diverse World 161 (2013) (reporting that 43.6 percent of the population lives below the international poverty line, on less than $1.25 per day).

[46] *See id.* (Reporting that nearly 62 percent of the population lives below the poverty line).

[47] *See id.* (Finding that 50.4 percent of the population lives below the poverty line).

[48] *See* EARLY MARRIAGE: A HARMFUL TRADITIONAL PRACTICE, supra note 41, at 4 (reporting that nearly 72 and 66 percent of women aged 20 – 24 in Mali and Chad respectively were married at exact age of 18, third and second worse in Africa, after Niger).

[49] UNICEF Innocenti Research Centre, *Early Marriage: Child Spouses* INNOCENTI DIG. 1, 1 (Mar. 2001), *available at* http://www.unicef-irc.org/publications/pdf/digest7e.pdf [hereinafter *Early Marriage: Child Spouses*] (citing economic considerations as a factor prompting parents to submit their under-age children to marriage and using the term "economic arrangement" to describe the process). *See also* Robert Jensen & Rebecca Thornton, *Early Female Marriage in the Developing World*, 11 Gender & Dev. 17 (2003) (citing high cost of raising children as a reason parents marry off their daughters quite early).

[50] *Early Marriage: Child Spouses*, *supra* note 49, at 2.

[51] UNICEF, The State of the World's Children 2009: Maternal and Newborn Health, at iii, U.N. Sales No. E.09.XX.1 (2009).

[52] *Id.*

tions.[53] Pregnant girls who are fifteen years or younger are five times more likely to die during childbirth than women in their twenties.[54] Furthermore, children begotten by mothers aged less than eighteen years have a 60 percent greater chance of dying within their first year of birth than those born to mothers who are above eighteen.[55] High rates of mortality resulting from these circumstances demonstrate the seriousness of the challenges posed by child marriage. Alarmingly, despite the fact that of all maternal deaths amongst teenagers fifteen to nineteen years old, 70,000 annually are associated with early pregnancy (the inevitable consequence of early marriage),[56] 42 percent, of the girls in Africa are married before they turn eighteen.[57]

Obstetric fistula – perforation in a woman's birth canal from prolonged obstructed labor which leaves her incontinent – is yet another harmful consequence of early marriage. Aptly described as "Africa's silent epidemic,"[58] the condition disproportionately affects pregnant girls.[59] Evidence of causal relationship between child marriage and obstetric fistula is provided by the fact that the condition is more prevalent in areas where child marriage is common.[60] In Nigeria, for instance, there is greater prevalence of the condition in the less developed northern part of the country, the same area with the highest number of child marriages.[61] An often glossed over misconception is that there is a causal link between female circumcision and obstetric fistula.[62] This is false. There is a great amount of credible scientific evidence that debunks this claim.[63] Tackling obstetric fistula involves adopting policies aimed at preventing early pregnancy, abolition of harmful traditional practices (such as self-delivery or use of the ser-

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[53] DEP'T OF ECON. & SOC. AFFAIRS OF THE U.N. SECRETARIAT, THE MILLENNIUM DEVELOPMENT GOALS REPORT, at 28, U.N. Sales No. E.09.I.12 (2009), *available at* http://www.un.org/millenniumgoals/pdf/MDG_Report_2009_ENG.pdf.

[54] *Id.*

[55] *Id.*

[56] *Id.*; UNICEF, The State of the World's Children 2009, *supra* note 51, at iii.

[57] UNICEF, EARLY MARRIAGE A HARMFUL TRADITIONAL PRACTICE 4 (2005), available at http://www.unicef.org/publications/files/Early_Marriage_12.lo.pdf.

[58] Alan White, *Obstetric Fistula: Africa's Silent Epidemic,* NewStatesman, (July 4, 2013, 11:08 AM), http://www.newstatesman.com/world-affairs/2013/07/obstetric-fistula-africas-silent-epidemic.

[59] L. Lewis Wall, et al., *The Obstetric Vesicovaginal Fistula: Characteristics of 899 Patients from Jos, Nigeria,* 190 Am. J. Obstet. Gynecol. 1011– 1016 (2004); D.P. Ghatak, *A Study of Urinary Fistulae in Sokoto, Nigeria,* 90 J. Indian Med. Assoc. 285-287 (1992).

[60] UNFPA & Engender Health, OBSTETRIC FISTULA NEEDS ASSESSMENT REPORT: FINDINGS FROM NINE AFRICAN COUNTRIES 58 (2003), *available at* http://www.unfpa.org/fistula/docs/fistula-needs-assessment.pdf.

[61] *Id.*

[62] White, *supra* note 58.

[63] Birgitta Essén *et al*., *Is There an Association Between Female Circumcision and Perinatal Death?,* 80 Bull. World Health Org. 629, 630 (2002) (finding that none of the perinatal deaths in study was related to circumcision); Andrew Browning et al., *The Relationship Between Female Genital Cutting and Obstetric Fistulae*, 115 Obstet. Gynecol. 578, 580-82 (2010) (reporting absence of causality between FGR and obstetric fistulae); Amber Peterman & Kiersten Johnson, *Incontinence and Trauma: Sexual Violence, Female Genital Cutting and Proxy Measures of Gynecological Fistula*, 68 Soc. Sci. & Med. 971-79 (2009) (finding that there is no association between genital cutting and fistula formation from obstructed labor).

vices of unskilled traditional birth attendants), improving access to prenatal services and promoting access to timely obstetric care.[64]

Another stark reality of early marriage is inter-spousal or domestic violence, "a major contributing factor to the ill-health of women"[65] and one of the most insidious forms of gendered violence.[66] Aside from the degrading nature and cruelty, which are its defining features, the indignity, disability, fatality, and other forms of harm that result when women suffer violence at the hands of their husbands make it a human rights issue.[67] Although domestic violence cuts across all ages, affecting women throughout their life cycle, from birth through death, younger women are disproportionately impacted.[68] Unlike women who were married as adults, child brides are typically much younger than their husbands, in some cases by ten or more years, – the so-called husband-wife age gap.[69] Unequal relationships fostered by such gaps, including a difference in physical strength, means that child brides are more prone to violence than older and invariably more experienced women. Moreover, women who married at younger ages are more likely not only to accept that it is justifiable for a husband to beat his wife, but also to have experienced physical violence.[70] In a recent study, 62 to 67 percent of women who were married before the age of fifteen approve of wife battery by husband under certain circumstances, compared to 36 to 42 percent of women who married between the ages of twenty-six and thirty.[71] This is troubling. According to a WHO study, women who had experienced

64 *10 Facts on Obstetric Fistula*, WORLD HEALTH ORG. (Mar. 2010), http://www.who.int/features/factfiles/obstetric_fistula/en/index.html.

65 World Health Org., WHO MULTI-COUNTRY STUDY ON WOMEN'S HEALTH & DOMESTIC VIOLENCE AGAINST WOMEN: INITIAL RESULTS ON PREVALENCE, HEALTH OUTCOMES AND WOMEN'S RESPONSES vi (2005) [hereinafter WHO Multi-Country Study].

66 U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation 19, Violence Against Women,* 1, U.N. Doc. A/47/38 (1992), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 243 ¶ 23, U.N. Doc. HRI/GEN/1/Rev.6 (2003) [hereinafter *General Recommendation 19*].

67 WHO MULTI-COUNTRY STUDY, *supra* note 65, at 15 (noting the rate of injury amongst women who were ever-abused women in the countries studied as ranging from nineteen to fifty-five percent, with some sustaining serious injuries such as broken bones, injuries to ears and eyes and asserting that poor health is more prevalent amongst women who had experienced domestic violence compared to those who had not). *See also* African Comm'n on Human and Peoples' Rights, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, pmbl. ¶ 9, art(s). 1(j), 3, 4, 5(d), 11(3), 22(b), 23(b), Sept. 13, 2000, CAB/LEG/66.6 [hereinafter Maputo Protocol], *reprinted in* 1 Afr. Hum. Rts. L.J. 40 (calling, in line with the African Platform for Action and the Dakar Declaration of 1994 and the Beijing Platform for Action of 1995, upon States to "take concrete steps to give greater attention to the human rights of women in order to eliminate all forms of discrimination and of gender-based violence against women"). *See also* Convention on the Elimination of All Forms of Discrimination Against Women art(s). 2(f), 3, 5, 6, 10(c), 11, 12, 14, 16, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; *General Recommendation 19*, *supra* note 66, ¶¶ 1 – 11, 23, 24.

68 WHO MULTI-COUNTRY STUDY, *supra* note 65, at 8 (reporting that girls aged fifteen to nineteen are at higher risk of violence from their partners).

69 Robert Jensen & Rebecca Thornton, *Early Female Marriage in the Developing World,* 11 GENDER DEV. 9, 13 – 14 (2003) (finding that women who marry at a young age are more likely to marry older men).

70 *Id.* at 16.

71 *Id.*

spousal abuse are more likely to accept the conduct as normal compared to those who had not.[72]

The danger in such widespread acceptance or normalization is that it accentuates the vulnerability of such women by rendering them more susceptible to future physical abuse since one cannot accept a particular conduct as normal and subsequently turn around to challenge it.[73] An informant, who was once herself a victim, seems to be echoing the same point in this response to an interviewer's questions: "I suffered for a long time and swallowed all my pain. That's why I am constantly visiting doctors and using medicines. No one should do this."[74] Obviously, this is an outcome no prudent person would endorse. It is also one that calls for urgent action. For countries interested in tackling this challenge, a productive starting point would be to reexamine their human rights commitments to women.

Both the Maputo Protocol and the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"),[75] to which many countries in Africa are States Parties, explicitly prohibit discrimination in all facets of life, including domestic violence, and additionally require the adoption of "appropriate legislative, institutional and other measures" to achieve this purpose.[76] Compliance with these provisions would include awareness campaigns, sensitization on the dangers of domestic violence, swift prosecution and punishment of offenders, and the empowerment of women by effacing obstacles to acquiring education and boosting independent ownership of resources.

Apart from domestic violence, there are still several other human rights issues inhering in children who are imperiled by early marriage. Some of these rights are freedom of association,[77] right to movement,[78] right to education,[79] and freedom of religion.[80] Betrothal and marriage of children infringe upon these rights by fostering inequality in the marital relationship.[81] The age, experience, socioeconomic and other differences between teenage wives and their husbands skew

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[72] WHO Multi-Country Study, *supra* note 65, at 10.

[73] WHO Multi-Country Study, *supra* note 65, at 19 (finding that twenty-nine to eighty-six percent of respondents in the country studied cited, as the most common reason given for not seeking help, their perception of the violence as normal or not serious).

[74] WHO Multi-Country Study, *supra* note 65, at 16.

[75] CEDAW, *supra* note 67, art. 2.

[76] *Id.*; Maputo Protocol, *supra* note 67, art. 2(1).

[77] Int'l Covenant on Civil & Political Rts. art. 22(1), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); Org. of African Unity, African Charter on Hum. & Peoples' Rts. art. 10, OAU Doc. CAB/LEG/67/3 rev. 5 (June 27, 1981) (entered into force Oct. 21, 1986).

[78] Int'l Covenant on Civil & Political Rts., *supra* note 77, art. 12; African Charter on Hum. & Peoples' Rts., *supra* note 77, art. 12.

[79] Int'l Covenant on Econ., Soc. & Cultural Rts. art. 13, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); African Charter on Hum. & Peoples' Rts., *supra* note 77, art. 17.

[80] Int'l Covenant on Civil & Political Rts., *supra* note 77, art. 18; African Charter on Hum. & Peoples' Rts., *supra,* note 77, art. 8.

[81] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) , art. 16(1) (Dec. 10, 1948) ("Men and women of full age . . . have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.").

power dynamics to the advantage of husbands, an unfair advantage that is traditionally exploited by the latter.[82] Evidence of this exploitation is found in restrictions imposed upon child-wives regarding their movement,[83] with whom they may associate,[84] denial of educational opportunities (those already in school are usually withdrawn), and forcible adoption of the religion of their husbands.

At the root of all these infractions is a breach of two crucial human rights at the time of the marriage: autonomy[85] and consent.[86] Although parents tend to arrogate to themselves the power of proxy consent in child marriage, this is legally as well as ethically wrong. It is an illegitimate usurpation of the right of the child. Even though surrogacy powers generally inhere in parents in circumstances where the child lacks capacity to understand the nature and consequences of the act in question, such proxy powers must be exercised to advance the interests of the child. The power is nullified when its exercise, as in child marriage, jeopardizes the health and wellbeing of the child.[87] Moreover, as argued elsewhere:

> While, for very good reasons, parents enjoy wide latitude in determining and pursuing interests they consider congruent with the well-being and security of their children, they are, nonetheless, not at liberty to make decisions that would detrimentally impact the children . . . Under normal circumstances, the court would step in to protect the right of parents to raise their children according to the dictates of their . . . conscience . . . The best interest of the children is always the guiding principle . . . On

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[82] Robert Jensen & Rebecca Thornton, *Early Female Marriage in the Developing World,* 11 GENDER DEV. 9, 14 (2003).

[83] *Id.* (noting that seventy percent of women who marry under the age of fifteen in India are required by their husbands to obtain permission before they could go to market, or to visit family or friends).

[84] *Id.*

[85] Jensen & Thornton, *supra* note 82 (reporting, as an instance of greater susceptibility to breach of autonomy, that forty-three percent of women who marry before the age of fifteen and thirty-five percent of those marrying before twenty, are not allowed to keep money, compared to only twenty-one to twenty-five percent of those who marry when they are twenty-one or older).

[86] Universal Declaration of Hum. Rts., *supra* note 81, art. 16(2) ("Marriage shall be entered into only with the free and full consent of the intending spouses"); Convention on Consent to Marriage, Minimum Age for Marriage & Registration of Marriages art. 1, Dec. 9, 1964, 521 U.N.T.S. 231 (stating that "no marriage shall be legally entered into without the full and free consent of both parties. . ."); Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 79, art. 13; African Charter on Hum. & Peoples' Rts., *supra* note 77, art(s). 17, 23 (stipulating that "[m]arriage must be entered into with the free consent of the intending spouses."); CEDAW, *supra* note 67, art. 16 (recognizing equality in men and women in respect to entering into marriage with free and full consent as well as the same rights and responsibilities in marriage and dissolution).

[87] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 1, Apr. 30, 1957, 226 U.N.T.S. 3 ("Each of the States Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of . . .(c) Any institution or practice whereby: (i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group.") *See also* CEDAW, *supra* note 67, art. 16(2) (prohibiting child marriage and requiring States Parties to specify a minimum age); ACRWC, *supra* note 2, art. 21(2) (barring child marriage but requiring States Parties to specify eighteen years as the minimum age of marriage and make registration of marriages in an official registry compulsory).

> the other hand, where there is evidence that this right has been or is at the risk of being abused, the court will step in to protect the children . . . In other words, the right of parents to raise their children is not absolute . . . It may be abridged where non-intervention by the State will expose the child to unnecessary risk or harm.[88]

Since marriage contracted in absence of true consent harbors deleterious consequences for teenage wives, it may be argued, following the reasoning in *Prince v. Massachusetts,*[89] that parental consent obtained in such cases is suspect and should be abrogated. The exposure to or potential for harm is the critical and decisive consideration. In this sense, child marriage, regardless of the so-called parental consent, is tantamount to forced marriage, which is a breach of autonomy.

One of the dark sides of this kind of marriage is that it strips the wife of decision-making powers, even those that are health-related, and vests the same powers in the husband whose interests may not be the same as the wife's. Sadly, of the thirty countries reported by UNICEF in 2009 as countries where women have no say in their own healthcare needs, only twelve were non-African.[90] The problem with having health decisions made by husbands, particularly amongst women who married at an early age as opposed to those married as adults,[91] is that it goes against the principle of individual empowerment or, in public health language, "health promotion", which is defined as a "process of enabling people to increase control over, and to improve, their health."[92] Health promotion (as a form of individual empowerment) is a public health tool predicated on making each individual responsible for his or her own health.[93] Its importance lies in enabling the individual to reduce exposure to conditions or circumstances, such as the denial of access to reproductive services, for instance,[94] that results in illness, thereby protecting her against the pain, suffering and other losses which she may have otherwise suffered.[95]

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[88] Obiajulu Nnamuchi, *Harm or Benefit? Hate or Affection? Is Parental Consent to Female Genital Ritual Ever Defensible?*, 8 J. Health Biomedical L. 377, 418 (2013).

[89] Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944) (ruling that parental rights are not absolute and may be abridged where its exercise is inconsistent with the welfare and best interests of the child).

[90] UNICEF, *supra* note 28, at 40.

[91] UNICEF, Early Marriage: A Harmful Traditional Practice 24 (2005), available at http://www.unicef.org/publications/files/Early_Marriage_12.lo.pdf.

[92] WHO, *The Ottawa Charter for Health Promotion: First Int'l Conference on Health Promotion*, (Nov. 21, 1986).

[93] Obiajulu Nnamuchi, Health and Millennium Development Goals in Africa: Deconstructing the Thorny Path to Success, *in* The Right to Health: A Multi-Country Stud. of L., Pol'y & Prac. (Obiajulu Nnamuchi et al., eds., forthcoming, 2014).

[94] CEDAW, *supra* note 67, art. 10(h) (vesting in wives and husbands the same rights pertaining to family planning and access to reproductive health services).

[95] Nnamuchi, Health and Millennium Development Goals in Africa, *supra* note 93.

B. Maternal Illiteracy

The fact that international law recognizes universal education as a fundamental human right is incontrovertible.[96] The foremost international human rights instrument on socioeconomic rights – ICESCR (31 articles in all) – mentions the word "education" at least 18 times.[97] Similarly, CEDAW employ the word 14 times[98] and there are at least 20 uses of it in the CRC.[99] For countries in Africa, regional treaties incorporate comparable provisions. In the context of child health and education, the regional women-centered human rights instrument adopted in July 2003 is particularly striking.[100] Article 12(2) of the Maputo Protocol mandates States Parties to: (a) promote literacy among women; (b) promote education and training for women at all levels and in all disciplines, particularly in the fields of science and technology; and, (c) promote the enrolment and retention of girls in schools and other training institutions and the organization of programs for women who leave school prematurely. Obviously literacy is important to all human demographics, but is even more so for children considering their vulnerability and dependence on others, particularly mothers, for their survival.

Titling this subsection "maternal illiteracy" speaks to the danger that awaits children born to illiterate mothers and the sense of urgency that should guide strategies for curative measures. As to why this is important, this author explains, in a related context:

> A key reason maternal health should occupy center stage in health policy formulation is that its neglect often has drastic domino-like consequences – consequences that extend far beyond the corridors of maternal wards to affect other segments of the population, particularly children. This is particularly true in the realm of literacy or illiteracy amongst women.[101]

The best way to understand these domino-like consequences and the link between maternal literacy (or illiteracy) and the health of their children is to think of education in terms of empowerment. An empowered individual is one who knows how to attend to life challenges even if, despite her best efforts, she is unable to conquer them. In its most elementary form, being empowered connotes knowledge as to navigating the complexities of life; that is, the capacity to surmount challenges to human wellbeing, and knowing how to overcome obstacles that are in the path to acquiring basic needs. It is in this box that we must place

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[96] Universal Declaration of Hum. Rts., *supra* note 81, art. 26; Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 79, art. 13; CEDAW, *supra* note 67, art. 10; CRC, *supra* note 1, art. 28.

[97] Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 79, art(s). 10(1), 13(1), 13(2)(a), 13(2)(b), 13(2)(c), 13(2)(d), 13(3),13(4), 14.

[98] CEDAW, *supra* note 67, pmbl. ¶ 8, art(s). 5(b), 10 (¶ 1), 10(a), 10(c), 10(e), 10(g), 10(h), 14(2)(d), 16(e).

[99] CRC, *supra* note 1, art(s). 19(1), 23(3), 23(4), 24(2)(e), 24(2)(f),28(1), 28(1)(a), 28(1)(b),28(1)(c), 28(1)(d), 28(3), 29(1), 29(2), 32(1), 32(2), 33, 40(3)(b).

[100] Maputo Protocol, *supra* note 67, art. 12(2).

[101] Nnamuchi, *Millennium Development Goal 5, Human Rights and Maternal Health in Africa*, *supra* note 39, at 110.

unempowered or illiterate women in order to fully appreciate the insidious role this factor plays in their children's health and wellbeing. The maxim *nemo dat quod non habet* is apposite here: a woman who is unempowered or illiterate in the sense that she cannot, for instance, navigate the health system for her own benefit cannot reasonably be expected to attend to the health needs of her child. As argued elsewhere:

> The kernel of individual empowerment is that it reduces exposure to [health] problems, saving the individual from the pain, suffering and expenses to which he could have otherwise been exposed. But there are two challenges that must be overcome to harness this benefit, namely, educating individuals about health promotion or preventive care, and creating access to resources that would make it possible for them to put the knowledge to productive use.[102]

Thus situated, it becomes easy to understand how illiteracy can transform mothers into risk factors for the healthy development of their children. To put this in proper perspective, children whose mothers are uneducated have about a 2.5 times higher risk of death than those born to mothers that have acquired secondary school or higher level of education.[103]

Since the health of children is intimately intertwined with the health and wellbeing of their mothers and the health of the latter is, aside from genetic factors, a product of her level of knowledge or education, it follows that there is a strong correlation between academic attainment of mothers and the health of their children. The two critical predictors of the likelihood of giving birth to a healthy baby are a willingness to adopt necessary lifestyle changes and the ability to access reproductive health services, including antenatal and prenatal care. Greater compliance with these measures is more likely to be found amongst educated women than uneducated ones. In fact, studies show that women who are literate are more likely to seek reproductive health and family planning services than uneducated ones[104] – meaning that the higher the level of maternal education, the better for the health of the child. This realization, perhaps, explains the stance of the ICESCR, in mandating compulsory and free primary education and progressive (gradual introduction of free tuition) availability of secondary and tertiary education to everyone.[105] For countries interested in protecting the

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[102] Nnamuchi, Health and Millennium Development Goals in Africa, supra note 93.

[103] World Health Org., The World Health Report 2005: Make Every Mother and Child Count 26 (2005) (reporting specifically on Nigeria, although there is no reason the result would be any different in countries similarly placed; that is, in terms of comparable level of socioeconomic development).

[104] *See generally* Chryssa McAlister & Thomas F. Baskett, *Female Education and Maternal Mortality: A Worldwide Survey*, 28 J. Obstet. Gynecol. Can. 983 (2006); Saffron Karlsen et al., *The Relationship between Maternal Education and Mortality Among Women Giving Birth in Health Care Institutions: Analysis of the Cross Sectional WHO Global Survey on Maternal and Perinatal Health*, 11:606 BMC Public Health 1 (2011), http://www.biomedcentral.com/content/pdf/1471-2458-11-606.pdf; Jose Luis Alvarez et al., *Factors Associated with Maternal Mortality in Sub-Saharan Africa: An Ecological Study*, 9:462 BMC Public Health 1 (2009), http://www.biomedcentral.com/content/pdf/1471-2458-9-462.pdf; Sarah McTavish et al., *National Female Literacy, Individual Socio-Economic Status, and Maternal Health Care Use in Sub-Saharan Africa*, 71 Soc. Sci. & Med. 1958 (2010).

[105] Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 79, art. 13(2).

health and wellbeing of their children, this is an obligation that should be taken seriously.

The inclusion of education as one of the MDGs[106] makes this point abundantly clear, by bringing to the forefront the interdependence, indivisibility, and interconnectedness of human rights. One human right, to achieve universal primary education (MDG 2), leads directly to the attainment of a number of other human rights, namely, to eradicate poverty and hunger (MDG 1), to promote gender equality and empower women (MDG 3), to reduce child mortality (MDG 4), to reduce maternal mortality (MDG 5), and to combat HIV/AIDS, malaria, and other diseases (MDG 6).[107] This is not to project education as an all-encompassing cure for everything. Instead, the argument merely suggests that acquiring education (an empowering factor) greatly enhances one's chances of surmounting the obstacles targeted by the mentioned MDGs.

UNICEF sums it up quite succinctly, "[e]ducating girls and young women is one of the most powerful ways of breaking the poverty trap and creating a supportive environment for maternal and newborn health."[108] The reverse is equally true. When girls marry early or suffer early pregnancies, HIV/AIDS, sexual violence, and other abuses, then the risk of dropping out of school escalates (lack of education equals disempowerment).[109] The inevitable result will be a "vicious cycle of gender discrimination, poverty and high rates of maternal and neonatal mortality."[110] This link, clearly evident in the MDG philosophy, is a pointer to the importance of solving global problems via a human rights approach – a theme developed more fully in Part IV of this discourse. It is one that strongly commends itself to countries in Africa.

C. Parental Poverty

To fully appreciate resource deficit as a significant factor in health woes of children in Africa, one must think of poverty as "marginalization" or "social exclusion," the ultimate determinant of who gets what or, in the tragic context of Africa, who lives or dies. Incapacity on the part of parents to provide necessary care for their children, or vital social conditions (underlying health determinants) such as adequate nutrition and shelter, dooms such children to a bleakly uncertain future. Namibia is a typical illustration. Although like the rest of the region, Namibia is still struggling to attain the objectives of MDG 4, virtually all births (98 percent) of the wealthiest 20 percent of the population in that country are attended by skilled health professionals, compared to just 60 percent for the poorest 20 percent.[111] The result of this wide parental poverty gap is unmistakable – substantially lower U5MR amongst the wealthiest 20 percent of the coun-

106 *See* U.N. Statistics Div., *supra* note 8, at MDG 2.

107 *See generally id.*

108 UNICEF, *supra* note 28, at iii.

109 *Id.*

110 *Id.*

111 Special Rapporteur on Extreme Poverty and Human Rights, *On Her Mission to Namibia from 1 to 8 October 2012*, U.N. Human Rights Council, ¶ 62, A/HRC/23/36/Add.1 (May 17, 2013) (by Magdalena

try.[112] For the remainder of the children under the age of five, as well as their parents, this is social exclusion of the worst kind. It is decisively disempowering. But Namibia is hardly atypical. Parental poverty and its destructive force on the well-being of children throughout Africa evidence quite strongly the inextricable relationship between different kinds of human rights, a concept explored previously in this article.

This relationship becomes even more glaring when one considers household poverty in the context of health and individual empowerment. Certainly education is empowering, but it is not in itself a sufficient panacea to the numerous health challenges that might arise during a woman's reproductive years or the pre-adult years of her children. More is needed in order for the knowledge or awareness to be of material benefit to the mother or her children. Indeed, as argued elsewhere:

> [The] success of individual empowerment goes beyond knowledge transfer [education] to include material resources needed for attending to underlying health determinants. Knowing how to protect oneself . . . is a good start but, to be an effective public health tool, the knowledge must be coupled with access to [vital goods and services]. . .[113]

And this is the paradox of global health. The very region with the greatest burden of childhood diseases and illnesses[114] is also where resources needed for health or related projects are in most dire shortage.[115] Atrocious health indices in Africa, including in the realm of child and maternal health, are directly traceable to overwhelming resource deficit in the vast majority of households in the region.[116]

The health of children is particularly unique in that its protection hinges crucially on the health of another demographic, namely, mothers. Akin to a pendulum which must swing in a consistent manner, the health of children swings up and down in tandem with that of their mothers, meaning that both must be addressed simultaneously to record a positive and sustainable outcome for children. This synergistic relationship may be illustrated with antenatal care – a basic ele-

Sepúlveda Carmona), *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/137/27/PDF/G1313727.pdf?OpenElement.

[112] *Id.* (citing World Health Org., Namibia: Health Profile, Apr. 4, 2011).

[113] Nnamuchi, Health and Millennium Development Goals in Africa, *supra* note 93.

[114] U.N., MDG Report 2013, *supra* note 11, at 25 (reporting that the poorest regions of the world account for the majority of child deaths, with sub-Saharan Africa and Southern Asia responsible for 5.7 million of the 6.9 million deaths of children under the age of five worldwide or 83 percent of the global total in 2011).

[115] Africa suffers 24 percent of the disease burden in the world but commands less than 1 percent of global health expenditure compared, for instance, to the region of Americas which shoulders just 10 percent share of the global diseases but accounts for more than 50 percent of the world's health financing. *See* World Health Org., The World Health Report 2006: Working Together for Health xviii – xix (2006) [hereinafter The World Health Report 2006].

[116] UNDP, Human Development Report 2009: Overcoming Barriers: Human Mobility and Development Table I1 (2009); UNDP, Human Development Report 2013: The Rise of the South: Human Progress in a Diverse World 27 (2013) (showing larger proportion of people living below poverty line, on less than $1.25/day, in countries in Africa than anywhere else).

ment of child health. It is a common knowledge that attendance at antenatal clinics is a surefire way not only to guard against pregnancy and childbirth complications, but also to shield the child from preventable morbidities, and even death. This dual dimension advantage underscores the requirement by UNICEF and WHO of at least four antenatal visits by pregnant women.[117] Yet, as current data (2000 to 2010) indicates, only 44 percent of pregnant women in African met this threshold, the worst globally.[118] The reason is not far-fetched.

Despite regional attempts at embracing an insurance-based system of health care financing, access to health services, including antenatal care, remains largely dependent on cash in most countries in the region. Given the high poverty rates, coupled with the escalating cost of services and competing household needs, funds available for health services, antenatal or otherwise, range from little to nothing. Perhaps in a bid to cushion the impact of this burden, a handful of countries in the region have introduced free or subsidized care for pregnant women and children.[119] This strategy is laudable for two critical reasons. First, it recognizes the peculiar vulnerability of this demographic. Physiological and anatomical immaturity renders infants and children susceptible to a greater number of diseases than adults,[120] as does diminished immunity in respect to pregnant women.[121] Second, by targeting the health care needs of particularly at-risk groups, such as women and children, the strategy adds to the improvement of the health of the entire population.[122]

It is noteworthy that although mothers are usually the primary care givers, the overall health and well-being of children are not their exclusive responsibility. Particularly in communal social units, as in African societies, fathers as well as extended family members do play significant roles. Therefore, domestic or regional measures aimed at mitigating maternal poverty as a factor in the poor health of African children must move beyond the specific needs of women to also efface obstacles confronting other household members in their struggles to

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117 U.N., MDG Report 2009, *supra* note 53, at 27.

118 World Health Org., World Health Statistics 2011 100 (2011). Eastern Mediterranean region shares the same record. *Id.*

119 Nnamuchi, *Millennium Development Goal 5, Human Rights and Maternal Health in Africa, supra* note 39, at 112.

120 *Children and Infant,* FLU.GOV, http://www.flu.gov/at-risk/children/ (last visited Mar. 31, 2014) (explaining, in reference to flu, that children are more susceptible to the virus because their immune systems are still developing).

121 *People at High Risk of Developing Flu–Related Complications*, Centers for Disease Control & Prevention, http://www.cdc.gov/flu/about/disease/high_risk.htm (last updated Mar. 31, 2014) (listing children and pregnant women at higher risk of flu than the general population).

122 The problem with a user fee system is that it is regressive. Even where payment is pegged at what the average person considers low, this does not necessarily mean affordability by everyone. The very poor might still be unable to pay the sum, especially when added to the cost of transportation, drug costs, et al that would be involved in accessing care. *See* Special Rapporteur on Extreme Poverty, *supra* note 111, ¶ 62 (finding that even though the user fees payable in the public health care system of Namibia seems to be low (between 4 – 8 Namibia dollars), the fee might still pose an insurmountable barrier to accessing health care services for those on the lowest income quintile).

extricate themselves from the cold clutches of poverty.[123] There must be a recognition of inter-household resource differentials as key contributors to disparities in the health of children, within and across countries. Children born to parents on the lowest income percentile are nearly twice as likely to die before age five as those born to parents on the highest income bracket.[124]

Resource constraint at the household level is visible throughout the region, more so than anywhere else, and its elimination must be seen in the context of the holistic approach of human rights.[125] Remarkably, this point was not lost on the experts that crafted the MDGs in 2000. The very first objective ("MDG 1") is aimed at eradicating extreme poverty, the kind that wreaks havoc in the lives of Africans and the most important factor stunting development in the region – in health as well as in other sectors.[126] This premier positioning is not merely coincidental. It recognizes that in order to effectively address the health needs of children in the severest resource-deficit region in the world, one of the more potent underlying causes, namely poverty, must also be expurgated. By echoing the indivisibility and interdependence of the needs of human beings as well as the challenges to addressing them, this international policy document validates a core principle of human rights, that human needs should be tackled as an indivisible, not an isolated, unit. It is a principle that should inform national responses and strategies throughout the region.

D. Dearth of Skilled Health Personnel

A major cause of the deteriorating state of children's health throughout Africa is the shortage of adequately trained health professionals. Starting from conception, through birth, and continuing after birth, the survival of children depends on the quality of care that the health system offers. A health system that is bereft of the right mix of physicians, nurses, and other ancillary staff is a failing health system. Not surprisingly, this is the state of most health systems in the region. Indeed, as revealed in the 2000 edition of the World Health Report, which compared the performance and attainment of health systems in the world, most Afri-

[123] UNICEF, *supra* note 28, at 58 (noting that the vital role played by families or household members in ensuring the health and wellbeing of children cannot be ignored by health systems). Moreover, the Kangaroo mother care (KMC) for low-birth weight babies, an innovative system introduced in Colombia in 1979 by Drs. Hector Martinez and Edgar Rey, and now adopted by many developing countries, identifies provision of support for the mother and other household members caring for the baby as one its four components. *Id*. at 62.

[124] U.N., MDG Report 2013, *supra* note 11, at 26.

[125] Mfonobong Nsehe, *The African Billionaires 2013,* Forbes (Mar. 6, 2013), http://www.forbes.com/sites/mfonobongnsehe/2013/03/06/the-african-billionaires-2013/ (reporting that of the 1,426 billionaires who made it to FORBES' annual ranking of the world's richest people, African billionaires occupied just a little over one percent of the positions on the list).

[126] The Targets of this goal (MDG 1) are (a) to halve, between 1990 and 2015, the proportion of people whose income is less than one dollar a day; (b) achieve full and productive employment and decent work for all, including women and young people; and (c) halve, between 1990 and 2015, the proportion of people who suffer from hunger. *See* U.N. Statistics Div., *supra* note 8, at MDG 1 (to eradicate extreme poverty and hunger).

can countries ranked in the bottom 30 percent of the nations surveyed.[127] Unavailability of physicians, as well as nurses and midwives in hospitals, coupled with high cost of services force parents into making unhealthy choices.

In contrast to other regions of the world, pregnancy is still a formidable risk in Africa. Poverty forces women in the region who are pregnant to either resort to home delivery, more than 60 percent,[128] or risk the services of traditional birth attendants.[129] Recent data (2005 to 2012) positions Africa as the region with the least proportion of births attended by skilled health personnel – at 49 percent compared to, for instance, Europe, which recorded 98 percent.[130] There are two major reasons for the situation. Medical and nursing training programs in virtually all sub-Saharan Africa nations do not graduate enough physician and nurses to fill positions in their respective hospitals and clinics. The consequence is that even where resources (drugs, equipment et al.) are available, there might not be adequate manpower to actually employ the resources to productive use. Manuel Dayrit, a senior WHO official, was quite on point, "[e]ven if you have the medicine, the vaccines, and the bed nets, you need the health workers to deliver the service."[131] Indeed, there have been cases where, although resources were available, care was not dispensed on account of manpower deficit.[132] And the situation is likely to worsen. As a recent study documents, not only is the existing manpower level insufficient to meet current needs, the training capacity in half of the countries surveyed is inadequate to maintain the current workforce level.[133]

Aside from the low number of available training spots for physicians and nurses, another factor responsible for the deficit of skilled health professionals in Africa is the substantial number of those who succeed in graduating from these schools quickly fleeing to Western countries in search of greener pastures. For instance, Angola has just 881 physicians but 168 of them are working in eight OECD countries as do 22 of Mozambique's 514 doctors.[134] Overall, 22 percent of physicians trained in Africa are employed outside the region five years following graduation.[135]

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[127] World Health Org., The World Health Report 2000: Health Systems: Improving Performance 152 – 54 (2000) [hereinafter WORLD HEALTH REPORT 2000].

[128] UNICEF, *supra* note 28, at 58.

[129] *Id.* at 2 (noting that most deliveries in poor countries are at home, unassisted by skilled health professionals).

[130] World Health Statistics 2013, *supra* note 14, at 104.

[131] Pooja Kumar, *Providing the Providers — Remedying Africa's Shortage of Health Care Workers*, 356 New Eng. J. Med., 2564, 2564 (2007).

[132] *Id.* (quoting a frustrated WHO official, "[w]ith the experience of the last few years, where you have had huge global funds move into an activity to provide resources . . . we've found that the bottleneck is really the delivery").

[133] Yohannes Kinfu, et al., *The Health Worker Shortage in Africa: Are Enough Physicians and Nurses being Trained?*, 87 Bull. World Health Org. 225, 227 (2009).

[134] World Health Report 2006, *supra* note 115, at 100.

[135] Fitzhugh Mullan et al., *Medical Schools in Sub-Saharan Africa*, 377 Lancet 1113, 1117 (2011), http://download.thelancet.com/pdfs/journals/lancet/PIIS0140673610619617.pdf.

The same bleak picture is repeated in the realm of nursing services. For instance, despite dire shortages in their respective national health systems, 18 percent of nurses trained in Lesotho and 34 percent of Zimbabwean nurses are employed in seven OECD countries.[136] Remarkably, these are some of the countries with the worst health indices in the world. In 2011, the U5MR in the two countries were 67[137] and 86[138] deaths per 1000 live births respectively, amongst the worst worldwide. With such large efflux from an already depleted workforce, it stands to reason that these countries will certainly continue to experience a manpower shortage into the foreseeable future. The proportion of births attended by skilled health personnel in Zimbabwe is 66 percent[139] and 62 percent in Lesotho, respectively.[140]

Although health worker shortage is a worldwide phenomena, in no other region is the brunt felt worse than in Africa. Whereas the densities of physician and nurses/midwives in Europe are 33.3 and 84.2 per a population of 10,000, the figures in Africa are 2.5 and 9.1, the worst globally.[141] Obviously, reversing the trend is vital to positioning the region on a sustainable track toward meeting its obligation under MDG 4. However, to be successful, the strategy must be situated within the context of the two major problems identified above, by increasing capacity in the region's medical and nursing/midwifery programs as well as by addressing the so-called push factors, particularly remuneration, job security and equipment.

E. Institutional Poverty and Leadership Void

Bemoaning poverty as a reason for the current paralytic stupor in virtually all sectors in most African countries is not uncommon amongst the political class in the region. Whether at national or international fora, Africa's problems are cleverly packaged by its leaders as easily surmountable only if they had access to adequate resources. As often as the message has been preached, it is not without some factual basis. Each year, the World Bank ranks global economies on the strength of gross national income ("GNI") per capita in each country –in descending order – high income, upper middle income, lower middle income and low income.[142] Although there are just 36 countries categorized in the latest report as low income countries ($1,035 GNI or less), 27 of them are in Africa.[143]

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[136] World Health Report 2006, *supra* note 115, at 100.

[137] World Health Statistics 2013, *supra* note 14, at 57.

[138] *Id.* at 53.

[139] *Id.* at 102.

[140] *Id.* at 98.

[141] World Health Statistics 2013, *supra* note 14, at 128.

[142] *New Country Classifications*, THE WORLD BANK (July 2, 2013, 12:42 AM), http://data.worldbank.org/news/new-country-classifications.

[143] *Country and Lending Groups*, THE WORLD BANK, http://data.worldbank.org/about/country-classifications/country-and-lending-groups (last visited Oct. 21, 2013).

Of the 49 nations classified as "least developed," only 15 are not in Africa.[144] With a GNI per capita of $760, a life expectancy of 61 years at birth and a 64 percent primary education completion rate, these countries represent the poorest group in the world.[145] Pragmatism dictates against expecting these same countries to respond to the health or any other challenges in their respective territories with the same vigor as their high income ($12,616 GNI or more) counterparts.[146] On this basis, therefore, it is unsurprising that the region with the worst poverty indices also lags behind the rest of the world in attending to the health of its population, including children.

Making inroads into child health challenges in Africa must start with identifying the factors that cumulatively create and sustain the problem. Aside from the factors previously identified, namely, child marriage, maternal illiteracy, parental poverty and deficit of skilled health personnel, there are other no-less difficult problems that would need to be vanquished. Direct causes such as malnutrition and preventable diseases like malaria, acute respiratory infections, diarrhea, and measles are responsible for 70 percent of child mortality in the region.[147] Measles is a particularly worrisome menace, wrecking havoc in the lives of children in Africa. Although the disease can be easily prevented by administering two doses of a safe and inexpensive vaccine, outbreaks continue to occur in many countries in the region.[148] In 2011, 90 percent of all measles deaths occurred in sub-Saharan Africa and Southern Asia.[149]

There is a reason the enumerated diseases are known collectively as "diseases of the poor" – the causes are deeply rooted in, and disproportionately suffered by, people living in poverty. This means that appropriate remedial measures must go deeper than the diseases or the illnesses they are meant to cure in order to address the underlying conditions that made people susceptible to it in the first place. Not only is lack of funds responsible for millions of childhood deaths in Africa, it is also the reason parents submit their children to early marriage. It is equally the reason teenage wives resign themselves to violence and other forms of cruel and harsh treatment by their husbands and their families. This implicates the responsibility of governments in the region.

Whilst undeniable that resource deficit hampers, to an extent, the capability of various governments in the region to adopt the kind of institutional responses needed to prevent unnecessary childhood morbidities and mortalities, this does not explain the almost hands-off approach in many of these countries. Malaria is illustrative. Although the disease is inexpensive to prevent (mosquito nets cost approximately $5),[150] easily diagnosable (pyrexia is a common symptom), and

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144 *Least Developed Countries: UN Classification*, THE WORLD BANK, http://data.worldbank.org/region/LDC (last visited Oct. 21, 2013).

145 *Id.*

146 *New Country Classifications, supra* note 142.

147 WORLD HEALTH ORG., CHILD Survival: A Strategy for the African Region ¶ 12 (2007).

148 U.N., MDG REPORT 2013, *supra* note 11, at 27.

149 *Id.*

150 *See* PROJECT MOSQUITO NET, http://www.projectmosquitonet.org/ (last visited Oct. 21, 2013).

treatable for next to nothing ($1.50 to 2.40 for adults and $0.40 to 0.90 for children),[151] it continues to be a major cause of outpatient morbidity and a major contributor to high mortality in the region. In 2008, Africa accounted for 768,070 deaths or 89 percent of the global malaria mortality.[152] "This has little or nothing to do with resources. It is simply a question of misallocation and misalignment of resources with need."[153]

When the 2001 African Summit on HIV/AIDS, TB, and Other Related Infectious Diseases resulted in a commitment by African leaders to allocate at least 15 percent of their annual budgets to the health sector,[154] the international health community applauded. But the optimism that heralded this commitment is gradually giving way to frustration as only six countries – Rwanda, Botswana, Niger, Malawi, Zambia, and Burkina Faso – have met the benchmark.[155] Why is this important? Non-fulfillment of this pledge is proof that lackluster performance of the health sector in Africa is not resource oriented, that poverty is not explanatory of the high number of children whose health and lives are continually compromised by the region's political leadership. Because there was no monetary figure demanded of any of the countries in the region, non-availability of funds cannot be an exculpatory factor.

What was required was a rearrangement of national priorities such that important sectors, like health, receive a defined proportion of the overall government expenditure. Even so, the vast majority of African leaders failed, demonstrating that irresponsible governance, not poverty, is the real culprit. A statement on the launching of the 2012 African Human development Report is quite helpful:

> This report is a damming condemnation of decades of governance in the Sub-Sahara Africa . . . It tells us what we know, that the poverty of Africa is the making of African leaders over the years. African leaders have made the option of taking us along the path of poverty. We don't need to be told.[156]

This statement, credited to a notable figure in the region, Olusegun Obasanjo, speaks volumes. As president of Nigeria in 2001, Obasanjo was the host of the African Summit where the pledge by African leaders to commit at least 15 percent of their national budgets to health was made. Yet, throughout his tenure, Nigeria never came close to meeting this benchmark even though he remained in

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151 *Malaria - Facts and Figures*, MÉDECINS SANS FRONTIÈRES (Apr. 25, 2004), http://www.msf.org/article/malaria-facts-and-figures.

152 WHO, World Malaria Report 2009 27 (2009).

153 Nnamuchi, Health and Millennium Development Goals in Africa, *supra* note 93.

154 Organisation of African Unity, Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases ¶ 26, Apr. 24-27, 2001, OAU/SPS/ABUJA/3, *available at* http://www.un.org/ga/aids/pdf/abuja_declaration.pdf.

155 *2010 Africa Health Financing Scorecard*, AFRICA PUBLIC HEALTH ALLIANCE, *available at* http://www.who.int/pmnch/events/2010/ausummit_2010healthfinancingscorecard.pdf (last visited Mar. 12, 2013).

156 Onyinye Nwachukwu, *Obasanjo Blames African Leaders for Poverty on the Continent,* BusinessDay (May 22, 2012), http://www.businessdayonline.com/NG/index.php/news/284-breaking-news/38135-obasanjo-blames-african-leaders-for-poverty-on-the-continent.

office until 2007. Subsequent administrations have fared no better. But despite the shortcomings of his administration, his conclusion is one that should resonate with those seriously committed to improving the health and wellbeing of children in Africa. "[L]et us be the change that we desire. We can do it and we must do it."[157]

IV. Human Rights and Children's Health/Well-Being

Human rights regimes governing children's right to health may be categorized into two distinct but related groups, namely, general and child-specific treaties. The first group consists of treaties that impose obligations on authorities to respect, protect and fulfill the right to health of the general population while the second category comprises regimes that specifically target the health and well-being of children. An exception to this rule is the Universal Declaration of Human Rights which, in addition to recognizing the right to health of all and sundry, specifically carves out special protection for children. Art. 25 stipulates:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Singling out children and mothers for "special care and assistance" speaks to the vulnerability of this demographic.[158] Aside from typically occupying the lowest rung of socioeconomic ladder, children and pregnant women not only bear a greater burden from disease than the rest of the population but are also disproportionately impacted by access barriers and negative social determinants of health.

Amongst human rights frameworks pertaining specifically to children, the most important are the CRC and, for African children, the African Charter on the Rights and Welfare of the Child ("ACRWC"). The CRC, as pointed out in the introductory section, is the most ratified human rights treaty. Except for Somalia and newly-independent Southern Sudan, all African countries are States Parties to the treaty.[159] Art. 6 (2) commits States Parties to "ensure to the maximum extent possible the survival and development of the child."[160] The language,

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[157] *Id.*

[158] *See, e.g.*, UNICEF, MALARIA AND CHILDREN: PROGRESS IN INTERVENTION COVERAGE 8 (2007), *available at* http://www.unicef.org/health/files/Malaria_Oct6_for_web(1).pdf (explaining that as a result of not-yet-developed and reduced immunity children and pregnant women respectively are more susceptible to malaria than the general population).

[159] *UN Treaty Collection: Status of Treaties, Status as at April 28, 2014*, UNICEF, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=EN (last visited Apr. 28, 2014).

[160] "Development of the child" is an omnibus term encompassing the physical, mental, moral, spiritual and social dimensions of development of children. This requires eliminating factors that threaten the

"maximum extent possible," signifies a cosmopolitan approach to implementing the obligations of the treaty. Nations are required to channel as many resources as it can muster toward ensuring the rights of all children within their jurisdictions. This is made more explicit regarding health in Art. 24(1). The provision recognizes the right children have to the "enjoyment of the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health." Discernible from Art. 6(2) and 24(1) is the proposition that the highest attainable standard of health is an impossible feat in absence of optimal effort in the nature of deployment of maximum resources, human and material, toward the goal. This, as will become evident shortly, is consistent with the holistic approach of human rights to health and well-being.

The CRC is all-inclusive, requiring States Parties to "ensure that no child is deprived of his or her right of access to . . . health care services."[161] The implication is that socioeconomic circumstances, status of birth (biological or adopted, legitimacy issues) or other differentials will not be a bar to equal access for all children.[162] In fact, as the Committee on the Rights of the Child[163] subsequently explains, "all children have the right to opportunities to survive, grow and develop, within the context of physical, emotional and social well-being, to each

life, survival, growth and development of the child through designing and implementing appropriate mechanisms that address social health determinants. *See* CRC, *supra* note 1, art. 6; Committee on the Rights of the Child, General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health, 62d Sess., art. 24 ¶ 16, U.N. Doc. CRC/C/GC/15 (2013) [hereinafter Committee on the Rights of the Child: General Comment No. 15].

[161] Convention on the Rights of the Child, *supra* note 1, art. 24(1).

[162] This is critical because some health systems tend to apportion health coverage on the basis of considerations which violate their international law obligations. *See*, e.g., Obiajulu Nnamuchi, *The Nigerian Social Health Insurance System and the Challenges of Access to Health Care: An Antidote or a White Elephant?,* 28 Med. L. 139, 139-40 (2009) (criticizing Nigeria's National Health Insurance Scheme for denying coverage to non-biological children of covered parents as a blatant violation of §42 of the Constitution which prohibits discrimination based on circumstances of birth). This kind of restriction on dependant coverage runs afoul of Art. 2 of the Convention on the Rights of the Child which enjoins States Parties to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. *See also* Committee on the Rights of the Child, General Comment No. 15, *supra* note 160, ¶ 8.

[163] Established under Art. 43(1) of the Convention on the Rights of the Child, the Committee on the Rights of the Child consists of independent experts charged with monitoring the implementation of the CRC as well as the two optional protocols to the Convention, on involvement of children in armed conflict and on sale of children, child prostitution and child pornography. In addition, the Committee is responsible for examining reports submitted by States Parties on how the rights are being implemented in their respective territories. An important function of the Committee is issuance of general comments or interpretation of the human rights obligations resulting from the CRC and its optional protocols. *See* Arts. 43 – 45. General comments are aimed at providing guidance and support to States Parties and other duty bearers as to the right strategies and mechanisms to be adopted in implementing their duty regarding respecting, protecting and fulfilling children's right to the enjoyment of the highest attainable standard of health. *See* Committee on the Rights of the Child, General Comment No. 15, *supra* note 160*,* ¶ 1. For a detailed analysis of the work of the Committee as a human rights implementation body, *see* David Weissbrodt, Joseph C. Hansen & Nathaniel H. Nesbitt, *The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law,* 24 Harvard Hum. Rts. L. J. 115 (2011); Cynthia Price Cohen & Susan Kilbourne, *Jurisprudence of the Committee on the Rights of the Child: A Guide for Research and Analysis,* 19 MICH. J. INT'L L. 633 (1998).

child's full potential."[164] This authoritative exposition places children's right to health within the broader context of other dimensions of well-being, not just health. In other words, for a State Party to be in full compliance with its obligation under the CRC, it must not only design and implement a health system that ensures "timely and appropriate prevention, health promotion, curative, rehabilitative and palliative services" for children in its territory, it must also incorporate "programmes that address the underlying determinants of health" in its national policy.[165]

Underlying or social determinants of health consist of conditions or circumstances that influence the health of individuals or communities, positively or otherwise. Interestingly, there has been a tendency in some quarters to conceptualize underlying health determinants solely in terms of provision of facilities (goods and services) that aid in healthy life. This is probably as a result of a description of the term by the U.N. Committee on Economic, Social and Cultural Rights ("Committee on ESCR") in 2000.[166] The Committee on ESCR describes social or underlying health determinants as including access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health, in addition to facilitating the participation of the population in all health-related decision-making at the community, national, and international levels.[167] This positively-couched characterization is likely responsible for the understanding. But this is wrong. Adverse factors or circumstances impacting health, such as lack of access to safe water supply or good schools, poor living conditions, hunger, starvation, poverty, etc., come within the definition of underlying determinants of health. In fact, in its final report to WHO, the Commission on Social

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[164] Committee on the Rights of the Child, General Comment No. 15, *supra* note 160, ¶ 1.

[165] *Id.* ¶ 2.

[166] U.N. Econ. & Soc. Council, Committee on Econ., Soc. & Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, ¶ 11, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies 85, U.N. Doc. HRI/GEN/1/Rev.6 (2003) [hereinafter Committee on Econ., Soc. & Cultural Rights: General Comment No. 14]. The Committee on ESCR consists of independent experts charged with the duty of monitoring the implementation of the International Covenant on Economic, Social and Cultural Rights by States Parties. Established under ECOSOC Resolution 1985/17 of May 28, 1985, the Committee undertakes monitoring functions assigned to the Economic and Social Council in Part IV of the International Covenant on Economic, Social and Cultural Rights. States Parties to the treaty are required to submit regular reports (within two years of ratification of, or accession to, the treaty and every five years thereafter) to the Committee which, in turn, examines the reports and issues "concluding observations," outlining its concerns and recommendations. Furthermore, since the entry into force of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on May 5, 2013, the Committee has gained competence to receive and consider communications from individuals claiming violation of their rights under the ICESCR. The Committee is empowered, under certain circumstances, to investigate allegations of grave or systematic violations of ECOSOC rights of the ICESCR. In addition, inter-state complaints are also entertained by the Committee. *See* Committee on Economic, Social and Cultural Rights: Monitoring the Economic, Social and Cultural Rights, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *available at* http://www2.ohchr.org/english/bodies/cescr/ (last visited Oct. 28, 2013).

[167] Committee on Econ., Soc. & Cultural Rights: General Comment No. 14, *supra* note 166.

Determinants of Health makes it quite explicit that it takes a broad view of underlying or social determinants of health.[168]

The Commission defines social determinants of health as comprising "the structural determinants and conditions of daily life."[169] These "structural determinants" encapsulate circumstances impacting upon "people's lives – their access to health care, schools, and education, their conditions of work and leisure, their homes, communities, towns, or cities" as well as "their chances of leading a flourishing life."[170] The implication, therefore, is that social health determinants comprise positive and adverse circumstances that impact health. When the conditions or circumstances promote health, they are positive social determinants. Otherwise, they are negative. Attending to these determinants requires innovations that although are not primarily health-oriented, nonetheless, contribute to good health. Examples include improving education and employment opportunities.

This broad conceptualization is consistent with the jurisprudence of the Committee on the Rights of Children. The Committee favors a holistic approach, placing the obligations imposed by the CRC "within the broader framework of international human rights obligations."[171] In essence, realizing the right children have to health requires the consideration of other human rights as well. A child's right to health cannot be secured unless those other rights, such as the right to shelter or to adequate nutrition, are also respected. Seen in this light, it becomes clear why the Committee on the Rights of the Child enumerates a gamut of factors touching on other human rights as social determinants that are critical to actualizing the right to health.[172] These factors are comprised of age, sex, educational attainment, socioeconomic status, and domicile; determinants at work in the immediate environment of families, peers, teachers, and service providers, notably the violence that threatens the life and survival of children as part of their immediate environment; and structural determinants including policies, administrative structures and systems, and social and cultural values and norms.[173] For States Parties to the CRC, this interpretation could be construed as requiring that productive attention to social determinants of health with respect to children incorporate attention to the needs of mothers also. This evokes some important concepts.

Aside from children being the most vulnerable, as previously stated, the vulnerability of mothers has a direct bearing on the well-being of their children. For instance, a mother who is in a violent relationship constitutes a risk for the health and well-being of the child. Moreover, a significant number of infant deaths occur during the neonatal period, related to the poor health of the mother prior to,

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168 The Commission on Soc. Determinants of Health, Closing the Gap in a Generation: Health Equity through Action on the Social Determinants of Health 1(2008).

169 The Commission on Soc. Determinants of Health, *supra* note 168.

170 The Commission on Soc. Determinants of Health, *supra* note 168.

171 Committee on the Rights of the Child, General Comment No. 15, *supra* note 160, ¶ 2.

172 *Id.* ¶ 17.

173 *Id.*

and during the pregnancy and the immediate post-partum period, as well as to suboptimal breastfeeding practices.[174] Therefore, since the health and health-related behaviors of mothers and other significant adults have a major impact on children's health,[175] attending to social determinants of health in respect to children must also address the needs of their mothers and other caregivers. This dual responsibility (to the mother and other caregivers on account of the dependence or needs of the child) brings to the forefront the significance of interdependence, interconnectedness and indivisibility of human rights, core human rights values.[176] Ideally, the implementation of one human right leads (or ought to lead) to the actualization of one or more other human rights. This is an important lesson for States Parties to the CRC as well as other human rights treaties. In structuring a response to one or more needs predicated on a particular human right, the impact on other needs or human rights should be carefully reflected upon and taken into consideration as a basis of action.

Remarkably, the CRC shares a striking similarity with MDG 4. Akin to MDG 4, the aim of which is to "reduce child mortality" and "under-five mortality rate,"[177] Art. 24(2)(a) of the CRC mandates States Parties to pursue full implementation of children's right to health and, in particular, take appropriate measures to "diminish infant and child mortality."[178] This link or similarity is critical and is subject to a number of interpretations. As of 2000, when the Millennium Declaration was adopted,[179] the international community had already subscribed to the obligation to reduce child mortality – by virtue of the CRC (adopted in 1989).[180] For this reason, it is arguable that MDG 4 does not impose novel obligations since these obligations were already binding upon the vast majority of these same nations by the force of international law to which they voluntarily subscribed. Moreover, the thrust of an even older international policy document,

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[174] *We Can End Poverty: Millennium Development Goals and Beyond 2015 Factsheet*, UNITED NATIONS, 1 (Sept. 2013), http://www.un.org/millenniumgoals/pdf/Goal_4_fs.pdf (reporting that 45 percent of all U5MR is blamable on undernutrition and that for the first six months of life, exclusively breastfed children are 14 times more likely to survive than children who were not breastfed).

[175] Committee on the Rights of the Child, General Comment No. 15, *supra* note 160, ¶ 18.

[176] *See* the Maastricht Guidelines on Violations of Econ., Soc. & Cultural Rts., ¶ 4, *reprinted in* 20 Hum. Rts. Q. 691–705 (1998) [hereinafter Maastricht Guidelines]; Limburg Principles on the Implementation of the Int'l Covenant on Econ., Soc. & Cultural Rts. ¶ 3, U.N. Doc E/CN.4/1987/17, *reprinted in* 9 Hum. Rts. Q. 122–35 (1987); 37 Int'l. Comm. Jurists Rev. 43–55 (1986) [hereinafter Limburg Principles]; Committee on the Rights of the Child, General Comment No. 15, *supra* note 160, ¶ 7; Obiajulu Nnamuchi, *Kleptocracy and its Many Faces: The Challenges of Justiciability of the Right to Health Care in Nigeria,* 52 J. Afr. L. 3 (2008).

[177] *See* U.N. Statistics Div., *supra* note 8.

[178] Interventions that could be pursued in attaining this goal include attention to still-births, pre-term birth complications, birth asphyxia, low birth weight, mother-to-child transmission of HIV and other sexually transmitted infections. Additional strategies consist of addressing neonatal infections, pneumonia, diarrhea, measles, under- and mal- nutrition, malaria, accidents, violence, suicide and adolescent maternal morbidity and mortality. Health systems need to be strengthened to be responsive to the needs of children. *See* Committee on the Rights of the Child, General Comment No. 15, *supra* note 160, ¶¶ 34 –35.

[179] G.A. Res. 53/202, U.N. Doc. A/RES/53/202 (Feb. 12, 1999).

[180] CRC, *supra* note 1.

the "Global Strategy Health for All by the Year 2000," was to the same effect.[181] The Global Strategy was adopted under the aegis of WHO in 1979 and specified its goal as the attainment by all people of the world by the year 2000 of a level of health that would permit them to lead socially and economically productive lives.[182] The goal of attaining health for all is obviously broad enough to incorporate reduction of child mortality envisaged by MDG 4 and the CRC. To this extent, MDG 4 represents a fresh attempt at remedying a problem that has failed to be addressed by previous international legal and policy instruments.

Aside from the child-specific legal frameworks considered above, there are several general human rights that also address the health of children, notably the ICESCR[183] and the African Charter on Human and Peoples' Rights.[184] Article 12 of the ICESCR not only recognizes the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health," it mandates that States Parties adopt a "provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child."[185] Article 12 also mandates the "creation of conditions which would assure to all medical service and medical attention in the event of sickness."[186] Here, again, there is an explicit link with MDG 4. The African Charter on Human and Peoples' Rights imposes similar obligations on States Parties to the Charter.[187]

The relatedness of this genre of frameworks with child-specific human rights treaties is that although they are more cosmopolitan, they also recognize children's right to health as part and parcel of the general population. Their recognition of the right to health of the general population also includes children. Moreover, child-specific and general human rights treaties share close affinity with the MDGs. As the Millennium Development Project acknowledges, "human rights (economic, social, and cultural rights) already encompass many of the Goals, such as those for poverty, hunger, education, health, and the environment."[188] This means that MDG4 does not, as pointed out earlier, impose new obligations. These very African nations now struggling to attain the requisite targets by 2015 are also States Parties to human rights treaties which, for several decades, demanded compliance with the same obligations. No matter how States Parties package their reasons, the issue is that they have not taken concrete mea-

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[181] Although the project was launched in 1979 at the 32nd World Health Assembly by virtue of resolution WHA32.30, the original idea for a united global effort at achieving health for all by the year 2000 was a product of the 30th World Health Assembly in 1977 (WHA 30.43). *See* World Health Org., Global Strategy for Health for All by the Year 2000 7 – 18 (1981) [hereinafter Global Strategy for Health]. *See also* Don A. Franco, Poverty and the Continuing Global Health Crisis 63 (2009) (describing the MDGs as a "sequel to one of the most ambitious commitments of the twentieth century to health through the objectives outlined in Health for All by the Year 2000 . . .").

[182] Global Strategy for Health, *supra* note 181.

[183] Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 79, art. 12.

[184] African Charter on Hum. & Peoples' Rts., *supra* note 77.

[185] Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 79, art. 12(2)(a).

[186] *Id.* art. 12(2)(d).

[187] African Charter on Hum. & Peoples' Rts., *supra* note 77, art. 16.

[188] U.N. Millennium Project, Investing in Development: A Practical Plan to Achieve the Millennium Development Goals 119 (2005).

sures to meet the health needs of the people within their respective jurisdictions. Had adequate resources been deployed toward ensuring compliance with their human rights obligations, there would certainly have been no need for MDG 4.

The question, then, becomes would international health policy (MDG project) succeed where international law (in the nature of human rights treaties) has failed? The answer is neither here nor there. Perhaps MDG 8, which requires affluent Western countries to support developing ones in their efforts toward attaining the various benchmarks of the MDGs, might be the clincher.[189] But the extent to which this goal would be realized depends on the seriousness of wealthy countries in terms of doling out funds to support struggling health systems in the global South. But is resource really the issue? Hardly. This concern is not new and has, for several years, been expounded by the Committee on ESCR.

Particularly relevant is the Committee's articulation of a standard it referred to as "minimum core obligations" in 1990.[190] General Comment No. 3 was the first attempt by the Committee on ECSR to interpret the nature of the obligation (its precise contours and boundaries) States Parties assumed under Art. 2(1) of the ICESCR.[191] According to the Committee on ESCR, "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [contained in the Covenant] is incumbent upon every State party."[192] As to how exactly this standard relates to the obligation of States Parties, the Committee explains, "a State party in which any significant number of individuals is deprived of . . . essential primary health care . . . is, prima facie, failing to discharge its obligations under the Covenant."[193] The Committee emphasizes the importance of the standard in stating, "[i]f the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être."[194] This means that underlying the ICESCR itself is a critical requirement, namely, that even if the rights of the Covenant cannot be optimally guaranteed, a basic threshold must be met, otherwise the State Party risks being considered non-compliant with its obligations.

In a subsequent interpretive instrument, adopted in 2000, the Committee on ESCR elaborated the standard, particularly in its specific application to the right to health under Art. 12 of the ICESCR.[195] In General Comment No.14, the Committee defines minimum core as imposing at least the obligations to:[196]

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[189] MDG requires affluent countries to assist poor countries that has committed to good governance, development and poverty reduction. *See* U.N. Statistics Div., *supra* note 8.

[190] U.N. Econ. & Soc. Council, Committee on Econ., Soc. & Cultural Rights General Comment No. 3: The Nature of States Parties' Obligations, 5th Sess., ¶ 10, U.N. Doc. E/1991/23 (1991) [hereinafter Committee on Econ., Soc. & Cultural Rights: General Comment No. 3] .

[191] Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 79, art. 13.

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *See generally* Committee on Econ., Soc. & Cultural Rights: General Comment No. 14, *supra* note 166.

[196] *Id.* ¶ 43.

> (a) ensure access to health facilities and related goods and services;
> (b) ensure access to the minimum amount of essential food;
> (c) ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
> (d) provide essential drugs, as from time to time defined under the WHO Action

Programme on Essential Drugs;[197]

> (e) ensure equitable distribution of all health facilities, goods and services;
> (f) adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population.

In addition, the Committee specifies a number of other obligations, which it projects as having "comparable priority," including the obligation to:[198]

> (a) ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;
> (b) provide immunization against the major infectious diseases occurring in the community;
> (c) take measures to prevent, treat and control epidemic and endemic diseases;
> (d) provide education and access to information concerning the main health problems in the community;
> (e) provide appropriate training for health personnel, including education on health and human rights.

Each of these obligations speaks powerfully to the challenges presently encountered in the area of child health, particularly in the developing world, and which MDG 4, depending on seriousness of implementation in each country, is poised to vanquish. For instance, paragraph (b) above, to "provide immunization against the major infectious diseases occurring in the community," is strikingly

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[197] *See generally Model List of Essential Medicine*, WORLD HEALTH ORG. (Apr. 2013), http://www.who.int/medicines/publications/essentialmedicines/en/index.html; *see also*, WORLD HEALTH ORG., MODEL LIST OF ESSENTIAL MEDICINES FOR CHILDREN: 3RD LIST (March 2011), *available at* http://whqlibdoc.who.int/hq/2011/a95054_eng.pdf. (WHO describes "essential medicines" as those that satisfy the priority health care needs of the population and are selected with due regard to public health relevance, evidence on efficacy and safety, and comparative cost-effectiveness. Essential medicines are intended to be available within the context of functioning health systems at all times in adequate amounts, in the appropriate dosage forms, with assured quality and adequate information, and at a price the individual and the community can afford. The WHO Model Lists of Essential Medicines has been updated every two years since 1977. The current versions are the 17th WHO Essential Medicines List and the 3rd WHO Essential Medicines List for Children updated in March 2011. The flexibility allowed countries in tailoring the list to meet their public health priorities recognizes the differences in health challenges each country faces. Endemic diseases in Africa, such as malaria, should receive consideration in configuring the list in African countries but would have no relevance to countries in Europe and North America, which have virtually no incidence of the disease).

[198] Committee on Econ., Soc. & Cultural Rights: General Comment No. 14, *supra* note 166, ¶ 44.

similar to a key indicator of MDG 4, namely, "proportion of 1 year-old children immunised against measles."[199]

So, how are these obligations different from the general obligations imposed in respect to other aspects of the ICESCR or even in regard to the right to health under Art. 12? Because fulfilling the obligations imposed by the ICESCR is predicated on availability of resources (goods and services needed to actualize the right), States Parties are allowed some flexibility in pacing their march toward ensuring the rights of the Covenant for their respective populations.[200] This flexibility recognizes that poor nations would not be in the same position as affluent ones in terms of resources needed for adequate response to the economic and social needs or rights of their peoples. The expectation is that States Parties "progressively," as dictated by economic circumstances, achieve the realization of the rights – in a sense, recognizing the interface between resources and ability to protect the rights.[201] So long as a country has deployed the "maximum of its available resources" toward fulfilling its obligations under the Covenant, it cannot be held to have breached its obligations, even if the resources are inadequate.[202] Regarding minimum core obligations, however, the position is different.

Although, as explained above, resource constraints could operate as an exculpatory factor, as a shield against non-compliance with country obligations under the ICESCR, the position is not the same in respect to those specific elements designated as minimum core obligations or of comparable priority. These latter obligations are non-derogatory, and non-compliance cannot be justified by any circumstances, including paucity of resources.[203] This non-derogability characterization of minimum core obligations represents a marked divergence and a laudable improvement over the previous interpretation (General Comment No. 3), which excused performance on the basis of resource constraints.[204] The Maastricht Guidelines is quite emphatic: "[s]uch minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties."[205] This is consistent with an earlier document, the Limburg Principles, which mandated State Parties, regardless of the level of economic development, to ensure respect for minimum subsistence (meaning, minimum core or threshold) rights for all.[206]

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[199] U.N. Statistics Div., *supra* note 8; Committee on Econ., Soc. & Cultural Rights: General Comment No. 14, *supra* note 166, ¶ 44.

[200] Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 79, art. 2(1); Committee on Econ., Soc. & Cultural Rights: General Comment No. 14, *supra* note 166, ¶¶ 30 – 31.

[201] Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 79, art. 2(1); Committee on Econ., Soc. & Cultural Rights: General Comment No. 14, *supra* note 166, ¶¶ 30 – 31.

[202] Int'l Covenant on Econ., Soc. & Cultural Rts., *supra* note 79, art. 2(1).

[203] Committee on Econ., Soc. & Cultural Rights: General Comment No. 14, *supra* note 166, ¶ 47.

[204] Committee on Econ., Soc. & Cultural Rights: General Comment No. 3, *supra* note 190, ¶ 10.

[205] Maastricht Guidelines, *supra* note 176, ¶ 9 (The Maastricht Guidelines have been recognized by the U.N. and published as an official U.N. Document with the following reference: E/C.12/2000/13).

[206] Limburg Principles, *supra* note 176, ¶ 25.

Justification for non-derogation rests on the notion that the resource implication of compliance, given the very basic nature (affordability) of the requisite goods and services, will not overwhelm natural resources. Indeed, it is recognized that governments can meet these obligations "with relative ease, and without significant resource implications."[207] Non-derogability is premised on the idea that no sovereign nation is so impecunious as to be incapable of providing basic goods and services, the kind that is needed to satisfy the minimum core obligations.[208] Significantly, in determining the amount of resources at the disposal of each country, consideration is given to both the national resources and those sourced externally through international cooperation and assistance,[209] including support obtained within the context of MDG 8 from wealthy nations – official development assistance ("ODA").[210]

V. Conclusion

Solutions don't have to be complicated. There are inexpensive and simple responses that save children's lives, by preventing and by treating illnesses. These interventions must be made available to those who need them the most.

— U.N., We can End Poverty: Millennium Development Goals and Beyond 2015

Having fleshed out the numbers, the question that must necessarily be unearthed is whether Africa is on track to meet the benchmark of MDG 4 – to reduce its U5MR by two-third or 66 percent in 2015, relative to 1990 level. All available data suggest that this is very unlikely. Since the U5MR in 1990 was 175 deaths per 1000 live births,[211] meeting the target would require reducing the number to 59.5.[212] This is not an easy feat to accomplish, especially considering the current figure of 107,[213] less than two years before the deadline. The latest MDG report affirms this difficulty as sub-Saharan Africa has achieved reductions of just 39 percent.[214] Despite this bleakness, however, there are several innovative changes that countries in the region could embrace in order to advance themselves toward the goal of reducing child morbidity and mortality in their respective territories. Factors identified in this paper as key challenges such as early marriage, maternal illiteracy, poverty on the part of parents, death of skilled health personnel, as well as institutional poverty and leadership deficit must be expeditiously and completely annihilated. As elaborately discussed in Parts III

[207] Maastricht Guidelines, *supra* note 176, ¶ 10.

[208] Obiajulu Nnamuchi, *Kleptocracy and its Many Faces: The Challenges of Justiciability of the Right to Health Care in Nigeria,* 52 J. AFR. L. 1, 33 (2008).

[209] Limburg Princicples, *supra* note 176, ¶ 26.

[210] *See* U.N. Statistics Div., *supra* note 8.

[211] World Health Statistics 2013, *supra* note 14, at 59.

[212] *Id.* (Figure derived by subtracting 66 percent or two-thirds from the 1990 figure (175) – which equals 115.5).

[213] World Health Statistics 2013, *supra* note 14, at 59.

[214] U.N. MDG REPORT 2013, *supra* note 11, at 25.

and IV, these are human rights violations and would need to be addressed as such.

Implementation strategies and initiatives targeting diseases and illnesses as well as conditions or circumstances that combine to produce them (negative socioeconomic environment or adverse social determinants of health) should be mainstreamed into national and regional policies and adequately funded. This echoes the thinking of the Committee on the Rights of the Child, that "most mortality, morbidity and disabilities among children could be prevented if there were political commitment and sufficient allocation of resources directed towards the application of available knowledge and technologies for prevention, treatment and care."[215] This, precisely, is the problem – whether African leaders are seriously committed to the health and wellbeing of children under their stewardship. Starkly presented, the question is whether Africa is so poverty-stricken that, despite its best efforts, it is simply incapable of responding to the needs of its people, health or otherwise. Development economists who have investigated this question, notably Dambisa Moyo[216] and William Easterly[217] project corruption, not finite resources, as the culprit for the stagnation in the region's socioeconomic fundamentals. But beyond corruption, an emerging menace that is more consequential in the damage it inflicts upon health and wellbeing in Africa is political cabalism.

Perhaps as an inoculation against charges of kleptocracy, political elites in various countries in the region have fashioned another disingenuous, albeit legal, scheme of siphoning public resources into their individual pockets: bloated perquisites. A typical example is Africa's most populous and petroleum-rich nation, Nigeria. Its health system ranks 187th in the world, out of 191 countries surveyed.[218] The under-five mortality rate in the country—124 deaths per 1000 live births[219] – is 14th worst globally.[220] Yet, its political class is the most remunerated (calculated as a ratio of GDP per capita) worldwide.[221] This is not to suggest that Nigeria is an oddity, sort of pariah, in the region. To the contrary, in a recent study of basic salary of lawmakers throughout the world, two other African nations, Kenya and Ghana, ranked second and third respectively.[222] Paradoxically, these are amongst the countries with the worst health indicators in the

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[215] Committee on the Rights of the Child, General Comment No. 15, *supra* note 160, ¶ 1.

[216] *See generally* DAMBISA MAYO, Dead Aid: Why Aid is Not Working and How There is a Better Way For Africa 48 – 97 (2009).

[217] *See generally* William Easterly, The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good 42-44 (2006).

[218] WORLD HEALTH REPORT 2000, *supra* note 127, at 154.

[219] World Health Statistics 2013, *supra* note 14, at 55 (Countries faring worse than oil-rich Nigeria are those considered amongst the poorest in the world: Niger, Mali, Guinea, Guinea Bissau, Angola, Burkina Faso, Burundi, Cameroon, Chad, Central Africa Republic, Congo, Sierra Leone and Somalia); *see also* WORLD HEALTH REPORT 2000, *supra* note 127, at 55.

[220] World Health Statistics 2013, *supra* note 14, at 50 – 57.

[221] J.S., I.B., & L.P., *Rewarding Work: A Comparison of Lawmakers' Pay*, The Economist (July 15, 2013, 2:54 PM), http://www.economist.com/blogs/graphicdetail/2013/07/daily-chart-12.

[222] *Id.*

world,[223] the same countries who are on the threshold of not meeting their MDG4 obligations on account of imaginary resource constraints.

To put this into perspective, the political class in Nigeria, including elite public servants (numbering just 18,000), is paid N1.26trn in salaries and allowances or 23 percent of the 2013 budget (N4.9trn).[224] A distraught chairman of a government panel constituted to review and harmonize all the reform processes in the country's federal public service was quite explicit, "it is certainly not morally defensible from the perspective of social justice or any known moral criterion that such a huge sum of public fund is consumed by an infinitesimal fraction of the people."[225] Indeed, to allow 18,000 people out of a population of 167 million[226] to pocket 23 percent of the national resources is indefensible on any account. Worse, when you add an estimated average of $4 to $8 billion annually during the eight years of Obasanjo administration (1999 to 2007)[227] that evaporated into offshore bank accounts of these same leaders, it becomes easy to understand why the health of children in the country flounders. There are simply not enough funds left for legitimate business of the people, health or otherwise. The story is much the same throughout sub-Saharan Africa. It is a story of governance gone amok. In 2010, Nigeria allocated a measly 5.7 percent of its national budget to health.[228] So, what is there to be done?

Western governments might invoke accountability mechanisms imbedded in MDG 8 to compel desired action on the part of political leadership in the region[229] but unless citizens themselves rise *en masse* to demand good governance, no meaningful progress is possible in the realm of health or on any other front in the region. The Committee on the Rights of the Child was quite emphatic, the CRC imposes obligation upon States Parties to render appropriate assistance to parents in the performance of their child-rearing responsibilities, including assisting them in providing appropriate living conditions for the healthy development of their children.[230] Therefore, failure on the part of governments in the region to

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[223] WORLD HEALTH REPORT 2000, *supra* note 127, at 153 – 54 (ranking the health systems of Ghana and Kenya as 135th and 140th globally).

[224] Adebolu Arowolo, *Lecturers Too Deserve Good Pay,* Daily Independent (Aug. 16, 2013), http://dailyindependentnig.com/2013/08/lecturers-too-deserve-good-pay-2/.

[225] *Id.*

[226] *Id.*

[227] *Criminal Politics: Violence, "Godfathers", and Corruption in Nigeria*," HUMAN RIGHTS WATCH 31-32 (Oct. 2007), http://www.hrw.org/reports/2007/nigeria1007/nigeria1007/webwcover.pdf.

[228] World Health Statistics 2013, *supra* note 14, at 136.

[229] *See* Nnamuchi & Ortuanya, *supra* note 10 (This means that MDG 8 (to develop a global partnership for development) requires wealthy nations whose development assistance fuels much of the abuse in Africa to hold erring governments accountable, for instance, by denying further assistance in absence of clear demonstration of good governance. *See also Paris Declaration on Aid Effectiveness*, *supra* note 10, ¶ 4(v) (stipulating that donors and recipients of development assistance commit themselves to tackling the remaining challenges in the path to development of third world countries, including, "[c]orruption and lack of transparency, which erode public support, impede effective resource mobile[z]ation and allocation and divert resources away from activities that are vital for poverty reduction and sustainable economic development . . .").

[230] U.N. Committee on the Rights of the Child, General Comment No. 7: Implementing Child Rights in Early Childhood, ¶ 20, U.N. Doc.CRC/C/GC/7/Rev.1 (2006).

discharge this duty foists upon the citizenry an obligation to stand up for their rights, to demand attention to their needs.

When, in the last quarter of 2013, news reached the Vatican that Franz-Peter Tebartz-van Elst, then Bishop of Limburg, Germany, had spent $43 million in renovating his residence, he was hurriedly summoned to Rome.[231] Aside from his luxurious residence, Tebartz-van Elst– dubbed the "Bishop of Bling" by the media to emphasize his extravagance – is notorious for wasting church funds on expensive automobiles and trips.[232] A statement credited to the Vatican in explanation of Tebartz-van Elst's unspecified leave, is quite telling, "a situation has been created in which the bishop can no longer exercise his episcopal duties."[233] This is not an insignificant statement. It echoes most provocatively the pro-poor vision of Pope Francis, that lavish and ostentatious lifestyle by church hierarchy should give way to Christian humility and service to the poor, the true symbol of leadership.[234] This statement is particularly poignant when one considers that children at risk "tend to be among the poorest and the most marginalized in society,"[235] the "wretched of the earth", to borrow the title of a 1963 classic by psychiatrist/philosopher Frantz Fanon.[236] Secularly translated, the papal pro-poor vision means that avarice, apathy and ostentatious lifestyles of the political class in Africa, projected in this paper as responsible for the health quandary in the region, must yield to responsible governance. It is a vision that should be co-opted by the citizenry in Africa.[237] It is also one that is powerfully consistent with a human rights approach to health.

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231 Nicole Winfield & Geir Moulson, *Pope Expels German 'Luxury Bishop' from Diocese*, MSN NEWS (OCT. 23, 2013), *available at* http://news.msn.com/world/pope-expels-german-luxury-bishop-from-diocese.

232 Carol J. Williams, *Suspended 'Bishop of Bling' was Bound to Irk Austere Pope Francis,* L.A. Times (Oct. 23, 2013), *available* at http://www.latimes.com/world/worldnow/la-fg-wn-german-bishop-bling-suspended-pope-20131023,0,6762660.story#axzz2ihL4q3Um.

233 *Id.*

234 *Pope Francis Urges Church to Focus on Helping Poor,* BBC NEWS EUROPE (Oct. 4, 2013), *available* at http://www.bbc.co.uk/news/world-europe-24391800 (Citing Pope Francis as saying the "Roman Catholic Church must strip itself of all 'vanity, arrogance and pride' and humbly serve the poorest in society" – in other words, for the Church to be transformed as the "Church of the poor").

235 *We Can End Poverty: Millennium Development Goals and Beyond 2015 Factsheet 1*, UNITED NATIONS (2013), http://www.un.org/millenniumgoals/pdf/Goal_4_fs.pdf.

236 Franz Fanon, The Wretched Of The Earth, *Transl.* Richard Philcox (1963).

237 *We Can End Poverty*, *supra* note 235 (The fact that resource strapped countries in Africa such as Ethiopia, Malawi, Tanzania and even war-torn Liberia have been able to lower the U5MR in their respective territories by two-thirds or more since 1990 signals that the task is attainable: is a question, ultimately, of commitment of the leadership of the various countries in Africa to responsible governance).

Human Rights Provisions in Free Trade Agreements: Do the Ends Justify the Means?

Meredith Kolsky Lewis*

I. Introduction

Numerous Free Trade Agreements (FTAs) contain provisions imposing human rights-related obligations, particularly in the case of agreements between the European Union and a developing country (often a former colony). Such obligations often consist of hortatory "best endeavors" language rather than legally binding provisions. Even the small number of provisions that are binding are very rarely enforced. Furthermore, even if an FTA features human rights-related provisions, it may contain other terms that have negative implications for human rights. Thus, including human rights provisions in FTAs will not necessarily result in better human rights outcomes. There are additional reasons to be cautious about the potential for FTAs to improve the circumstances of developing countries. There is an inherent inequality in FTA negotiations between developed and developing countries. And trade agreements vary significantly in the degree to which they provide for financial, technical, logistical, and other forms of assis-

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tance to their developing country participants. Indeed, there has been a recent trend towards negotiating FTAs and other trade agreements amongst predominantly developed countries. These agreements tend to focus on achieving commitments to liberalize trade more deeply and broadly than that to which the World Trade Organization (WTO) membership as a whole would be likely to agree. Such "high standard" agreements do not make many, if any, provisions for particularized needs or different capabilities of developing countries. It is therefore not surprising that such agreements and negotiations have no least-developed country (LDC)[1] or poorer developing country participants. Given the unfavorable bargaining power developing countries face in FTA negotiations with developed country partners and the trend towards negotiating FTAs that are not well-aligned with poorer countries' interests, FTAs may not be a suitable forum for addressing human rights-related concerns.

Furthermore, even though the European Union's FTAs among others contain human rights clauses, such FTAs by and large do not include the countries with the worst human rights abuses. While human rights violations occur in all countries, there is a significant correlation between level of economic development and such abuses.[2] The countries that are considered to have the highest levels of corruption and human rights abuses are not, by and large, participating in FTAs or other reciprocal trade agreements, at least in part because they are not members of the WTO. While the WTO is not a panacea for developing countries, it may provide the better space – as compared to FTAs – for achieving objectives in furtherance of human rights objectives.

This article begins in Part II with a brief discussion of the historical debates over human rights and trade linkage and the practice of including human rights provisions in FTAs. Part III identifies a number of concerns regarding the inclusion of human rights obligations in FTAs, including the fact that FTAs rarely include the worst human rights offenders. Part IV then argues that it may be preferable – and more fruitful – to promote human rights by bringing the worst culprits into the WTO, and details some of the ways human rights concerns can be promoted through the WTO and membership therein. Part V then concludes.

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[1] "LDC" is the term the United Nations uses to refer to countries it has identified as being low-income and suffering from severe structural obstacles to sustainable development. The criteria used to determine LDC status includes gross national income per capita; a human asset index; and an economic vulnerability index. There are presently 48 countries classified as LDCs. *See* What are least developed countries (LDCs)?, UNITED NATIONS (last visited Jan. 17, 2015), http://www.un.org/en/development/desa/policy/cdp/ldc_info.shtml.

[2] Indeed, the denial of economic opportunity can be seen as a direct violation of human rights. See International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) (entered into force Jan. 3, 1976). However, economic rights are often seen as "second generation" rights that are a lower priority than "first generation" civil and political rights. *See, e.g.*, Makau wa Mutua, *The Ideology of Human Rights*, 36 VA J. INT'L L. 589, 605 and n.42 (1996); *see also* Makau Mutua, *Human Rights and Powerlessness: Pathologies of Choice and Substance*, 56 BUFF. L. REV. 1027, 1028 (2008) ("[T]here has never been a major human rights NGO in the West that focuses on economic, social, and cultural rights. The problem is not simply one of orientation, but a fundamental philosophical commitment by movement scholars and activists to vindicate 'core' political and civil rights [over other types of rights] . . . .").

II. Trade and Human Rights – To Link or Not to Link?

There has been a lengthy debate within academia and the GATT/WTO membership regarding the linkage or lack thereof between trade and human rights, and to what degree any such linkage should be formalized within the GATT/WTO.

Ernst-Ulrich Petersmann has long argued that international trade governance in the WTO should be "constitutionalized" in conformity with Members' human rights obligations and that the right to trade should be seen as a human right.[3] While many ascribe to Petersmann's views, his position has also been subject to numerous critiques.[4]

Disagreement remains over whether human rights should be written more explicitly into the WTO Agreements. However, views have evolved such that it is now much more common to see commentators claim that human rights are implicitly consistent with the WTO and that the WTO should be read consistent with other international law obligations, including human rights treaties and principles of customary international law.[5] As will be discussed below, there have been numerous examples of WTO members finding ways to allow human rights concerns to be addressed, and for such concerns to be acknowledged by dispute settlement panels and the Appellate Body.

Nonetheless, the WTO membership as a whole is highly unlikely to provide for more explicit human rights-related obligations in any sort of agreement. Developing countries are generally opposed to such provisions and have not been willing to discuss them in the WTO context. Although developing countries can use their numbers to their advantage within the WTO, they are not able to do so when negotiating an FTA with a developed-country partner.[6] In the FTA con-

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[3] Petersmann has published extensively on this subject for over twenty years. *See, e.g.*, Ernst-Ulrich Petersmann, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW (1991); Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3 J. INT'L ECON. L. 19 (2000); Ernst-Ulrich Petersmann, *Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUROPEAN J. INT'L L. 621 (2002). For an extensive list of Petersmann's publications on this subject prior to 2002, see Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUROPEAN J. INT'L L. 815, n3 (2002).

[4] For a particularly harsh critique, see Alston, *supra* note 3. For other critiques, *see* Robert Howse and Kalypso Nicolaides, *Legitimacy Through "Higher Law"? Why Constitutionalizing the WTO is a Step Too Far*, in THOMAS COTTIER AND PETROS MAVROIDIS, EDS., THE ROLE OF THE JUDGE: LESSONS FOR THE WTO (2002); Steve Peers, *Fundamental Right or Political Whim? WTO Law and the European Court of Justice*, in GRÁINNE DE BÚRCA AND JOANNE SCOTT, EDS., THE EU AND THE WTO (2001).

[5] *See, e.g.*, Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT'L L. 753, 755 (2002) ("Unless otherwise prescribed, WTO provisions must evolve and be interpreted consistently with international law, including human rights law . . . . [A] good faith interpretation of the relevant WTO and human rights provisions should lead to a reading of WTO law coherent with human rights law.").

[6] *Cf.* Marcia Harpaz, *When East Meets West: Approximation of Laws in the EU-Mediterranean Context*, 43 COMMON MARKET L. REV. 993, 999 (2006) (discussing the EU's expectation that its Mediterranean neighbors will unilaterally align their legislation in certain respects to that of the EU rather than the parties engaging in a "give and take" negotiation).

text, many developing countries have acceded to the demands of developed countries by agreeing to some form of human rights obligations.[7]

There have been a variety of efforts to discipline human rights through trade agreements. In some cases, provisions are included that make specific reference to "human rights." The European Union has long included such human rights clauses in its agreements.[8] Other agreements include chapters or other provisions that, while not using the term "human rights," are nonetheless linked to an objective that can be seen as human rights-related. Examples include provisions requiring the parties to abide by International Labor Organization treaties.[9] Many FTAs, including all FTAs entered into by the United States, include labor-related provisions – sometimes in the form of an entire chapter.[10] FTAs with provisions designed to protect indigenous peoples and their innovations arguably also fit into this category. Some provisions are designed to reserve the right to take measures to further the interests of indigenous peoples, even if doing so results in giving better treatment to a segment of the domestic population than is accorded to the trading partner. New Zealand includes such provisions in its FTAs, designed to preserve the policy space necessary to comply with its obligations to Mâori pursuant to the Treaty of Waitangi.[11] Other agreements include provisions relating to the protection of traditional knowledge.[12] Examples include the China – New Zealand FTA, which provides that the parties may, subject to their respective international obligations, "establish appropriate measures to protect genetic resources, traditional knowledge and folklore."[13]

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[7] *See, e.g.*, EMILIE HAFNER-BURTON, FORCED TO BE GOOD: WHY TRADE AGREEMENTS BOOST HUMAN RIGHTS, 4 (2009).

[8] *See, e.g.*, LORAND BARTELS, HUMAN RIGHTS CONDITIONALITY IN THE EU'S INTERNATIONAL AGREEMENTS (Oxford 2005).

[9] For example, the labor chapter in the United States – Peru FTA establishes a number of obligations to comply with ILO obligations. *See* United States – Peru Trade Promotion Agreement (2006), ch. 17, particularly Arts. 17.1-17.3, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file73_9496.pdf.

[10] For a discussion of the range of labor provisions in FTAs to which the United States is a party, *see* David A. Gantz, *Labor Rights and Environmental Protection Under NAFTA and other U.S. Free Trade Agreements*, 42 U. MIAMI INTER-AM. L. REV. 297 (2011).

[11] *See, e.g.*, New Zealand – Thailand Closer Economic Partnership Agreement (entered into force Jul. 1, 2005), Art. 15.8, para. 1 ("Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Party or as a disguised restriction on trade in goods and services or investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Agreement including in fulfillment of its obligations under the Treaty of Waitangi."). For the full text of the agreement see New Zealand Ministry of Foreign Affairs & Trade, *New Zealand - Thailand Closer Economic Partnership Agreement*, *available at* http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Thailand/Closer-Economic-Partnership-Agreement-text/index.php.

[12] "Traditional knowledge" refers to "knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity." *See* World Intellectual Property Organization, *Traditional Knowledge*, http://www.wipo.int/tk/en/tk/.

[13] *See* New Zealand – China Free Trade Agreement, chapter 12, Art. 165 (entered into force Oct. 1, 2008), *available at* http://www.chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/0-downloads/NZ-ChinaFTA-Agreement-text.pdf. For a discussion of FTA provisions relating to traditional knowledge, see Susy Frankel, *Attempts to Protect Indigenous Culture Through Free Trade Agreements*,

The European Union (EU) has been the most prominent proponent of including human rights clauses in FTAs, having done so for well over twenty years.[14] The EU's agreements have generally contained provisions indicating that respect for human rights, as expressed in the Universal Declaration of Human Rights, constituted "an essential element" of the agreement.[15] Despite these provisions, earlier agreements contained no operational language requiring any particular implementing measures to ensure the protection of human rights, nor any enforcement mechanism should human rights be violated.[16] More recently, the EU has included implementation provisions that obligate the parties to implement measures necessary for their fulfillment of their FTA obligations, including a human rights clause.[17] Notwithstanding such provisions, the FTAs vary in the degree to which – if at all – the human rights clauses are subject to the agreements' dispute settlement provisions. Also, even when dispute settlement is a possibility, the EU has generally stopped short of exercising its full rights with respect to its trading partners' human rights violations.[18] While it is primarily the EU that includes human rights clauses in its FTAs, the United States and other countries often include provisions relating to labor rights that can be seen as a type of human rights provision.[19] While labor rights abuses can be seen as human rights abuses, it is not clear that the purposes of labor chapters in FTAs have much to do with protecting human rights. The motivation for including such clauses is instead to assuage the concerns of those – particularly Democrats in the United States Congress – who worry that the proposed free trade agreements will lead to a shift in jobs to developing countries due to lower wages and lax labor standards in those countries.[20] Thus, the impetus for including labor chapters in FTAs seems to be the desire to protect, or be seen to be protecting, workers in the developed country instead of protecting workers' rights in the developing country. Given the motivation for such provisions, we should not be sanguine that their inclusion in FTAs is a step forward for human rights.

in CHRISTOPH B. GRABER, KAROLINA KUPRECHT AND JESSICA C. LAI, INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE: LEGAL AND POLICY ISSUES (2012).

[14] *See* HAFNER-BURTON, *supra* note 7, at 51-52 (describing EU protections of human rights in trade agreements dating back to the early 1990s).

[15] *See Universal Declaration of Human Rights*, UNITED NATIONS, *available at* http://www.un.org/en/documents/udhr/.

[16] Lorand Bartels, *Human Rights and Sustainable Development Obligations in EU Free Trade Agreements*, University of Cambridge Legal Studies Research Paper No. 24/2012 (Sept. 2012) at 4, 8.

[17] *Id.* at 4.

[18] *Id.* at 9.

[19] *See* Zolomphi Nkowani, *International Trade and Labour: A Quest for Moral Legitimacy*, 8 J. INT'L TRADE L. & POL'Y 4, 10 (2009) (arguing that "is beyond dispute . . . that labour rights are human rights . . . ."). For a discussion of labor clauses in United States FTAs, see Nkowani at 10-11.

[20] HAFNER-BURTON, *supra* note 7, at 58, 62-64.

III. Human Rights and FTAs – Missing the Target?

A. Effectiveness of Human Rights Provisions in FTAs

Although the EU uses FTAs as a mechanism for imposing human rights provisions on developing countries, and the United States has also included human rights-related provisions in its FTAs, most commonly relating to labor standards,[21] it is unclear whether such provisions go very far towards reducing the most significant human rights abuses worldwide.

There is some data to suggest the provisions used by the EU and United States have, in some cases, had positive effects on their FTA partners' compliance with human rights obligations.[22] Of course there is a real question whether it is appropriate or desirable for developed countries to be dictating conditions of behavior to developing countries. However, if one ascribes to the "the ends justify the means" school of thought, then FTAs still do not appear to be a particularly effective instrument for addressing human rights concerns.

The author of a detailed examination of the use of human rights provisions in trade agreements has concluded the EU and US's motivations in including such provisions has more to do with politics and other considerations than with any genuine concern for a positive human rights outcome:

> [T]he rise of a human rights discourse should be viewed with at least some skepticism. . ..Many policymakers may not actually be as invested in the human rights outcome, or the effects of the policy, as they could be. . ..And so they may be willing to trade off or sell down certain aspects of human rights to win a political compromise that seems indefensible to moral advocates and that could have harmful, and certainly unintended, effects.[23]

Such inconsistencies are evident in developed countries' approaches to trade agreements with developing countries. The United Nations High Commission for Human Rights has cautioned developing countries about the potential human rights implications of adopting intellectual property protections more stringent than those required under the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), commonly referred to as TRIPS-plus provisions.[24] Such provisions include data exclusivity for patented pharmaceuticals, making it more difficult for less expensive generic medications to compete in the

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[21] Nkowani, *supra* note 19.

[22] *See generally* HAFNER-BURTON, *supra* note 7.

[23] HAFNER-BURTON, *supra* note 7, at 172. *See also* Stephen Joseph Powell and Patricia Camino Perez, *Global Laws, Local Lives: Impact of the New Regionalism on Human Rights Compliance*, 17 BUFF. HUM. RTS. L. REV. 117, 149 (2011) ("[M]any of the human rights provisions negotiated arguably serve the political and economic agendas of the developed countries rather than the actual concerns of the regional partners about their failure to implement human rights obligations to the betterment of their civil societies.").

[24] Ioana Cismas, The Integration of Human Rights in Bilateral and Plurilateral Free Trade Agreements: Arguments for a Coherent Relationship with Reference to the Swiss Context, 21-SUM CURRENTS: INT'L TRADE L. J. 3, 6 (2013).

marketplace. In the Dominican Republic – Central America – United States FTA (DR-CAFTA) negotiations, Guatemala in particular attempted to fight against such provisions, but was unsuccessful.[25] The United States and other developed countries simultaneously require TRIPS-plus commitments in their FTAs with developing countries while including provisions requiring various human rights protections – and sometimes declining to include provisions sought by the developing country to assist in promoting its economy. For example, while the United States and other developed countries have insisted upon TRIPS-plus provisions within FTAs, they have largely declined to provide protections for the traditional knowledge of the developing country partner.[26] Perhaps unsurprisingly, this reflects a preference by developed countries for political rights over economic and social rights.[27]

The culprits are not limited to the United States and European Union. The United Nations Committee on Economic, Social and Cultural Rights identified an example of this preference in Switzerland's FTAs. It noted that by requiring its FTA partners to accede to the International Convention for the Protection of New Varieties of Plants, Switzerland's FTAs could jeopardize its partners' right to food (on the basis that adherence to the convention may increase the cost of food production).[28] In the context of the PACER Plus trade negotiations, New Zealand and Australia have been accused of pressuring Pacific Island countries to increase market access for fatty cuts of meat, alcohol and tobacco products.[29]

Developed countries therefore often send a mixed message with respect to their interest in promoting human rights. Countries appear to push for provisions that suit their policy preferences, which reflect different priorities in different countries. The United States includes in its conditions – both in its GSP program

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[25] Powell and Perez, *supra* note 23 at 148-49. *See also* Joseph E. Stiglitz, Trade Agreements and Health in Developing Countries, 373 THE LANCET 363, 364 (2009) ("But perhaps the most adverse consequences for health arise from provisions in trade agreements that are designed to restrict access to generic medicines. These include . . . the data exclusivity provisions that have become a standard part of US and European bilateral trade agreements.").

[26] Colombia and Peru unsuccessfully sought such protections in their respective FTA negotiations with the United States. *See* Powell and Perez, *supra* note 23, at 146-47.

[27] Not all developed countries have insisted on TRIPS-plus provisions. Indeed, Norway refused to support negotiating for the inclusion of TRIPS-plus provisions in the EFTA-India FTA precisely because it did not wish to impede India's access to affordable medicines. Cismas, *supra* note 24, at 6.

[28] Cismas, *supra* note 24, at 6.

[29] The Pacific Agreement on Closer Economic Relations (PACER) is an umbrella agreement between Australia and New Zealand and the Forum Island Countries that sets out a plan for staged trade liberalization and cooperation. At present these countries are negotiating "PACER Plus", which will be a free trade agreement between the Forum Island countries and Australia and New Zealand. *See* New Zealand Ministry of Foreign Affairs and Trade: *Pacific Agreement on Closer Economic Relations (PACER,) available at* http://www.mfat.gov.ws/PACER.html. For a discussion of the potential negative health implications for the Pacific Islands countries of PACER Plus, see Adam Wolfenden, *Health Implications of PACER-Plus for Pacific Island Countries*, Pacific Network on Globalisation (Oct. 14, 2014), *available at* http://pang.org.fj/health-implications-of-pacer-plus-for-pacific-island-countries/ ("Non-communicable diseases are already a major problem for many FICs and commitments under PACER-Plus could exacerbate this as tariffs are cut. There are concerns that FICs will have their ability to ban the import of such fatty foods as mutton flaps, turkey tails, as well as food high in sugar content curtailed."); *see also* David Legge et al., TRADE AGREEMENTS AND NON-COMMUNICABLE DISEASES IN THE PACIFIC ISLANDS 10 (2013), *available at* http://www.who.int/nmh/events/2013/trade_agreement.pdf.

and its FTAs – provisions relating to the human rights of children, but does not require that recipient countries outlaw other serious human rights violations, such as torture or murder.[30] In contrast, the EU has emphasized workers' human rights in its GSP scheme, but has tended to refer to human rights without specifying labor rights in its FTAs.[31]

These contradictory approaches are not limited to GSP programs and FTAs, but are also evident in bilateral negotiations in connection with new WTO members' protocols of accession. In order to join the WTO, a non-member must attain the consensus of all existing members that it should be permitted to accede.[32] In practice this has led to significant demands from the existing membership, particularly the United States, for concessions that go beyond the terms of the WTO Agreements.[33] These "WTO-plus" requests are de facto requirements if the non-member wishes to receive the consensus it needs to become a member. These demands may do damage to the would-be member's development interests. For example, as a condition of Samoa's accession to the WTO, the United States required Samoa to lift its existing restrictions on the importation of turkey tails, a cheap and very fatty product that is treated as a waste product in Samoa, which has the world's highest percentage of obesity. Samoa had its measures in place to make this unhealthy product less accessible. However, just as Australia and New Zealand did for mutton flaps, the United States saw a market opportunity and seized upon it.[34]

Nevertheless, demands made in the context of WTO accession may be directed at rectifying deficiencies in judicial independence, affording legal protections for individuals and businesses, providing avenues for public participation in proposed rule-making, and other changes directed at improving transparency and reducing the potential for corruption in domestic regulatory and judicial processes.[35] Thus, some aspects of the WTO accession process are likely to lead to improvements in human rights.

B. Lack of Capture of Worst Offenders

Unfortunately, even if human rights provisions in existing FTAs are having positive effects, these agreements are not reaching the most significant human

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[30] HAFNER-BURTON, *supra* note 7 at 10.

[31] *Id.* at 10, 12.

[32] *See* Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994 1867 U.N.T.S. 154, Art. XII [hereinafter Marrakesh Agreement]; *see also* WTO, *Accessions*, *available at* http://www.wto.org/english/thewto_e/acc_e/acc_e.htm ("Any state or customs territory having full autonomy in the conduct of its trade policies may become a member ("accede to") the WTO, but all WTO members must agree on the terms.").

[33] *See, e.g.*, Julia Ya Qin, 'WTO-Plus' Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol, 37 JOURNAL OF WORLD TRADE 483 (2003).

[34] *See, e.g.*, *Samoa Rewarded for Turkey Tail Turnaround*, SAMOA OBSERVER (Oct. 3, 2012), *available at* http://www.samoaobserver.ws/local-news/other/business/1314-samoa-rewarded-for-turkey-tail-turnaround.

[35] *See, e.g.*, Susan Ariel Aaronson and M. Rodman Abouharb, *Unexpected Bedfellows: The GATT, the WTO and Some Democratic Rights*, 55 INT'L. STUD. Q. 1, 7-8 (2011).

rights abuses. Those abuses are not disciplined or addressed by the vast majority of free trade agreements, even those containing human rights provisions. This is because the worst human rights offenders largely do not participate in international trade agreements, including the WTO and FTAs.

Given the broad range of human rights instruments, it is not always evident what types of abuses are occurring when "human rights violations" are discussed in broad terms.[36] Nonetheless, various organizations and the press have catalogued countries in order to identify the most egregious violators of human rights. Although it is not clear what criteria were applied to create these rankings, which are not identical from list to list, there are significant overlaps. Two such lists are provided here as illustrative examples. What is striking about these lists is how few of the listed countries are members of the WTO.[37]

According to the Christian Science Monitor, in 2013, the world's worst human rights violators were:[38]

Tibet (not a WTO member)
Uzbekistan (not a WTO member)
Turkmenistan (not a WTO member)
Sudan (not a WTO member)
Somalia (not a WTO member)
North Korea (not a WTO member)
Libya (not a WTO member)
Eritrea (not a WTO member)
Equatorial Guinea (not a WTO member)
Myanmar (is a WTO member)

The worst violators in 2014, according to Human Rights Risk Atlas, are:[39]

Syria (not a WTO member)
Sudan (not a WTO member)
DR Congo (is a WTO member)
Pakistan (is a WTO member)
Somalia (not a WTO member)
Afghanistan (not a WTO member)
Iraq (not a WTO member)
Myanmar (is a WTO member)
Yemen (not a WTO member)
Nigeria (is a WTO member)

There are a few overlaps on these lists, with Myanmar, Somalia and Sudan appearing on both. However, of the seventeen different countries listed, only four

[36] It is likely that the abuses garnering the most attention are violations of civil and political rights rather than economic, social or cultural rights. *See* Mutua, *supra* note 2.

[37] The status of each country as a WTO member or not is indicated in parenthesis following the country's name.

[38] *World's Worst Human Rights Violators*, Christian Science Monitor (Nov. 7, 2013), http://www.csmonitor.com/Photo-Galleries/Lists/World-s-worst-human-rights-violators#279281.

[39] Maplecroft Global Risk Analytics, *Human Rights Risk Atlas 2014*, Maplecroft Global Risk Analytics, http://maplecroft.com/portfolio/new-analysis/2013/12/04/70-increase-countries-identified-extreme-risk-human-rights-2008-bhuman-rights-risk-atlas-2014b/.

– Nigeria, Myanmar, Pakistan, and Democratic Republic of Congo – are members of the WTO, and only one WTO member, Myanmar, appears on both lists.

There is also a correlation between corruption and the fulfillment of human rights.[40] In particular, "[t]he protection of human rights is inversely affected by the presence of corruption in a society."[41] It has even been argued that corruption can itself be a direct violation of human rights.[42]

Given the connection between corruption and human rights abuses, the most corrupt countries likely have significant human rights issues as well. Transparency International measures the perceived levels of corruption in countries worldwide, based on expert opinion. In the 2013 study, the ten countries perceived to have the highest levels of corruption (from worst to tenth-worst) were:[43]

Somalia (not a WTO member)
North Korea (not a WTO member)
Afghanistan (not a WTO member)
Sudan (not a WTO member)
South Sudan (not a WTO member)
Libya (not a WTO member)
Iraq (not a WTO member)
Uzbekistan (not a WTO member)
Turkmenistan (not a WTO member)
Syria (not a WTO member)

It is striking that not a single one of the most corrupt countries is a member of the WTO.

There is also a correlation between human rights violations and corruption on the one hand and lack of participation in FTAs on the other. There are numerous FTAs in existence between a developed country on the one hand and a developing country on the other, and many of these contain human rights-related obligations. However, such agreements tend not to be with the worst human rights abusers,[44] which suggests such agreements may be of limited value in addressing human rights issues. The vast majority of FTAs WTO members enter into are

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[40] *See* United Nations Convention against Corruption, G.A. Res. 58/4, U.N.Doc. A/RES/58/4 (Oct. 31, 2003) (taking the view that corruption is adversely related to the realization of human rights).

[41] James Thuo Gathii, *Defining the Relationship between Human Rights and Corruption*, 31 U. PA. J. INT'L L. 125, 147 (2009).

[42] Julio Bacio Terracino, *Corruption as a Violation of Human Rights*, (Int'l Council on Human Rights Policy Working Paper 2008), *available at* http://www.ichrp.org/files/papers/150/131_terracino_en_2008.pdf.

[43] *Corruption Perceptions Index 2013*, TRANSPARENCY INTERNATIONAL, http://www.transparency.org/cpi2013/results (last visited Jan. 18, 2015).

[44] There are numerous South-South FTAs; however, such agreements are often between neighboring countries with similar factor endowments and export portfolios, meaning that the gains from trade achieved by such agreements are likely to be modest. *See* JAMES THUO GATHII, AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES (2011) at 8 (noting this to be the case in the context of African FTAs).

with other WTO members.[45] The WTO rules dictate this dynamic. Under the rules, WTO members must give each other most-favored nation (MFN) status; MFN requires a WTO member to give to every other WTO member treatment that is at least as good as that given to any other country.[46] Thus, in the absence of an applicable exception, WTO members should treat all other WTO members the same without favoring any particular trading partner over the others. The MFN requirement applies, *inter alia*, to tariff rates.[47] Therefore, a WTO member's tariff rate on a given line of its tariff schedule should be the same for all WTO member-exporting countries. Furthermore, because MFN requires that WTO members give each other the best treatment given to "any other country," any preferential treatment given to a non-WTO member must be extended "immediately and unconditionally" to all WTO members.[48]

There are a number of exceptions to the MFN rule.[49] For our purposes, the most significant one is GATT Article XXIV, which provides that WTO members may enter into FTAs (and customs unions) with each other without extending the provisions of such agreements on an MFN basis to other WTO members, so long as certain criteria are satisfied.[50] In other words, the MFN obligation does not apply to Article XXIV-compliant FTAs. Thus, the parties to an FTA falling within the scope of Article XXIV do not need to extend to other WTO members the favorable treatment they grant to one another. With respect to the scope of Article XXIV, the text provides in relevant part that customs unions and FTAs are permitted "as between the territories of contracting parties" if certain elaborated conditions are satisfied.[51] Thus, it appears that FTAs between a WTO member and a non-WTO member would not fall within the Article XXIV exception to the MFN obligation. Accordingly, if a WTO member entered into such an FTA, it would be obligated to extend to its fellow WTO members any provisions in the FTA that were more favorable than the treatment being provided prior to the

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[45] The WTO maintains a Regional Trade Agreements Information System, which includes an online list of all FTAs that have been notified to the WTO. WTO, *Welcome to the Regional Trade Agreements Information System (RTA-IS)*, http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx (last updated Jan. 15, 2015).

[46] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, Art. I [hereinafter GATT].

[47] GATT Art. I:1.

[48] *Id.*

[49] The exceptions to the most-favored nation principle are pervasive, so much so that MFN has been termed "least favored nation" or LFN, as countries give better than the MFN rate to so many other WTO members. *See, e.g.*, Alan O. Sykes, *The Law, Economics and Politics of Preferential Trading Arrangements: An Introduction*, 46 STAN. J. INT'L L. 171 (2010). For a discussion of this phenomenon, see *The Future of the WTO, Report by the Consultative Board to Director-General Supachai Panitchpakdi* (2005) ("the Sutherland Report") at 19-21, *available at* http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf. The Sutherland Report references the particularly stark example of the European Union, which at the time of publication in 2005 gave better than MFN treatment to all WTO members except for nine (Australia, Canada, Chinese Taipei (Taiwan), Hong Kong, Japan, Korea, New Zealand, Singapore and the United States). The case of the EU has since become even more noteworthy as it has since concluded an FTA with Korea and is currently negotiating FTAs with Canada, Japan, Singapore, and the United States.

[50] GATT Art. XXIV.

[51] GATT Art. XXIV:5.

creation of the FTA. For this reason, the vast majority of FTAs are amongst WTO members.[52]

C. Not in Developing Countries' Best Interests

Bilateral FTAs between a developed country and a developing country often contain provisions that the developing country does not consider attractive, including human rights provisions, TRIPS-plus intellectual property obligations, and labor and environmental commitments.[53] While developing countries have successfully fended off these types of provisions for possible inclusion in WTO agreements, they are nonetheless willing to agree to them in a one-on-one negotiating context.[54] The bilateral negotiating context is therefore viewed as less favorable overall for developing countries than the WTO, where the developing countries are in the majority and can block the negotiation of agreements or terms that they find objectionable.[55]

In addition, negotiating FTAs takes time and resources, which are then not available to apply in the context of WTO negotiations. This has been a negative development for poorer WTO members – a trend that is likely to get worse, as discussed below.

D. Trend Towards FTAs that Exclude the Poorer WTO Members

Currently a new wrinkle is emerging with respect to FTAs that suggests even more strongly that the WTO is the better forum for developing countries. Previously, FTAs were primarily bilateral, no more ambitious than the WTO in terms of commitments, and often included developing countries. The world's economic powerhouses were not pairing with each other, but with countries with which they saw a benefit – perhaps for political or other non-economic strategic reasons – to allying. Now, however, the trend in FTAs seems to be towards multi-party agreements with high-standards objectives that by and large do not include the poorest WTO members.

Until recently, FTAs were primarily: between neighboring or closely proximate countries; between a developed and a developing country; covering similar

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[52] There are some exceptions. For example, some WTO members have entered into customs unions or free trade agreements with neighboring non-WTO member countries. In most such cases, the non-WTO member is in the process of WTO accession.

[53] *See*, *e.g.*, Arie Reich, Bilateralism versus Multilateralism in International Economic Law: Applying the Principle of Subsidiarity, 60 U. TORONTO L.J. 263, 287 (2010).

[54] *See generally* HAFNER-BURTON, *supra* note 7; Frederick M. Abbott, *A New Dominant Trade Species Emerges: Is Bilateralism a Threat?*, 10 J. INT'L ECON L. 571, 583 (2007) ("weaker actors have a better chance to have their voices heard, and their policy choices taken into account" in the multilateral consensus-based system). Cf. Andrew T. Guzman, Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties, 38 VA. J. INT'L L. 639 (1997-1998) (discussing similar phenomenon in context of BITs).

[55] *See, e.g.*, David Kinley and Hai Nguyen, Viet Nam, Human Rights and Trade: Implications of Viet Nam's Accession to the WTO 40 (Friedrich Ebert Stiftung, Working Paper No. 39 2008) (difficulties in WTO negotiations "can, and has, lead to an upsurge in the negotiation of bi-lateral trade agreements which inevitably favour the powerful over the weak and dilute the overall protective reach (albeit limited) of multi-lateral agreements such as the WTO").

topics to the WTO; and/or between a superpower and a much smaller developed country. Thus, the major economies were entering into FTAs with a variety of trading partners, but not with each other. There is currently no FTA between any two of the United States, European Union, China or Japan, nor between any two of Japan, China and South Korea. However, this dynamic is changing rapidly. At present the United States and the European Union are negotiating the Trans-Atlantic Trade and Investment Partnership (TTIP);[56] the United States and Japan are negotiating an FTA along with ten other countries in the Trans-Pacific Partnership (TPP) negotiations;[57] and Japan, China and South Korea are all engaged in the sixteen-country negotiations to form the Regional Cooperation and Economic Partnership (RCEP).[58] In tandem, China, Japan and Korea are negotiating a trilateral FTA, known as "CJK", and China and Korea have all but wrapped up bilateral FTA negotiations. Thus, much of the FTA momentum consists of the largest economies finally pairing up, rather than linkages with poorer countries.

In addition, there has been a recent move towards pursuing broader and deeper economic integration efforts within FTAs. While many previous FTAs largely tracked the subject matters of the WTO, more recently, FTAs and other trade agreement negotiations have increasingly included subjects that are outside the scope of the WTO. For example, the TPP, mentioned above, has been characterized by the parties as a "twenty-first century trade agreement".[59] While the exact meaning of this term is unclear, it seems to refer to both the breadth and depth of the agreement.[60] In terms of depth, it is understood that there will be no *a priori* exclusions of any tariff lines from the trade in goods coverage.[61] This differs from most FTAs which tend to provide carve-outs for anywhere from a relatively small to quite a large number of tariff lines associated with products seen as sensitive or otherwise of particular importance to one or more of the participating countries.[62] While it remains to be seen whether the TPP will indeed include

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[56] *See Transatlantic Trade and Investment Partnership*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, *available at* http://www.ustr.gov/ttip (last visited Jan. 18, 2015).

[57] *See Trans-Pacific Partnership*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, *available at* http://www.ustr.gov/tpp (last visited Jan. 18, 2015).

[58] *See* Department of Foreign Affairs and Trade (Australia), *Regional Comprehensive Economic Partnership Negotiations*, *available at* http://www.dfat.gov.au/fta/rcep/.

[59] *See Trans-Pacific Partnership Leaders Statement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Nov. 12, 2011), *available at* http://www.ustr.gov/about-us/press-office/press-releases/2011/november/trans-pacific-partnership-leaders-statement.

[60] Addressing this question is one of the primary objectives of a recent book. *See* THE TRANS-PACIFIC PARTNERSHIP: A QUEST FOR A TWENTY-FIRST CENTURY TRADE AGREEMENT (C.L. Lim, Deborah Elms and Patrick Low, eds.) (Cambridge 2012).

[61] *See, e.g., Outlines of the Trans-Pacific Partnership Agreement*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Nov. 2011), *available at* http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement ("The TPP tariff schedule will cover all goods, representing some 11,000 tariff lines.") [hereinafter USTR TPP Fact Sheet].

[62] The agricultural sector in particular is often carved out in whole or in part. *See, e.g.*, Warren Maruyama, *Preferential Trade Agreements and the Erosion of the WTO's MFN Principle*, 46 STAN. J. INT'L L. 177, 190 (2010) (discussing the phenomenon of FTAs with major sectoral exclusions); Matthew Schaefer, *Ensuring That Regional Trade Agreements Complement the WTO System: U.S. Unilateralism a Supplement to WTO Initiatives?*, 10 J. INT'L ECON. L. 585, 570 (2007) (discussing the tendency to exclude agriculture from FTAs); Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Con-*

commitments to remove tariffs on every single tariff line, it is unusual in even professing that such an outcome would be desirable.[63] With respect to breadth, the TPP will address several areas that generally have not been covered by FTAs. These include provisions dealing with regulatory coherence; supply chain management; state-owned enterprises; small- and medium-sized enterprises; and e-commerce.[64] In addition, the TPP will have chapters addressing environmental protection and labor standards.[65] Consistent with many United States FTAs, the provisions of these chapters may be subject to binding dispute settlement. While this is a common feature of United States FTAs, most other countries only apply hortatory or "best endeavors" language to describe any FTA text pertaining to protecting the environment or guaranteeing labor rights.

At the same time that the largest economies are negotiating FTAs with one another, larger groupings of countries are also in the process of negotiating sector-specific plurilateral agreements such as the Trade in Services Agreement (TiSA).[66] These negotiations are endeavors to incorporate broader subject matter coverage and deeper liberalization than is presently covered by the WTO Agreements, particularly in sectors involving rapidly evolving technologies. Countries that produce technology are finding the GATS increasingly anachronistic given its outdated services definitions and categories.[67] The poorest WTO members, which generally do not produce technology, have not sought to participate in these negotiations.[68] This dynamic, coupled with the lack of progress in concluding the Doha Round, has led coalitions of the willing to negotiate on their own. Because these plurilateral negotiations comprise like-minded countries interested in accelerating trade liberalization, the discussions are unlikely to involve much,

stitutional, and Political Constraints, 98 AM. J. INT'L L. 247, 268 (2004) (noting that many of the EC's FTAs exclude agriculture).

63 It is difficult to imagine that this will be the case due to a few extreme sensitivities, the most notable of which is Japan's tariff on rice. The most likely scenario is that rice would be included, but that Japan's obligations to lower tariffs would consist of something short of reducing such tariffs to zero over a given time period. Instead, the agreement could call for Japan to lower its tariffs over time, but perhaps not remove them entirely. *See, e.g.*, *Tariff Agreement with the U.S. Stands in Way of TPP*, THE JAPAN TIMES (Feb. 2, 2014), http://www.japantimes.co.jp/news/2014/02/02/national/tariff-disagreement-with-u-s-stands-in-way-of-tpp/#.U0YG26L6r6M (noting that of five categories of farm products Japan is trying to shelter from tariff cuts, the U.S. has insisted on comprehensive tariff removal for four categories, but has "shown signs of being flexible on giving exceptional treatment to rice").

64 *See, e.g.*, Embassies of Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore & Vietnam, *Trans Pacific Partnership: a 21st Century Agreement*, *available at* http://www.usnzcouncil.org/wp-content/uploads/2012/11/TPP-at-a-glance.pdf.

65 *See USTR TPP Fact Sheet*, *supra* note 61.

66 See Shin-yi Peng, *Is the Trade in Services Agreement (TiSA) a Stepping Stone for the Next Version of GATS?* 43 HONG KONG L.J. 611 (2013); Coalition of Services Industries, The Trade in Services Agreement (TISA), available at https://servicescoalition.org/negotiations/trade-in-services-agreement.

67 Peng, *supra* note 66 at 611.

68 The current TiSA participants are Australia; Canada; Chile; Chinese Taipei; Colombia; Costa Rica; the European Union; Hong Kong (China); Iceland; Israel; Japan; Liechtenstein; New Zealand; Norway; Mexico; Pakistan; Panama; Paraguay; Peru; South Korea; Switzerland; Turkey; and the United States. The parties have made clear that other WTO members that share the group's objectives are welcome to join the negotiations. *See* Foreign Affairs, Trade and Development Canada, *Trade in Services Agreement (TISA)*, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/services/tisa-acs.aspx?lang=eng.

if any, discussion of special and differential treatment for developing countries. This is a significant difference from the WTO context. Within the WTO, the principle of special and differential treatment is well-established, and is reflected in, inter alia, developing countries being subject to more lenient provisions and longer phase-in periods for a variety of commitments.[69] While the WTO process is imperfect, and much ink has been spilled over the failure of WTO members to deliver on the Doha Development Agenda, which had been promised in exchange for the Uruguay Round Agreements, developing countries nonetheless have a greater voice and have achieved far more concessions within the WTO's multilateral process than in any other trade agreement context.

Due to the size of the economies involved, these new agreements have more potential than previous FTAs to set the terms for future multilateral trade agreements. Yet developing countries, particularly poorer ones, are largely absent from this new generation of FTAs. The TPP includes a number of developing countries – most notably Vietnam – but, unlike the WTO, does not appear to be designed to include less significant commitments or other special and differential treatment provisions for these countries.[70] Sector-specific plurilateral trade agreements such as TiSA may address technologies in which poorer countries are not actively participating. As such, the less-developed countries are not needed to obtain a "critical mass".

IV. The WTO and Human Rights

A. WTO Membership Correlated with Improved Human Rights Records

The data cited above suggested that *not one* of the ten most corrupt countries is a member of the WTO. As a result, there appears to be a significant correlation between human rights abuses and corruption on the one hand, and lack of WTO membership on the other. But does WTO membership "cure" the corruption and human rights abuses? Many commentators have critiqued the WTO in particular and globalization more broadly for their role in contributing to income inequality within countries.[71] Nonetheless, even amongst those who express reservations about trade liberalization, many have conducted case studies and determined that in many instances joining the WTO has contributed to an improvement in human rights and a decrease in corruption. For example, Aaronson and Abouharb found a positive correlation between respect for democratic rights and GATT/WTO membership, with the level of respect for such rights increasing in tandem with

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[69] *See* WTO, *Special and Differential Treatment Provisions*, *available at* http://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm.

[70] *See, e.g.*, Deborah Kay Elms, *Trans-Pacific Partnership Trade Negotiations: Some Outstanding Issues for the Final Stretch*, 8 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 379, 396 (2013) ("RCEP explicitly allows special and differential treatment for developing economies, while the TPP does not.").

[71] *See, e.g.,* Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1576 (2000) (linking globalization with increased income inequality); Joel R. Paul, *Do International Trade Institutions Contribute to Economic Growth and Development?*, 44 VA. J. INT'L L. 285, 288 (2003) (concluding that globalization has increased income inequality within, and amongst, countries). For a critique of the critics, see Michael J. Trebilcock, Critiquing the Critics of Economic Globalization, 1 J. INT'L L. & INT'L REL. 213, 220-26 (2005).

the length of GATT/WTO membership.[72] They provide examples indicating that both the WTO accession process and the Trade Policy Review Mechanism have played important roles in these improvements, as these processes provide other members with the opportunity to identify problems such as lack of transparency, failure to provide the opportunity for democratic participation in various processes, and partiality in regulatory or other processes affecting businesses.[73] Kinley and Nguyen have similarly determined that Vietnam's human rights record has improved since its accession to the WTO.[74]

Accordingly, a better path towards protecting human rights may be to promote WTO membership and to facilitate developing country participation within the WTO, particularly in WTO negotiations. If this is accepted, it should be seen as a positive that many least-developed countries (LDCs) were founding members of the WTO, and several others (Cambodia, Cape Verde, Laos, Nepal and Yemen) have joined since the WTO's inception.[75] Nonetheless, the WTO accession process can be extremely lengthy and challenging, with some countries abandoning the process before achieving membership.[76]

B. Developing Countries Get More of a Say

Developing countries are better able to negotiate for redistributive or other welfare-enhancing measures in the context of the WTO than in a bilateral agreement. Although developing countries have sometimes been disappointed with the WTO as a forum for progressing their interests, the WTO is nonetheless a preferable avenue for developing countries than bilateral FTAs. First, within the WTO, developing countries have the ability to use their numbers to their advantage in promoting certain agendas and putting a halt to others. A significant majority of the WTO's 160 members[77] comprises developing and least developed countries.[78] As a result of the developing countries' demands, the WTO agreements contain many different provisions that reflect the principle of "special and differential treatment" for developing countries.[79]

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[72] *See* Aaronson and Abouharb, *supra* note 35.

[73] *Id*.

[74] Kinley and Nguyen, *supra* note 55.

[75] *See* WTO, *Members and Observers,* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (detailing a complete list of WTO members, including dates of accession).

[76] *See* UNCTAD, *The Least Developed Countries Report: Linking International Trade with Poverty Reduction*, (2004) chapter 3 (discussing LDC accession to the WTO) *available at* http://unctad.org/en/docs/ldc2004_en.pdf.

[77] There were 160 members as of Jul. 20, 2014. Yemen is the newest WTO member, having ratified its Protocol of Accession earlier this year. *See* WTO, *Yemen to Become 160th WTO Member* (May 27, 2014), http://www.wto.org/english/news_e/news14_e/acc_yem_27may14_e.htm.

[78] The WTO website indicates that over two-thirds of Members are developing countries. WTO, *Trade and Development*, http://www.wto.org/english/tratop_e/devel_e/devel_e.htm.

[79] The WTO Secretariat has periodically prepared compilations of the various special and differential treatment provisions. For the most recent version see WTO, *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WT/COMTD/W/77 (Oct. 25, 2000), *available at* http://www.wto.org/english/tratop_e/devel_e/d2legl_e.htm.

The 2013 Bali Ministerial Conference outcomes reflect the impact of developing countries banding together within the WTO. The Bali package includes several notable decisions of interest to developing countries, including an Agreement on Trade Facilitation;[80] an interim agreement relating to the stockpiling of food for food security purposes;[81] and a pledge to improve the level of duty-free and quota-free market access provided to least developing countries.[82]

C. The WTO as a Space to Address Some Human Rights Concerns

1. Power in Numbers

While developing countries can band together in the WTO context, negotiating a bilateral FTA presents a very different dynamic. When a relatively poor country negotiates an FTA with a wealthy one, the inequality in bargaining power unsurprisingly results in the developed country largely dictating terms to the developing country. This can result in developing countries individually agreeing to terms – such as intellectual property provisions that go beyond those required by the WTO's TRIPS Agreement – that they have collectively resisted within the WTO context.[83] Indeed, within the WTO, the least developed countries have been able to postpone their implementation of TRIPS since the inception of the organization. At present, LDCs will not have to implement TRIPS until 2021 at the earliest.[84]

A further benefit for developing countries is the WTO's practice of decision-making by consensus. The strong preference for consensus means that even small countries can, in theory, block certain actions. While in practice a poor country standing alone is unlikely to stand in the way of measures to which all other members either agree or are acquiescent, developing countries have successfully influenced the WTO negotiating agenda. For example, in 1996, the Singapore Ministerial Conference included a number of items on a proposed negotiating agenda that were widely viewed as of interest to developed countries, but not to developing ones.[85] Due to the opposition of developing countries, the so-called

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[80] Ministerial Decision of 7 December 2013, Agreement on Trade Facilitation, WT/MIN(13)/36, WT/L/911 (11 December 2013).

[81] Ministerial Decision of 7 December 2013, Public Stockholding for Food Security Purposes, WT/MIN(13)/38, WT/L/913 (11 December 2013).

[82] Ministerial Decision of 7 December 2013, Duty-Free and Quota-Free Market Access for Least-Developed Countries, WT/MIN(13)/44, WT/L/919 (Dec. 11, 2013).

[83] *See, e.g.*, Richard Baldwin, Simon Evenett and Patrick Low, *Beyond Tariffs: Multilateralizing Non-Tariff RTA Commitments*, in RICHARD BALDWIN AND PATRICK LOW, EDS., MULTILATERALIZING REGIONALISM: CHALLENGES FOR THE GLOBAL TRADING SYSTEM 89 (2009) ("[I]t is striking that many WTO members [have] accepted RTAs that include disciplines whose discussion they firmly rejected at the multilateral level.").

[84] Pursuant to TRIPS Art. 66.1, LDCs were given a ten-year transition period from the entry into force of the WTO before they would need to implement the bulk of TRIPS' obligations. This transition period was extended by the WTO membership in November 2005 to July 2013, and again in July 2013 until July 2021. *See Decision of the Council for TRIPS of 29 November 2005*, IP/C/40 and *Decision of the Council for TRIPS of 11 June 2013*, IP/C/64.

[85] The Marrakesh Agreement provides that the WTO membership shall meet as the Ministerial Conference at least once every two years. Marrakesh Agreement Art. IV:1. The Ministerial Conference is the

"Singapore issues" - competition policy, investment, transparency in government procurement and trade facilitation – were not included in the negotiating agenda.[86]

Thus, the WTO presents a better opportunity than do FTAs for developing countries to weigh in on topics that have human rights impacts.

2. GSP

An additional avenue under the WTO framework for human rights concerns to be addressed is to grant and withhold preferential tariff treatment through Generalized System of Preferences (GSP) schemes. The WTO rules provide for an exception to the MFN principle for preferential treatment given to developing countries pursuant to GSP programs. In 1979, the GATT contracting parties adopted the Enabling Clause,[87] which permits GATT (and now WTO) signatories to grant preferential treatment to developing countries under GSP schemes without extending that treatment on an MFN basis to all WTO members.[88] Such programs must be generalized, meaning that there should be some form of universal or neutral criteria to determine which countries are eligible, with like preferences being applied to similarly situated countries.[89] Thus, it is not acceptable to give lower tariffs solely to one's former colonies, but it would be permissible, for example, to give preferences to all countries below a certain income threshold.[90] Although the Enabling Clause is silent as to whether developed countries may condition their GSP programs on actions to be taken or abstained from on the part of the would-be recipients, it has been a widespread practice of GSP-

highest decision-making body of the WTO. *See* WTO, *Ministerial Conferences*, *available at* http://www.wto.org/english/thewto_e/minist_e/minist_e.htm. There have been nine Ministerial Conferences since the WTO's inception; Singapore was the first. *Id.* Prior to the Singapore Ministerial, many of the WTO's developed-country members pushed for the Ministerial to launch negotiations on a number of topics. Due to the objections of developing country members, new negotiations were not initiated. Instead, the Ministerial established working groups to consider the so-called Singapore issues. See *Singapore Ministerial Declaration*, WTO Doc WT/MIN(96)/DEC (Dec. 18, 1996), paras. 20-22.

[86] The resistance of developing countries led to a compromise whereby Ministers only agreed to establish working groups to study the issues surrounding these four topics. *See Singapore Ministerial Declaration*, WTO Doc WT/MIN(96)/DEC (Dec. 18, 1996), [20]-[22].

[87] Differential and more favorable treatment reciprocity and fuller participation of developing countries, Decision of 28 November 1979, GATT Doc. L/4903.

[88] GSP originated from the United Nations Conference on Trade and Development (UNCTAD) in 1968. See Gerhard Erasmus, *Accommodating Developing Countries in the WTO: From Mega-Debates to Economic Partnership Agreements*, in DEBRA P. STEGER, ED., REDESIGNING THE WORLD TRADE ORGANIZATION FOR THE TWENTY-FIRST CENTURY (2010).

[89] *See* Appellate Body Report, *European Communities – Conditions for Granting Tariff Preferences to Developing Countries*, WT/DS246/AB/R para. 173 (Apr. 7, 2004) ("[The Enabling Clause] does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that such differential tariff treatment meets the remaining conditions in the Enabling Clause. In granting such differential tariff treatment, however, preference-granting countries are required, by virtue of the term 'nondiscriminatory', to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the 'development, financial and trade needs' to which the treatment in question is intended to respond.").

[90] *Id.* Such schemes sometimes include preferential treatment for non-WTO members, particularly LDCs. For the list of the recipients to the European Union's "Everything but Arms" program, *see, e.g.*, http://trade.ec.europa.eu/doclib/docs/2012/december/tradoc_150164.pdf.

granting countries to impose such conditions.[91] Conditions are imposed in two contexts. First, the GSP program as a whole may only be available to countries satisfying certain criteria, such as complying with human rights or other international obligations.[92] Second, some GSP-grantors have a base-level GSP program available to all developing countries (often subject to a GDP ceiling), but then provide additional so-called "GSP-plus" preferences to countries meeting specified criteria.[93] Under both contexts, developed countries have used the threat of removing GSP or GSP-plus treatment as a stick to encourage developing countries to, *inter alia*, comply with human rights obligations.[94] At the same time, the ability to obtain the basic and/or heightened preferences is held out as a carrot to developing countries. Recently, the United States suspended its grant of GSP to Bangladesh as a result of the highly-publicized tragedies resulting in the deaths of over a thousand Bangladeshi garment factory workers. President Obama announced the suspension, stating Bangladesh "is not taking steps to afford internationally recognized worker rights."[95]

Developing countries have discounted the value of the favorable treatment they receive from GSP programs due to developed countries erecting new trade barriers (such as voluntary export restraints) and excluding key products from their GSP schemes.[96] One of the problems with GSP schemes is that the grantor country often grants preferences on primary products while excluding further manufactured products that use the primary product as an input. For example, unprocessed cocoa beans may be subject to preferential tariff rates, while chocolate products such as chocolate bars will not be.[97] This creates unfortunate incentives for poor countries. It would be better from a development standpoint to shift from heavy emphasis on farming and exporting primary products to a trade portfolio that included further manufacturing of those primary products. Further manufacturing is where the product is transformed from a commodity into a far more valuable (in terms of the price it will command) product. Yet when GSP programs give preferential tariff treatment to raw materials and commodities, but not to value-added products, it is understandable that GSP recipients continue to pro-

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[91] *See*, *e.g.*, Craig Forcese, *Globalizing Decency: Responsible Engagement in an Era of Economic Integration*, 5 YALE HUM. RTS. & DEV. L.J. 1, 53 (2002).

[92] *See* Susan Aronson, *Seeping in Slowly: How Human Rights Concerns are Penetrating the WTO*, 6 WORLD T.R. 413, 428-29 (2007).

[93] *Id.* at 429.

[94] The United States links GSP status to the provision of workers' rights. The EU links certain incentives to compliance with a subset of the ILO Conventions. See HAFNER-BURTON, supra note 7 at 9, n.11.

[95] U.S. Suspends Trade Preferences Program for Bangladesh, GLOBALPOST (Jun. 28, 2013), http://www.globalpost.com/dispatch/news/kyodo-news-international/130628/us-suspends-trade-preferences-program-bangladesh. *See also* U.S. Trade Representative Michael Froman Comments on President's Decision to Suspend GSP Benefits for Bangladesh, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Jun. 2013), http://www.ustr.gov/about-us/press-office/press-releases/2013/june/michael-froman-gsp-bangladesh.

[96] ROBERT E. HUDEC, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 78 (1987).

[97] *See, e.g.*, Matthew G. Snyder, Note, *GSP and Development: Increasing the Effectiveness of Nonreciprocal Preferences*, 33 MICH. J. INT'L L. 821, n. 166 (2012).

duce primary products and that such products form the bulk of their exports to developed countries.[98]

While developing countries may be dissatisfied to some degree with the conditionality of GSP programs, they do appear to provide a mechanism for developed countries to discipline human rights abuses.

3. GATT Exceptions

i. Article XX

WTO members may also be able to influence adherence to human rights obligations through the use of the GATT Article XX exceptions, in particular XX(a) allowing measures "necessary to protect public morals."[99] Article XX(a) has not been invoked frequently, and it is unclear how broadly its terms can be stretched. However, the recent *EC – Seal Products* case may signal a willingness on the part of the WTO Appellate Body to interpret "public morals" broadly. In the *Seal Products* dispute, the dispute settlement Panel and the Appellate Body both accepted the EU's contention that its ban on imported seal products was "necessary to protect public morals" under Article XX(a).[100] While *Seal Products* related to animal welfare rather than human rights, this decision seems to open the door to import restrictions based on human rights violations. In particular, it is arguably incongruous to allow import restrictions based on a moral objection to inhumane slaughter methods of seals, but to prohibit such restrictions based on a moral objection to violations of fundamental human rights (such as child labor).[101]

ii. Article XXI

An additional possibility is the use of the GATT Article XXI Security exceptions. Article XXI allows a WTO Member to refrain from complying with WTO obligations through a self-judging provision that a Member State can invoke whenever "it considers" a measure to be "necessary for the protection of its essential security interests."[102] This language is then limited by requirements that

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[98] *See* JAMES THUO GATHII, AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES 9-10 (2011) (noting that African countries primarily export unprocessed raw materials).

[99] GATT Art. XX(a).

[100] *See* Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, adopted June 18, 2014, para. 5.201 ("Accordingly, we find that the Panel did not err in concluding that the objective of the EU Seal Regime falls within the scope of Article XX(a) of the GATT 1994."); *see also* Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R, para. 7.639. While the Appellate Body (and Panel, albeit via logic rejected by the Appellate Body) found that the EU's measure did not satisfy the Art. XX chapeau and thus would need to be modified in some way (paras. 5.338-5.339), its finding under XX(a) is of potentially major significance.

[101] *See* Robert Howse and Makau Mutua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization, Rights and Democracy* (Jan. 11 2000), *available at* http://www.iatp.org/files/Protecting_Human_Rights_in_a_Global_Economy_Ch.htm (arguing that Art. XX should be interpreted consistent with international human rights law norms).

[102] GATT Art. XXI(b).

the security interests relate to fissionable materials; arms and other munitions trafficking; or times of war or other emergencies.[103]

The use of Article XXI has been limited to date.[104] However, during the GATT era, it was the basis – in tandem with United Nations Security Council authorization – for signatories to impose sanctions on South Africa.[105] Because Article XXI reads as a self-executing provision – meaning that the member makes the determination as to whether the exception applies, not a dispute settlement panel – there may be further policy space available here to respond to human rights violations committed by another WTO member.

4. *Waivers*

A further flexibility within the WTO is the ability for members to provide a waiver to excuse one or more members from abiding by some aspect of their WTO commitments.[106] The waiver process was used in the context of a shared view that WTO members should comply with the Kimberley Process Certification Scheme, which was designed to prevent any trade in diamonds that have not been certified as conflict-free. Implementing the Kimberley Process requires members to prohibit importation of certain diamonds. In theory, such import restrictions could have been justified under either Article XX or XXI of GATT.[107] However, because members did not wish to rely upon the potential application of an exception, they instead decided to draft a waiver to excuse members from complying with WTO obligations to the extent such noncompliance was necessary to comply with the Kimberley process. While the waiver may not have been necessary (because Article XX or XXI could perhaps have been relied upon as defenses, had a country trading in conflict diamonds challenged a ban on importation of such diamonds), the relevant point here is that waivers are another tool WTO members can use to limit trade in order to further human rights objectives.

V. Conclusion

Human rights provisions in FTAs may have a positive effect on human rights adherence in some cases. However, such advances are likely to be around the margins, as the most serious human rights offending countries and the most corrupt nations are largely not participating in FTAs. In addition, FTAs present some concerns due to the inequality of bargaining power that exists in agree-

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[103] *Id*.

[104] *See, e.g.*, Roger Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697, 707.

[105] Olufemi Amao, *Trade Sanctions, Human Rights and Multinational Corporations: the EU-ACP Context*, 32 HASTINGS INT'L & COMP. L. REV. 379, 389 (2009) ("[S]anctions were successfully imposed based on Article XXI and United Nations Security Council authorisation, for gross violations of human rights in the territory."). *See* S.C. Res. 418, U.N. Doc. S/RES/418 (Nov. 4, 1977); S.C. Res. 569, U.N. Doc. S/RES/569 (Jul. 26, 1985).

[106] *See* Marrakesh Agreement, Art. IX:3-5. Waivers require the approval of at least three fourths of the WTO membership. Marrakesh Agreement, Art. IX:3.

[107] *See*, *e.g.*, Joost Pauwelyn, *WTO Compassion or Superiority Complex? What to Make of the WTO Waiver for 'Conflict Diamonds'*, 24 MICH. J. INT'L L. 1177 (2003).

ments featuring a developed and a developing country; the inclusion alongside human rights obligations of certain provisions, such as TRIPS-plus intellectual property provisions that may conflict with human rights objectives; and the trend towards FTAs that will largely exclude developing countries and their interests. The data is more convincing with respect to a linkage between WTO membership and an improvement in human rights. In addition, the WTO provides a more conducive forum than FTAs for developing countries to have a voice in the policies that affect them. There is policy space within the WTO for developed countries to adopt policies to encourage developing countries to adhere to human rights obligations, but at the same time, allow the developing countries to express their own views on these issues. As such, those interested in promoting human rights in developing countries should focus less on pushing human rights obligations in FTAs and more on bringing countries into the WTO and working therein to effect agreements that will help the economies – and in conjunction the human rights records – of developing countries.

Defending the Spirit of the DOHA Declaration in Free Trade Agreements: Trans-Pacific Partnership and Access to Affordable Medicines

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Abstract

The Doha Declaration on the World Trade Organization's (WTO) Agreement on Trade Related Intellectual Property Rights (TRIPS) and Public Health is a strong political statement, which further confirms the interpretative value of

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TRIPS. According to Paragraph 4 of the Doha Declaration, Members can and should interpret and implement TRIPS in a manner supportive of their own rights to protect public health and, in particular, to promote access to medicines for all. The 'spirit of Doha' represents this broad consensus of the international community that governments are not only entitled to but have a duty to use the necessary public policy health safeguards – so called TRIPS flexibilities – that are necessary to protect public health and promote access to affordable medicines.

The recent rise of bilateral and multilateral free trade agreements (FTAs) threatens public health and access to affordable medicines. FTAs usually include provisions that mandate an increased level of intellectual property protection and strengthened terms of enforcement.

The United States Trade Representative (USTR) is currently negotiating the Trans-Pacific Partnership (TPP), a multilateral free trade agreement with twelve countries in the Asia Pacific region. The negotiations include the U.S., Japan, Australia, Peru, Malaysia, Vietnam, New Zealand, Chile, Singapore, Canada, Mexico, and Brunei.

The intellectual property chapter proposed by USTR includes measures harmful to access to affordable medicines that have not been seen before in previous FTAs. They limit public health policy space in the Asia-Pacific region and disregard the spirit of Doha Declaration.

I. Introduction

The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) stands as a powerful symbol of the globalization of intellectual property rights (IPRs). TRIPS, the first multilateral agreement that expressly links intellectual property (IP) to trade, was introduced during the final part of the Uruguay round of the World Trade Organization (WTO) negotiations. The Agreement covers a wide range of IP issues, including provisions on domestic enforcement and a procedure for achieving binding dispute settlements between Parties. TRIPS is unique in character as it establishes a minimum standard for IPRs protection for all WTO members.

Over the last decade, there have been a number of heated discussions and debates revolving around the TRIPS Agreement. These debates have usually centered on the implementation of the TRIPS Agreement at a domestic level, as well as its potential impact on development and the subsequent costs of compliance, including access to affordable medicines. According to the Doha Declaration, Members can and should interpret and implement TRIPS in a manner supportive of their own rights to protect public health and, in particular, to promote access to medicines for all. The 'spirit of Doha' represents the broad consensus of the international community that governments are not only entitled to, but also have a duty to use the necessary public policy health safeguards – the so called TRIPS flexibilities – which are necessary in order to both protect public health and promote access to affordable medicines.

On the other hand, the recent rise of bilateral and multilateral free trade agreements (FTAs) shrink policy space for public health and access to affordable

medicines. FTAs usually include provisions that mandate an increased level of IP protection and strengthened terms of enforcement. Hence, the title of 'TRIPS-plus' has emerged in reference to provisions that either exceed the requirements of TRIPS or eliminate the flexibilities underpinning TRIPS.

The Trans-Pacific Partnership is President Barack Obama's signature Asia-Pacific economic project – covering roughly half the world's population. The current negotiations include twelve countries: the U.S., Japan, Australia, Peru, Malaysia, Vietnam, New Zealand, Chile, Singapore, Canada, Mexico, and Brunei. The intellectual property chapter proposed by the U.S. Trade Representative (USTR) includes measures harmful to access to medicines in several chapters of the TPP that have not been seen before in previous FTAs. Leaked texts have revealed U.S. demands that would significantly expand the scope of pharmaceutical patents and lower patentability criteria lengthen pharmaceutical monopolies and eliminate safeguards against patent abuse. These risks combined make the TPP especially dangerous for access to affordable medicines as they limit public health policy space in the Asia-Pacific region and disregard 'the spirit of Doha Declaration.'

This paper gives an account of the developments that have shaped the intellectual property landscape. The first part of the paper outlines the origins and background of the TRIPS Agreement and the Doha Declaration. The second part focuses on the TPP and summarizes the TRIPS-plus provisions of the U.S. proposal for the IP chapter of the TPP.

II. The TRIPS Agreement

A. The Origins of the TRIPS Agreement

The roots of the TRIPS Agreement begin in the Paris Convention for the Protection of Industrial Property (1883)[1] and the Berne Convention for the Protection of Literary and Artistic Works (1886).[2] These conventions established the basic legal principles of IPRs regarding non-discrimination, national treatment, and right of priority for ultimate global protection of IPRs. Remarkable advances in technology during the 1980s, including the effective utilization of computers, led to a surge of technological developments. Computer-aided drug design allowed pharmaceutical companies to discover new molecules and compounds through random screening of natural products. This use of computer technology enabled inventors to introduce new inventions to the market more rapidly than

[1] The provisions of the Paris Convention enabled inventors to obtain protection in foreign territories for their intellectual creations in the form of industrial property rights and inventions (e.g. patents, trademarks and industrial designs). *See* Paris Convention for the Protection of Industrial Property, Mar. 20, 1883.

[2] The Berne Convention brought copyright into the international arena. Berne made it possible for nationals of signatory states to obtain international protection of their right in relation to controlling and receiving payment for the use of their creative works. *See* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886.

ever before.[3] The effective protection of IPRs became relatively favourable and advantageous for pharmaceutical companies and developed countries.

Patents are one of the oldest forms of intellectual property protection. As with all forms of intellectual property, patent protection is justifiable as being primarily a neutral social mechanism that enables an adequate allocation of private sources to encourage the creation of technology.[4] In highly industrialized and developed countries, patent systems are used as regulatory tools to stimulate investment in research and development (R&D) and innovation. Over the last few decades, patents were made more available and easier to obtain for a wider variety of goods in those countries.

By the end of the 1980s, multinational pharmaceutical companies made the international protection of IPRs a high priority. Numerous studies noted the economic losses suffered by major companies due to the lack of effective protection and/or enforcement of IPRs abroad, especially in the major developing countries.[5] The relatively weak IPRs protection in developing countries started to be seen as a trade-related problem by multinational pharmaceutical companies and governments of developed countries. Multinational companies demanded a uniform system that would provide strong worldwide protection, which led to the collaboration of the three leading lobbying groups – entertainment, software, and pharmaceutical industries. They shared a common interest in fortifying the protection of IPRs worldwide, because their success relatively depended upon the collection of economic royalties that accrue from IPRs protection. They had the political muscle to place IPRs prominently on the U.S. trade agenda.[6]

Taking all these concerns into account, the U.S. Congress incorporated IPRs into the U.S. trade regime. Relatively weak IPRs protection in developing countries was identified as one of the major causes for trade distortion and the consequent export losses. The protection of IPRs was afforded more favourable treatment than the apparent public interest in the availability of affordable medicines.

Consequently, Section 301 of the U.S. Trade Act of 1984 introduced IPRs into the U.S. trade agenda, which was designed to provide for the enforcement of trade sanctions against foreign countries for maintaining acts, policies and practices that violate or deny U.S. rights and benefits under trade agreements, or that are unjustifiable, unreasonable, discriminatory and have the potential to restrict U.S. commerce. By the authority given under Section 301, USTR undertook an investigation of allegations of IP infringement.[7]

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[3] Burcu Kiliç, Boosting Pharmaceutical Innovation in the Post-TRIPS Era; Real Life Lessons for the Developing World 68-72 (2014).

[4] Nuno Pires De Carvalho, The TRIPS Regime of Patent Rights 1 (2d ed., 2005).

[5] Global Dimensions of Intellectual Property Rights in Science and Technology 12-22 (Mitchel B. Wallerstein et al. eds., 1993).

[6] Kenneth C. Shadlen, *Intellectual property, trade, and development: can foes be friends?* 13 Global Governance 171, 172 (2007).

[7] Susan K. Sell, *Intellectual Property Protection and Antitrust in the Developing World: Crisis, Coercion, and Choice*, 49 Int'l Org. 315, 323 (1995).

Nevertheless, Section 301 did not go far enough to assure global protection for IPRs at the desired level. Following failure of these bilateral efforts, the process moved to a multilateral setting.

B. Intellectual property and trade - hand in hand for new beginnings

The World Intellectual Property Organisation (WIPO) was the primary regulative organ for the administration of the main IPRs treaties, such as the Paris Convention on Industrial Property and the Berne Convention on Literary and Artistic Works. The standards established by these WIPO treaties failed to provide substantive protection and crucially, the WIPO system lacked proper enforcement mechanisms.

The reviews of the Paris Convention, which took place in the early 1980s, ended in a fiasco for developed countries. It had become obvious that the proposals to strengthen the WIPO system of IPRs protection were not practical enough to meet the needs of an effective, global IPRs regime. Given the lack of tangible results achieved during that period, developed countries, led by the U.S., substantially redefined their interests and changed their approach.[8]

These developed countries adopted a trade-based approach not overseen by WIPO. The U.S. was the first member to propose the inclusion of IPRs within the agenda of the General Agreement on Tariffs and Trade (GATT). As part of the Ministerial Declaration of 1986, the Uruguay round of negotiations on the trade-related aspects of intellectual property was launched.[9]

The goal was to draft a multilateral binding agreement that would set minimum levels of protection and enforcement for IPRs. The variable WIPO regime was replaced with a more robustly governed multilateral regime that set a minimal floor level for protection of IPRs.[10] Hence, the developed countries, led by the U.S., envisaged an ambitious and comprehensive agreement on standards for the protection of IPRs.

The Uruguay round of negotiations was based on incomplete information and as a result, it was regarded as an 'imperfect bargain'[11] for developing countries. They were willing to "co-operate on the former, but opposed the latter"[12] and were unable to form a cohesive group. In fact, developing countries were individually weak and divided as a group. There was a vast gap regarding both intellectual knowledge and negotiation resources between the developed and developing countries. While most of the developing countries were represented by a limited

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[8] Daniel J. Gervais, *The Internationalization of Intellectual Property: New Challenges From the Very Old and the Very New*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 929, 934 (2002).

[9] DUNCAN MATTHEWS, GLOABLISING INTELLECTUAL PROPERTY RIGHTS: THE TRIPS AGREEMENT 17 (Richard Higgott ed., 2002).

[10] CHRISTOPHER MAY, THE WORLD INTELLECTUAL PROPERTY ORGANIZATION, RESURGENCE AND THE DEVELOPMENT AGENDA 68 (2007).

[11] For TRIPS negotiation narrative, see DANIEL GERVAIS, INTELLECTUAL PROPERTY TRADE AND DEVELOPMENT, STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA (2007).

[12] BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADE SYSTEM 283 (2nd ed. 2001).

number of negotiators, the U.S. had dozens of negotiators who were solely working on the issue of IPRs alone.[13] At the time, the negotiation process was described as "a lopsided affair; it is like a war where some people fight with pistols while the others engage in aerial bombardment."[14] Developing countries simply did not have the technical expertise to negotiate the issue. Furthermore, there was a lack of motivation and coordination among developing countries. They were unable to "foresee how far reaching the economic and social implications of the TRIPS Agreement were likely to be."[15] Combined with "hardball" diplomacy, this enabled developed countries to 'win the battle' and achieve the first global governance regime for IPRs as a part of the new WTO system.[16]

In contrast to the rest of the Uruguay round, the TRIPS negotiations were focused not on freeing trade but on changing the domestic regulatory and legal regimes in developing countries.[17] At this stage, the TRIPS negotiations were assumed to be zero-sum in the short run because it was thought that the stronger enforcement of rights in developing countries could result in large transfers of foreign direct investment.[18] There were a number of possible gains to be made in relation to world trade, since each group of countries was able to offer something that the other group of countries wanted.

It is possible to view TRIPS as unique because of the way it was negotiated. There was a strategy to get a mix of issues on the table, even if they were previously unrelated, in order for them to become linked for bargaining purposes. This was known as 'linkage-bargain diplomacy.'[19] Thus, IP was negotiated across sectors. Put simply, it was traded in negotiations for deals on fruits or textiles. Hence, GATT offered opportunities to create bargaining positions and many developing countries had much to gain from a liberalized trade regime, which had the ability to incorporate textiles and agricultural products. The fear of being undercut by competitors in the developing world meant that some of the poorer nations were forced to tighten their domestic protection of IPRs unitarily in order to attract foreign direct investment and technology and to avoid the U.S. trade sanctions[20]. On the other hand, the U.S. and other developed countries had much to gain from the liberalization of services and strong worldwide IP protection.[21] Thus, TRIPS was considered to be the product of a compromise between developed and developing countries. However, the bargaining power of the parties was

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[13] HA-JOON CHANG, BAD SAMARITANS: THE GUILTY SECRETS OF RICH NATIONS AND THE THREAT TO GLOBAL PROSPERITY 37 (2007).

[14] *Id.*

[15] *See* MATTHEWS, *supra* note 9, at 44-45.

[16] CHRISTOPHER MAY & SUSAN SELL: INTELLECTUAL PROPERTY RIGHTS: A CRITICAL HISTORY 158 (2006).

[17] *See* HOEKMAN & KOSTECKI, *supra* note 12, at 284.

[18] *Id.*

[19] MICHAEL P. RYAN, KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY 92 (1998).

[20] BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM 284 (2nd ed. 2001).

[21] *Id.*

far from equal.[22] It was "the opportunity to obtain multilateral rules and enforcement mechanisms across so many disparate issues [that was] likely to be viewed as one of the major accomplishments in any concluded the Uruguay Round."[23]

According to legal scholars, the TRIPS method of dictating rules to countries, whether developed, developing or least-developed, regarding what they must do and when and how they must do it, was unprecedented in multinational treaties. As a result, there has been widespread discussion over whether this will have far-reaching effects on national legal systems to an extent that goes far beyond the realms of intellectual property.[24]

C. A Beginning of the New Era

TRIPS may be described as a 'constitution like' agreement because it contains more than mere 'wishes,'[25] it reaches into the nation-state, giving rights to individuals.[26] However, there is still some room for flexibility regarding the way the protected subject matter is defined, owned, managed and made subject to exceptions.[27]

The main objective of the Agreement is "to reduce distortions and impediments to international trade."[28] The need to provide adequate IPRs standards has been recognised. However, there should be a balance between the interests of the public in access to information and technology and the interests of those creating new works and inventions in securing a return on their investment. This is necessary in the context of trade to avoid distortion of the system. It follows that TRIPS can only survive as an instrument of international public policy to an extent that the balance between these competing interests is established. [29]

TRIPS establishes 'minimum standards' of IPRs; however the implementation of the provisions was left to the member states' own discretion.[30] Thus, the Agreement was not recognized as being 'self-executing' or having 'direct effect.' However, Members are given the opportunity to adopt a more extensive protection than what is required, provided that such protection does not contradict the provisions of TRIPS.

The Agreement allows for diversity in the implementation methods of the provisions. The way in which it is implemented may have important implications

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[22] Peter K. Yu, *TRIPS and Its Discontents,* 10 MARQ. INTELL. PROP. L. REV. 370, 371 (2006).

[23] Dunkel, In "Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations", GATT DOC.MTN.TNC/W/FA (20 December 1991).

[24] Gerald J. Mossinghoff, *National Obligations Under Intellectual Property Treaties: The Beginning of a True International Regime*, 9 FED. CIR. B.J. 591, 603 (2000).

[25] *See* GERVAIS, *supra* note 11 at 25.

[26] Steve Charnovitz, *The WTO and the Rights of the Individual* 36 INTERECONOMICS, 98, 98 (2001).

[27] *See* GERVAIS, *supra* note 11 at 25.

[28] TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Preamble, available at http://www.wto.org/english/tratop_e/trips_e/t_agm1_e.htm.

[29] *See* GERVAIS, *supra* note 11, at 24-25.

[30] TRIPS Agreement, Art. 1.1 ("Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.").

regarding the conditions for the access to and the use of technology, as well as for the economic and social development particularly in developing countries.[31]

TRIPS is widely regarded as a means for the realization of public policy objectives via the 'inducement to innovation' and therefore, the access to the results thereof by those who need them.[32] The Agreement makes an explicit reference to "the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge."[33] The reference to mutual advantage of producers and users represents a compromise between developed and developing countries.

D. The Post-TRIPS Era and the Doha Declaration

Through their signature of TRIPS, the member states effectively gave up significant elements of their own sovereignty regarding the essential features of polity, i.e. the relevant administrative and judicial structures and procedures.[34]

The Agreement still remains an effective compromise between developed and developing countries over the scope of IPRs protection. It attempts to balance the needs and desires of all the members in order to harmonize the world IPRs regime, particularly the patent systems. However, doubt still remains regarding whether conflict has surpassed compromise.

The implementation of the Agreement was a painful process for those countries that were not in a position to absorb the deadweight losses that resulted from the global protection of IPRs.[35] This gave rise to serious problems. In other words, the strategy of the Agreement represented an unprecedented experiment that effectively accelerated the introduction of higher IPRs standards into countries that would not ordinarily be expected to adopt them.[36]

TRIPS was highly ambitious; it was presented to developing countries as an instrument for securing a long-term interest towards the goals of sustainable development and innovation. However, not long after the singing of the Agreement, its controversial provisions gave rise to discussions that focused on the costs and side effects. To a great extent, the patent regime has been linked to rising healthcare costs and problems regarding access to medicine. Many developing countries, especially the least developed ones, were faced with public health crises. These countries have experienced the difficulties related to the increasing prices of medicines. It became evident that patents substantially delayed market entry of generic medicines, raising costs and reducing access. As a result, the Agreement has come under fierce criticism.

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[31] Carlos M. Correa, Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement 23 (1998).

[32] *Id.* at 94.

[33] Daniel J. Gervais, The TRIPS Agreement: Drafting History and Analysis 117 (2003).

[34] Ryan, *supra* note 19, at 143.

[35] David W. Opderbeck, *Patents, Essential Medicines, and the Innovation Game*, 58 Vanderbilt L. Rev. 501, 507 (2005).

[36] Keith E. Maskus, Intellectual Property Rights in the Global Economy 144 (2000).

Clearly, when the developing countries signed the TRIPS Agreement, they conceded more than they received. For instance, the TRIPS assumptions and expectations regarding the technological self-sufficiency of developing countries have proven to be inaccurate.[37] This contributed directly to a number of health crises around the globe.[38] Thus, the enactment of TRIPS led to a wide-ranging debate regarding the positive and negative sides of introducing strong IPRs in developing countries.[39] These concerns have historically played an inordinate role in shaping changes to the *political landscape.*

In this context, the WTO's Fourth Ministerial Conference in Doha, Qatar, in November 2001 (the Doha Round) reflected the concerns of developing countries. The Ministerial Conference produced a separate Declaration on TRIPS and Public Health.[40] It was a strong political statement, which provided a mandate for Parties on the implementation of TRIPS by affirming its interpretative value.[41] It aimed to establish a balance between the need for access to medicines and creating incentives for innovation.[42]

The main purpose of the Declaration was to clarify the uncertainty that had arisen in many developing countries surrounding the use of TRIPS flexibilities, as most of the developing countries lack the experience and administrative know-how to regulate patents. Furthermore, the political and administrative systems of developing countries were not mature enough to face the challenges of the patent system.

Thus, Paragraph 4 of the Doha Declaration clarified that the Members can and should interpret and implement TRIPS in a manner supportive of their own rights in order to protect public health and, in particular, to promote access to medicines for all.

"We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitments to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive WTO Members' rights to protect public health and, in particular, to promote access to medicines for all."[43]

The wording of the text was drafted ambiguously enough to satisfy priorities of developing and developed countries. The existing legal obligations were main-

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[37] *Id.*

[38] Jerome H. Reichman & Rochelle Cooper Dreyfuss, *Harmonization Without Consensus: Critical Reflections on Drafting a Substantive Patent Law Treaty*, 57 DUKE L.J. 86, 97 (2005).

[39] Walter G. Park, *Chapter 9 Intellectual Property Rights and International* Innovation, INTELLECTUAL PROPERTY, GROWTH, AND TRADE 289, 295 (Keith E. Maskus ed., 2007).

[40] World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002).

[41] Carlos M. Correa, *Multilateral Agreements and Policy Opportunities*, *available at* http://policydialogue.org/files/events/Correa_Multilateral_Agreements_and_Policy_Opportunities.pdf.

[42] GERVAIS, *supra* note 11, at 8.

[43] World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002).

tained, however the importance of public health over private interests of right owners had been vindicated.[44]

TRIPS was regarded as a form of "nodal governance."[45] In this system, the powerful groups built up an ever-increasing circle of influence, arguably achieved through the use of trade coercion. Hence, the Doha Declaration may be appreciated as a victory for developing countries. They managed to isolate the U.S. and its pharmaceutical industry during the negotiations.[46]

The Declaration was a strong political statement, demonstrating that when a group of countries does not feel that a treaty has given them a fair deal, they could continue the political fight at a later date.[47]

The spirit of Doha represents this broad consensus of the international community that governments are not only entitled to but have a duty to use the necessary public policy health safeguards – so called TRIPS flexibilities necessary to protect public health and promote access to affordable medicines. These flexibilities should not only be implemented in domestic legislation but they should also be safeguarded against IP provisions that negatively affect access to medicines.

]E. TRIPS-plus provisions & Free Trade Agreements

The three leading industries in the U.S. were not entirely satisfied with the terms of TRIPS or the compromises given to the developing countries as a part of the Doha Declaration.[48] TRIPS set certain minimum standards for IP protection, but the industries wanted more.

The multinational WTO negotiations in the public eye, coupled with the increasing public awareness of access to affordable medicines, necessitated a forum shift.[49] In the late '90s, closed-door non-transparent FTA negotiations emerged as a better venue for continuing global IP norm setting.

The FTAs usually include provisions that mandate an increased level of IP protection and strengthened terms of enforcement going beyond the requirements of TRIPS[50]. Hence, the title of TRIPS-plus has started to be used widely in reference to provisions that either exceed the requirements of TRIPS or eliminate the flexibilities underpinning TRIPS.

The recent rise of bilateral and multilateral FTAs threatens public health and access to affordable medicines. Strong trade and power asymmetries exist be-

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[44] J. Michael Finger, *The Doha Agenda and Development: A View from the Uruguay Round* 19, (Asian Development Bank, ERD Working Paper Series No. 21, 2002).

[45] Scott Burris et al., *Nodal Governance,* 30 Australian Journal of Legal Philosophy, 30, 46 (2005).

[46] Peter Drahos, *Expanding Intellectual Property's Empire: the Role of FTAs,* GRAIN 1, 11 (2003) http://www.grain.org/rights_files/drahos-fta-2003-en.pdf.

[47] *Id.* at 9.

[48] Charan Devereaux et. al., Case Studies in US Trade Negotiation, Volume 1: Making the Rules 75 (2006).

[49] *See* Susan K. Sells, Private Power, Public Law: The Globalization of Intellectual Property Rights (Steve Smith et al. eds., 2003).

[50] Carsten Fink & Patrick Reichenmiller, *Tightening TRIPS: Intellectual Property Provisions of U.S. Free Trade Agreements, in* Trade, Doha, and Development: Window into the Issues (2006).

tween developed and developing countries during FTA negotiations. The trade-oriented pressures applied to developing countries to far surpass the protection afforded by TRIPS and to diminish the system of the TRIPS flexibilities in order to fall in line with the ill-suited 'TRIPS-plus' solutions.[51]

Since 1994, the U.S. has signed twenty FTAs with both developed and developing countries including Jordan, Morocco, Peru, Chile, Australia, and Singapore.[52] These agreements introduce substantive patent and enforcement rules and each agreement updates the previous one and sets the bar higher for IP protection for countries that aim to engage in negotiations to establish bilateral and regional FTAs with the U.S.[53] and EU.[54] In addition to influencing the IP regimes of FTA parties, they also exert normative influence at the international level.

In fact, the increasing number of FTAs, or bilateral investment treaties, shows that the TRIPS Agreement is being increasingly marginalized, even though its passing has not been made official.[55]

III. Trans-Pacific Partnership

USTR is currently negotiating the Trans-Pacific Partnership Agreement (TPP) with eleven countries in the Asia-Pacific region including Vietnam, Malaysia, Brunei Darussalam, Singapore, Australia, New Zealand, Peru, Chile, Canada, Mexico and Japan.[56] Over time, the U.S. hopes to eventually expand the TPP's reach to the entire Asia-Pacific Region – comprising roughly forty percent of the world's population, fifty-five percent of global GDP, and some of the world's fastest growing economies.[57] According to President Obama the TPP is "a real model, not only for the region but for the world.[58]

The origins of the TPP go back to a little known Trans-Pacific Strategic Economic Partnership (P4) Agreement, a FTA signed between New Zealand, Chile,

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[51] SELLS, *supra* note 49.

[52] *See* Free Trade Agreements, Office of the U.S. Trade Representative, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements.

[53] The U.S. has free trade agreements in force with 20 countries. *Free Trade Agreements*, Office of the United States Trade Representative, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements.

[54] The EU has free trade agreements in force with 29 countries. *The EU's free trade agreements – where are we?,* European Commission, *available at* http://europa.eu/rapid/press-release_MEMO-12-932_en.htm?locale=EN

[55] Mohammed El-Said, *Editorial: Free Trade Intellectual Property and TRIPS-Plus World,* 28 Liverpool L.R. 1, 8 (2007) (discussing TRIPS becoming increasingly marginalized).

[56] *See* Trans-Pacific Partnership (TPP), *available at* http://www.ustr.gov/tpp

[57] *What is Asia-Pacific Economic Cooperation?*, ASIA-PACIFIC ECONOMIC COOPERATION, http://www.apec.org/About-Us/About-APEC.aspx.

[58] Statements by President Barack Obama and Prime Minister of Canada Stephen Harper of Canada, The White House Office of the Press Secretary (December 6, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/12/07/statements-president-barack-obama-and-prime-minister-canada-stephen-harp.

Singapore and Brunei in 2006.[59] In 2009, USTR announced that the U.S. would be joining the expanded Trans-Pacific Partnership to negotiate a comprehensive and high-standard trade agreement for the Asia-Pacific region.[60] Australia, Peru, Singapore, Malaysia and Vietnam also eventually joined the partnership.[61] The first round of official negotiations took place in Melbourne, Australia in March of 2010.[62] The U.S. took the driver's seat afterwards for agenda setting and proposal submissions.

By late 2010, it became clear that the TPP would not be an ordinary trade agreement introducing more simplified and transparent trade and investment procedures in the Asia-Pacific region. Rather, it would impose expansive policy and regulatory constraints on the signatory countries.[63] USTR aimed at going far beyond trade facilitation and to deeper integration in IP, public health policies, custom regulations, consumer rights, and other issues of public concern. It has been made clear that the TPP would harmonize IPR obligations strictly upwards.[64]

USTR tabled its proposals for the IP chapter in February 2011, during the fifth round of TPP negotiations in Santiago, Chile.[65] The text was leaked by Knowledge Ecology International (KEI) in March 2011.[66] The proposals were marked as "protected from unauthorized disclosure," because they included confidential information and were deemed classified until four years after entry into force or close of the negotiations.[67]

The U.S. proposals contained numerous provisions that go well beyond the required standards of TRIPS. They collectively aimed for favourable conditions for the U.S. pharmaceutical industry in the TPP countries.[68] If adopted and implemented, several of those provisions would severely limit access to affordable medicines and treatment options in low- and middle-income countries, including several that are parties to the TPP negotiations.[69] The proposals are widely ac-

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59 Trans-Pacific Strategic Economic Partnership (P4) Agreement, New Zealand Ministry of Foreign Affairs & Trade, *available at* http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/index.php.

60 Trans-Pacific Partnership Announcement, USTR (December 14, 2009), *available at* http://www.ustr.gov/about-us/press-office/press-releases/2009/december/trans-pacific-partnership-announcement.

61 *See* New Zealand Ministry of Foreign Affairs & Trade, *supra* note 59.

62 Trans-Pacific Partnership Agreement negotiations, Australian Government Department of Foreign Affairs and Trade, *available at* https://www.dfat.gov.au/fta/tpp/100326-tpp-stakeholder-update-1.html.

63 Trans-Pacific Partnership (TPP): Job Loss, Lower Wages and Higher Drug Prices, Public Citizen's Global Trade Watch, *available at* http://www.citizen.org/TPP.

64 *See* Notes from meeting with USTR on the TPP IPR chapter, Knowledge Ecology International (KEI) (December 13 2010), *available at* http://keionline.org/node/1035.

65 Mike Palmedo, *TPP Negotiations – US Tables Intellectual Property Text; Members of US Congress Push for Strong IP Protections; Civil Society Asks for Protection of TRIPS Flexibilities*, INFOJUSTICE *available at* http://infojustice.org/archives/1245.

66 The Trans-Pacific Partnership, Intellectual Property Rights Chapter, Draft- February 2011, *available at* http://keionline.org/sites/default/files/tpp-10feb2011-us-text-ipr-chapter.pdf.

67 *See id.*

68 For more information on the TPPA, *see* http://www.citizen.org/more-about-trans-pacific-FTA.

69 *Access to Medicines in the Trans-Pacific FTA*, PUBLIC CITIZEN, *available at* http://www.citizen.org/Page.aspx?pid=5325&frcrld=1.

knowledged as the latest manifestation of the U.S. maximalist agenda in international intellectual property rulemaking.[70]

The February text included stringent patent and enforcement rules, including placeholder provisions on pharmaceutical related IP provisions.[71] The placeholder text was tabled in September 2011 during the eighth round of negotiations in Chicago, U.S., with a white paper outlining the Obama Administration's plans to harmonize trade and IP policies with TPP partners in order to protect and promote access to medicines.[72] The Trade Enhancing Access to Medicines ("TEAM") approach is presented as fresh thinking, which aims to "deploy the tools of trade policy . . . to help reduce potential barriers to access to medicines, while also supporting innovation and the development of new medicines by the U.S. pharmaceutical and other health industries."[73]

Despite these positive intentions expressed on paper, the simultaneous release of the TEAM paper and the most controversial and access-restricting provisions of the TPP casted doubts among public health advocates and academics. The paper has been subject to substantial criticisms for entirely failing to address these access-restricting provisions of overly aggressive IP provisions. USTR's efforts have been interpreted as back-pedalling on the promises made to the developing world on public health safeguards.[74]

The leaks of the September 2011 text revealed that USTR has again increased demands on developing countries to trade away access to affordable medicines.[75] There was even a significant roll back to modest New Trade Policy commitments (the Bipartisan Agreement on Trade Policy of May 10, 2007) incorporated into Peru, Panama, and Colombia FTAs, which ensured public health was not undermined by those FTAs.[76] A core objective was to ensure that FTA obligations do not put patients in developing countries in a position in which they could have to wait longer than patients in the U.S. to obtain affordable, life-saving generic medicines.

Indeed, the proposals tabled by USTR introduced significant 'FTAs-plus' IP standards, which appear to be more restrictive than the ones in other FTAs signed

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[70] Sean Flynn et al., *The U.S. Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement,* 28 Am. U. Int'l. L. Rev. 105, 108 (2013).

[71] *See* Palmedo, *TPP Negotiations*, *supra* note 65.

[72] *See generally* Office of the U.S. Trade Representative, Trans-Pacific Trade Goals to Enhance Access to Medicines (2011), *available at* http://www.ustr.gov/webfm_send/3059.

[73] *Id.*

[74] Tido von Schoen-Angerer, *Shooting Itself In the Foot: The Broken Promises of the U.S. Trade Agenda,* The WorldPost (Sept. 14, 2011 12:00 PM), http://www.huffingtonpost.com/tido-von-schoenangerer/shooting-itself-in-the-fo_b_959847.html.

[75] *See generally* Trans-Pacific Strategic Economic Partnership, Intellectual Property Rights Chapter (Selected Provisions), proposed September 2011, *available at* http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificIP1.pdf.

[76] A core objective was to ensure that FTA obligations do not put patients in poor countries in a position in which they could have to wait longer than patients in the United States to obtain affordable life saving generic medicines. Office of the U.S. Trade Representative, Bipartisan Agreement on Trade Policy 3 (May 2007), *available at* http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf.

by the U.S. By prioritizing private interests over the public interest, USTR's demands aimed to strengthen, lengthen and broaden pharmaceutical monopolies, which would lead to higher drug prices, harming access to affordable medicines and treatment in developing countries. They imposed further limitations that would prolong drug monopolies, eliminate local competitors, increase drug prices, and inhibit the development of national pharmaceutical industries in the Asia- Pacific region.

Despite the public relation efforts of the USTR, the U.S. proposals have not escaped criticism. Doctors without Borders (MSF) called the TPP "the worst trade deal ever with millions losing access to medicines."[77] A number of public interest health and advocacy groups and academics have appealed the issue to the United Nation's Special Rapporteur[78] on the right to health and asked him to intervene into the negotiations.[79] The Rapporteur requested nine of the negotiating parties of the TPP to clarify whether "some of the TPP's intellectual property provisions would strengthen monopolies for life-saving medicines and create barriers for access to medicines" and "negatively impact the ability of developing countries to take positive steps towards ensuring the enjoyment of the right to health of their citizens."[80] Only Australia, Chile and New Zealand responded to the Rapporteur and assured that they would not agree to provisions that would negatively impact rights to health and access to medicines.[81]

Considering political sensitivities, the United Nations Programme on HIV/AIDS (UNAIDS) and the United Nations Development Programme (UNDP) adopted a more moderate tone in criticising the TPP noting " . . . there is growing evidence that TRIPS-plus provisions may adversely impact medicine prices and, consequently, access to treatment."[82] A joint brief issued in 2012 drew attention to the importance of TRIPS flexibilities and warned countries about the negative consequences of TRIPS-plus provisions, proclaiming that "to retain the benefits of TRIPS Agreement flexibilities, countries at a minimum should avoid entering

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[77] Doctors Without Borders, Twitter, http://www.doctorswithoutborders.org/support-us/campaigns/trans-pacific-partnership (where Doctors Without Borders asked users to tweet U.S. Trade Representative Michael Froman regarding the TPP).

[78] SPECIAL RAPPORTEUR TO THE UNITED NATIONS, MANDATE OF THE SPECIAL RAPPORTEUR ON THE RIGHT OF EVERYONE TO THE ENJOYMENT OF THE HIGHEST ATTAINABLE STANDARD OF PHYSICAL AND MENTAL HEALTH (July 19, 2011), *available at* https://spdb.ohchr.org/hrdb/19th/AL_USA_19.07.2011_%2813.2011%29.pdf.

[79] Krista Cox & Thiru Balasubramaniam, *UN Special Rapporteur for the Right to Health Asked to Intervene in TPP Trade Negotiation*, KNOWLEDGE ECOLOGY INTERNATIONAL (March 21, 2011), http://www.keionline.org/node/1099.

[80] *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, BIPARTISAN AGREEMENT ON TRADE POLICY, *supra* note 76.

[81] James Love, *Australia, Chile, and New Zealand Reply to UN Rapporteur for Right to Health on TPP Complaints*, KNOWLEDGE ECOLOGY INTERNATIONAL (September 27, 2012), http://keionline.org/node/1554.

[82] UNITED NATIONS DEV. PROGRAMME & JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS, THE POTENTIAL IMPACT OF FREE TRADE AGREEMENTS ON PUBLIC HEALTH 4 (2012), *available at* http://www.unaids.org/sites/default/files/en/media/unaids/contentassets/documents/unaidspublication/2012/JC2349_Issue_Brief_Free-Trade-Agreements_en.pdf ("[T]here is growing evidence that TRIPS-plus provisions may adversely impact medicine prices and, consequently, access to treatment . . . .").

into FTAs that contain TRIPS-plus obligations that can [have an] impact on pharmaceuticals prices or availability."[83]

Not surprisingly, the U.S. proposals ran into severe opposition from TPP partners. It has been reported by various sources, which have been closely following the negotiations that eight of the negotiating parties opposed the U.S. September text and the trade enhancing access to medicines (TEAM) approach.[84] Facing growing opposition, the U.S. entered into a "period of reflection" in order to internally review the feasibility of its initial proposals on patents and pharmaceuticals.[85] Throughout the negotiations in 2012 and 2013, this issue became so critical that some observers feared that the deadlock of negotiations might jeopardize a successful outcome in the TPP talks.[86]

While the U.S. was in a "period of reflection," a group of six countries including Chile, New Zealand, Australia, Singapore, Malaysia and Canada[87] took the driver's seat in May of 2013 during the 17th Round of negotiations in Lima, Peru.[88] They presented a discussion paper outlining an alternative approach on pharmaceutical IP provisions to the one proposed by the U.S.[89] The paper used the TRIPS language as a starting point for developing a legal text for the last official round of the TPP negotiations in Brunei Darussalam in August of 2013. The six-country proposal, which eventually became a five-country counterproposal,[90] preserved the spirit of Doha by incorporating certain TRIPS flexibilities to facilitate access to affordable medicines.

In November 2013, WikiLeaks published the complete draft of the IP chapter from the Brunei Round of the negotiations.[91] The new leaks demonstrated that USTR still demanded terms, which would limit access to lifesaving medicines throughout the Asia-Pacific region. Different from the previous leaks, the WikiLeaks text included other countries' positions and identified which countries support which terms. The text also revealed new issues of interest and changes in

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[83] *Id.* at 5.

[84] *TPP Countries Poised to Revisit U.S. Access to Medicines Proposal*, World Trade Online (March 8, 2013), http://insidetrade.com/Inside-Trade-General/Public-Content-World-Trade-Online/tpp-countries-poised-to-revisit-us-access-to-medicines-proposal/menu-id-896.html.

[85] *Id.*

[86] *Canada, Mexico May Have Mixed Impact on U.S. Efforts on IPR in TPP*, World Trade Online (August 16, 2012), http://insidetrade.com/Inside-US-Trade/Inside-U.S.-Trade-08/17/2012/canada-mexico-may-have-mixed-impact-on-us-efforts-on-ipr-in-tpp/menu-id-172.html.

[87] Richard Bush & Joshua Meltzer, The Brookings Institution Center for East Asia Policy Studies, Tawain and the Trans-Pacific Partnership: Preparing the Way 5 (2013).

[88] N.Z. Ministry of Foreign Trade and Tourism, Trans-Pacific Partnership Negotiations Move Forward in Peru (May 24, 2013), http://www.mfat.govt.nz/downloads/trade-agreement/transpacific/TPP-Move-Forward-in-Peru-24May2013.pdf.

[89] *U.S. Tables SPS Text; Other Countries Float Pharmaceutical IP Ideas*, World Trade Online (May 20, 2013), http://insidetrade.com/201305202434890/WTO-Daily-News/Daily-News/us-tables-sps-text-other-countries-float-pharmaceutical-ip-ideas/menu-id-948.html.

[90] Australia was in election period during the drafting of the counterproposal. Krista Cox, *TPP Negotiating Parties' Counterproposal to the US on Medicines Represents a More Flexible Approach*, Knowledge Ecology International (November 14, 2013), http://www.keionline.org/node/1826.

[91] *See generally* Trans-Pacific Partnership, Intellectual Property Rights Chapter, proposed August 2013, *available at* https://wikileaks.org/tpp/static/pdf/Wikileaks-secret-TPP-treaty-IP-chapter.pdf.

the state of play. There were a few, but not many, helpful changes to the U.S. position. More importantly, the publication revealed unanimous or nearly unanimous opposition to many harmful U.S. proposals, and indeed epic efforts by some countries to advance the public interest and public domain.[92]

On October 2014, WikiLeaks released a second updated version of the IP Chapter of the proposed TPP.[93] The updated text revealed new proposals and issues of interest. The deep resistance to the U.S.-backed measures that would expand pharmaceutical monopoly power and compromise access to medicines has endured for years. It became clear that "the U.S. has dropped some harmful proposals, but continued to insist on many others."[94]

IV. Overview of some of the U.S. proposals on patents & pharmaceuticals

A. Patentability Requirements & Evergreening

Critics including public health experts, international organizations, government officials, academics, and civil society organizations have pointed out that the patent provisions of the proposed IP chapter aim to lengthen, strengthen and broaden patent protection, and thus the monopolies of pharmaceutical companies in TPP negotiating countries.[95]

Patent evergreening has been identified as a main area of concern for all of the negotiating parties. Evergreening patents aim to extend the life of the original patent through the patenting of minor changes in active pharmaceutical ingredients of existing products (polymorphs, salts, etc.), inert ingredients, formulations, dosages, and combinations.[96]

In terms of evergreening concerns, much attention has been paid to USTR's text tabled in September 2011, which is widely known as the 'pharmaceuticals' text. Nevertheless, a very significant threat lies in the heart of the U.S. February 2011 text. Article 8 of the IP chapter sets substantive standards for patent protec-

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[92] Burcu Kilic & Peter Maybarduk, *What's New in the WikiLeaks TPP Text?*, PUBLIC CITIZEN'S GLOBAL ACCESS TO MEDICINES PROGRAM (November 13, 2013), http://www.citizen.org/documents/Whats%20New%20in%20the%20WikiLeaks%20TPP%20Text-11.pdf.

[93] *See generally* Trans-Pacific Partnership, Intellectual Property Rights Chapter, proposed May 2014, *available at* https://wikileaks.org/tpp-ip2/tpp-ip2-chapter.pdf.

[94] Burcu Kilic & Peter Maybarduk, *What's New in the 2014 WikiLeaks TPP Intellectual Property Text? Pharmaceuticals: Landing Zones and Issues for Ministerial Discussion*, PUBLIC CITIZEN'S GLOBAL ACCESS TO MEDICINES PROGRAM (October 16, 2014), http://www.citizen.org/documents/pharmaceuticals-landing-zones-and-issues-for-ministerial.pdf.

[95] *See generally How the TPP Endangers Access to Affordable Medicines*, PUBLIC CITIZEN'S GLOBAL ACCESS TO MEDICINES PROGRAM (November 2013), http://www.citizen.org/documents/TPPonepagerfinalnovember2013.pdf (discussing longstanding concerns associated with U.S. draft proposal for the Intellectual Property Chapter of the TPP).

[96] Burcu Kilic & Luigi Palombi, *The Question of Patent Eligible Subject Matter and Evergreening Practices*, INFOJUSTICE.ORG (July 27, 2013), http://infojustice.org/archives/30314#more-30314.

tion. Articles 8.1,[97] 8.2,[98] 8.12,[99] when read together, facilitate so-called evergreening patents.

The U.S. proposal provided U.S.-based patent protection extending the scope of protection to new forms, uses, and methods of using a known product. Pharmaceutical companies would then be able to file patent applications for new methods of preparation, new formulations and new uses of known substances without being subject to any restrictions.

The only TPP countries - and the only countries in the world - to recognize patent protection to diagnostic, therapeutic and surgical methods for the treatment of human beings are the U.S. and Australia.[100] The exclusion of these methods from patentability is grounded in ethical values, i.e. to ensure physicians can treat patients with therapies that best fit their needs. Patentability of new therapeutic applications of known drugs – known as second/subsequent use – also falls within this exclusion. A new therapeutic application of a known drug is widely considered a method for treatment of humans.[101]

Moreover, an introduction of patent protection for methods of treatment for the human body in TPP countries without any safeguards could impose additional costs on their healthcare system. It is possible that hospitals could be required to obtain licenses for patented treatments that they offer, and doctors could be asked to pay royalties for the patented diagnostic, therapeutic and surgical methods they use.

Article 8.1 of the February 2011 text provides patent protection to new uses and method claims. Article 8.2 make methods of treatment for the human (or animal) body eligible subject matter for patents. Article 8.12 interprets industrial

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[97] Article 8.1: The Parties confirm that patents shall be available for any new forms, uses, or methods of using a known product; and a new form, use, or method of using a known product may satisfy the criteria for patentability, even if such invention does not result in the enhancement of the known efficacy of that product. FN15: For the purposes of this Article, a party may treat the terms "inventive step" and "capable of industrial application" as being synonymous with the terms "non-obvious" and "useful" respectively. In determinations regarding inventive step (or non-obviousness), each Party shall consider whether the claimed invention would have been obvious to a skilled artisan (or having ordinary skill in the art) at the priority date of claimed invention. Trans-Pacific Partnership, Intellectual Property Rights Chapter (Selected Provisions) art. 8.1 & n.15, proposed September 2011, *available at* http://www.citizens trade.org/ctc/wp-content/uploads/2011/10/TransPacificIP1.pdf.

[98] Article 8.2: Each Party shall make patents available for inventions for the following: (a) plants and animals, and (b) diagnostic, therapeutic, and surgical methods for the treatment of humans and animals. Trans-Pacific Partnership, Intellectual Property Rights Chapter (Selected Provisions) art. 8.2, proposed September 2011, *available at* http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacific IP1.pdf.

[99] Article 8.12: Each Party shall provide that a claimed invention is industrially applicable if it has a specific, substantial, and credible utility. Trans-Pacific Partnership, Intellectual Property Rights Chapter (Selected Provisions) art. 8.12, proposed September 2011, *available at* http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificIP1.pdf.

[100] Burcu Kilic & Tiffany Jang, *Medical Procedure Patents in the TPP: A Comparative Perspective on the Highly Unpopular U.S. Proposal*, Public Citizen's Global Access to Medicines Program 2 (November 13, 2013), http://www.citizen.org/documents/MEDICAL%20PROCEDURE%20PATENTS%20IN%20THE%20TPP.pdf.

[101] Yûsuke Satô & Jiameng Kathy Liu, *Patent Protection of Medical Methods –Focusing on Ethical Issues,* 20 Pac. Rim. L. Poly. J. 125, 126 (2011) (discussing "therapeutic methods and their inclusion of methods for treating humans using medical products such as medications").

application in a broad sense and seeks specific, substantial and credible utility to satisfy industrial application requirements. When read together, these three Articles assure patent eligibility for second or subsequent use of known products and further restrict generic competition. Patenting of new forms, uses or methods of known products would give rise to patents on minor variations of existing chemical entities, regardless of their impact on therapeutic efficacy, and risk greatly expanding pharmaceutical patenting and restricting affordable access to medicines.

The Wikileaks text of November 2013 revealed that the U.S. has dropped patents for "new forms" of known substances from its original proposal.[102] This could be interpreted as a positive change. However, USTR still aims to impose patents for new uses or methods of using old medicines, which can still facilitate patent evergreening. Nine countries, including Canada, Singapore and New Zealand, oppose this proposal.[103]

According to updated version of the WikiLeaks text dated October 2014, the U.S., Australia, and Japan still seek patent protection for new uses or new methods of using a known product.[104] The language of this provision, however, has been changed and arguably improved since November 2013. Negotiators changed the language from "patents shall be available," to "Parties confirm that patents are available." The Canadian proposal on "any new use . . . that is not otherwise excluded from patentability by the Party"[105] is also new. This may provide some additional flexibility for countries seeking to maintain their existing rules and practices.[106]According to the Wikileaks text of November 2013, the U.S. and Japan also propose a provision attacking Section 3(d) of the Indian Patent Act,[107] a famous rule that has helped protect access to affordable medicines worldwide. While the U.S. proposal against a limited efficacy requirement was included in earlier versions of the TPP text,[108] it has been revised here

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[102] Trans-Pacific Partnership, Intellectual Property Rights Chapter art. QQ.E.1, proposed August 2013, *available at* https://wikileaks.org/tpp/static/pdf/Wikileaks-secret-TPP-treaty-IP-chapter.pdf.

[103] *Id.*

[104] Trans-Pacific Partnership, Intellectual Property Rights Chapter art. QQ.E.1.4, proposed May 2014, *available at* https://wikileaks.org/tpp-ip2/tpp-ip2-chapter.pdf ("US/AU/JP propose; CL/MY/PE/SG/VN/BN/NZ/CA/MX oppose: Consistent with paragraph 1, the Parties confirm that patents are available for: (a) any new uses, or alternatively, new methods of using a known product").

[105] *Id.* ("CA propose: Alt (a) any new use, or new method of using a known product that is not otherwise excluded from patentability by the Party"). *Id.*

[106] Burcu Kilic & Peter Maybarduk, *What's New in the 2014 WikiLeaks TPP Intellectual Property Text? Highlights of Section E: Patents / Undisclosed Test or Other Data*, Public Citizen's Global Access to Medicines Program (October 16, 2014), http://www.citizen.org/DOCUMENTS/HIGHLIGHTS-OF-SECTION-E.PDF.

[107] The Indian Patent Act, Sec. (d), "the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant." Sec. 3 (d), The India Patent Act, No. 39 of 1970, India Code (1995).

[108] *See generally* Trans-Pacific Strategic Economic Partnership, Intellectual Property Rights Chapter (Selected Provisions), proposed February 2011, *available at* http://keionline.org/sites/default/files/tpp-10feb2011-us-text-ipr-chapter.pdf.

to reflect USTR's position that 3(d) is an impermissible "fourth criterion" for patentability. Even though India is not among the countries negotiating the TPP, the U.S. has complained about India's patent rules and practices, and this TPP provision is a clear effort to curb India's influence and the spread of the rule.

Under Section 3(d), a new form of a known chemical substance is not considered an invention if it "does not result in the enhancement of the known efficacy of that [known] substance." However, a derivative of a known substance can overcome this presumption against subject matter eligibility if it demonstrates a significant difference in its properties with regard to efficacy.[109]

According to USTR, India's law creates a special, additional patentability criterion for select technologies like pharmaceuticals, which might be prohibited by the TRIPS Agreement. Yet Section 3(d) is structured as a subject matter eligibility threshold, not as a patentability test.[110] TRIPS provides WTO Members with a flexibly to define what qualifies as an invention (patent eligible subject matter). Like the U.S.,[111] India excludes certain categories from patent eligible subject matter.

In the second WikiLeaks text of October 2014, the first part of the provision on new uses or methods of using a known product has been moved below as a separate section. In the prior version, this provision had been tied to language on new uses or methods of using known products. Two concepts have now been separated.[112]

The November 2013 WikiLeaks text also revealed that after years of negotiations, USTR still seeks to impose medical procedure patents on Asian and Latin American countries.[113] All eleven other negotiating countries oppose the proposal.[114] Medical procedure patents raise healthcare costs. Health providers, including surgeons, could be liable for the methods they use to treat patients.

The U.S. has added the provision that medical procedure patents should be available only "if they cover a method of using a machine, manufacture or composition matter."[115] In one sense, this is progress, a modest limitation on a bad rule. However, the proposed rule still fails to include safeguards in U.S. law that immunize medical practitioners from suit, particularly when the machine, manufacture or composition of matter itself is not patented.

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[109] Kilic & Palombi, *supra* note 96.

[110] *India's Patent System Plays by WTO Rules and Supports Global Health*, Public Citizen's Global Access to Medicines Program (Jun. 27, 2013), http://www.citizen.org/documents/Whats%20New%20in%20the%20WikiLeaks%20TPP%20Text-11.pdf.

[111] *See generally* Ass'n for Molecular Pathology *et al.* v. Myriad Genetics, Inc., *et al.*, No. 12-398 (U.S. Jun. 13, 2013) (holding that "cDNA and isolated but otherwise unmodified DNA are patent-eligible").

[112] Public Citizen's Global Access to Medicines Program, *supra* note 106.

[113] Trans-Pacific Partnership, Intellectual Property Rights Chapter art. QQ.E.2, proposed August 2013, *available at* https://wikileaks.org/tpp/static/pdf/Wikileaks-secret-TPP-treaty-IP-chapter.pdf.

[114] Trans-Pacific Partnership, Intellectual Property Rights Chapter art. QQ.E.1, proposed August 2013, *available at* https://wikileaks.org/tpp/static/pdf/Wikileaks-secret-TPP-treaty-IP-chapter.pdf.

[115] *Id.*

Essentially, except for when a surgeon uses her bare hands, surgical methods would be patentable under the U.S. proposal. While U.S. law immunizes certain care providers from infringement liability, the U.S. TPP proposal fails to include these safeguards, risking more serious consequences for TPP negotiating countries.[116]

The rule flouts international norms. Eighty countries have excluded such methods from patentability, only one other country permits them (Australia, which nevertheless opposes the U.S. proposal), and medical societies worldwide are outraged by the idea.[117] Numerous FTA provisions reinforce TRIPS Articles 27.2 and 27.3, which expressly permit members to exclude from patentability "diagnostic, therapeutic and surgical methods for the treatment of humans or animals."[118]

On the other hand, the competing five-country proposal offers language similar to TRIPS Article 27.3[119] affirming TPP countries' rights to determine whether to include diagnostic, therapeutic, and surgical methods for treating humans and animals as exceptions to patentability.

One very significant development in the new WikiLeaks text of October 2014 is the removal of the highly unpopular U.S. proposal on diagnostic, therapeutic, and surgical methods patents, also known as medical procedure patents. Every negotiating country aside from the U.S. opposed this proposal. Footnote 56 explains that the U.S. and Japan are "reconsidering the inclusion" of this proposal subject to consensus in the patent landing zone.[120] This is interpreted as a reference to a deal between Parties on patents for new uses/new methods of use in exchange for the revocation of proposals on medical procedures.[121]

B. Patent Oppositions

Pre-grant opposition is an important safeguard against patent abuse, improvidently granted patents and unwarranted pharmaceutical monopolies based on weak or erroneous information.[122] It helps improve patent quality and the efficiency of patent examinations by facilitating broad participation of the public and private sector. Under an adversarial administrative process, any person, including researchers, public interest groups and competitors are able to oppose a patent application by submitting information and analysis to patent examiners.

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116 Kilic & Jang, *supra* note 100, at 5.

117 *Id.* at 1.

118 Agreement on Trade-Related Aspects of Intellectual Property Rights art. 27.3, Apr. 15, 1994, 1867 U.N.T.S. 154.

119 *Id.*

120 Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 93, at n. 56 ("Negotiator's Note: US/JP reconsidering the inclusion of subparagraph (b) (provision relating to diagnostic, therapeutic and surgical methods), subject to consensus on patent landing zone. Trans-Pacific Partnership, Intellectual Property Rights Chapter").

121 Kilic & Maybarduk, *supra* note 106, at 2.

122 *See generally Pre-Grant Opposition*, PUBLIC CITIZEN, http://www.citizen.org/documents/Leaked-US-TPPA-paper-on-eliminating-pre-grant-opposition.pdf (outlining the U.S. argument for eliminating pre-grant opposition).

Pre-grant opposition supports appropriate generic competition and access to affordable medicines. The February 2011 text includes a provision eliminating pre-grant opposition in TPP counties.[123]

The absence of pre-grant opposition would make patent examination less informed and would likely increase the number of post-grant cases before the courts. Costs associated with the patent opposition system could rise significantly. This would create market uncertainty for generics firms, and lead to low-quality patents and unjustified drug monopolies until post-grant challenges could reach a successful conclusion.[124]

According to the WikiLeaks text of November 2013, the U.S. has withdrawn its highly controversial proposal to eliminate pre-grant opposition, a key mechanism used in TPP countries and many others to prevent patent abuse. A paper on this U.S. proposal[125] that was leaked in 2011 has been subject to significant international criticism.[126] The five-country proposal explicitly requires countries to provide a procedure for third persons to formally oppose the grant of a patent, but leaves it to their discretion whether it should be before or after a decision on the application or available at any time.[127] This is a superior, pro-health alternative to the original U.S. proposal.

The new WikiLeaks text of October 2014 revealed that the U.S. has withdrawn its highly controversial proposal to eliminate pre-grant opposition, a key mechanism used in TPP countries and many others to prevent patent abuse. A footnote referencing the proposal in last year's text has been removed.[128] This can be seen as a modest but important victory for public health policies.

C. Patent Term Adjustments (for patent prosecution periods)

Patent term adjustments (typically called extensions) allow patent owners to postpone patent expiry. This further delays market entry of competing generic drugs and restricts access to affordable medicines.

The U.S. TPP proposal introduces general patent term adjustments applying to all fields of technology including pharmaceutical products and processes.[129] The U.S. proposal defines unreasonable delay as more than four years from the date of filing or two years after an examination request.[130]

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123 Trans-Pacific Strategic Economic Partnership, Intellectual Property Rights Chapter (Selected Provisions), *supra* note 108, at art. 8.7.

124 PUBLIC CITIZEN, *supra* note 122.

125 *Id.*

126 *Risks of the Trans-Pacific Free Trade Agreement for Access to Medicines: Analysis of the Leaked U.S. Paper on Eliminating Patent Pre-Grant Opposition*, PUBLIC CITIZEN (Jul. 7, 2011), http://www.citizen.org/documents/analysis-of-leaked-US-paper-on-eliminating-pregrant-opposition.pdf.

127 Trans-Pacific Strategic Economic Partnership, Intellectual Property Rights Chapter (Selected Provisions), *supra* note 108, at art. 8.7.

128 Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 91, at art. QQ.E.4.

129 Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 91, at art. QQ.E.XX.

130 *Id.*

Patent term adjustments not only allow patent owners to postpone patent expiry but they increase regulatory uncertainty and place an unnecessary burden on patent offices. In the U.S., for instance, the United States Patent and Trademark Office's (USPTO) laws and rules defining patent term adjustment are considered "among the most complicated in patent practice."[131] The section on patent term extensions alone in the USPTO's Manual of Patent Examining Procedure (MPEP) is nearly 50-pages long.[132] This creates extra burden for the USPTO, which struggles to keep-up with the ever-growing backlog of patent applications.[133]

A patent term adjustment that is applicable to pharmaceutical products and processes would further delay market entry of competing generic drugs, restricting access to affordable medicines.

The five-country counterproposal does not require patent term adjustments for patent office delays *per se*. However, it explicitly addresses patent quality and efficiency by encouraging Parties to improve quality and efficiency of their patent system, enhance their patent registration systems, simplify and streamline administration systems for the benefit of all users of the system and the public as a whole.[134]

This approach is more flexible and less burdensome for patent systems, yet still creates unreasonable delays in processing of patent applications by encouraging Parties to address those delays.[135] It establishes a balance between the need for flexibility to construct a patent system, which balances diverse private and public interests.

The relevant provision in the October 2014 WikiLeaks text provided two options for countries. The Parties may either adjust the patent term or provide means to adjust the term.[136]

Option 2 provides more flexibility to countries. Even in the U.S., patent term adjustment time is calculated using a complex set of rules that, in general, involves adding up the days of delay attributable to the patent office and then subtracting the days of delays that the patent applicant himself caused.[137]

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131 Scott E. Kamholz, *Patent Term Adjustment for Fun and Profit*, INTELLECTUAL PROPERTY TODAY (Aug. 24, 2006), http://patentlyo.com/media/docs/2006/10/PTA_20for_20Fun_20and_20Profit.pdf.

132 *See generally* MPEP § 2700 (8th ed. Rev. 2, May 2004).

133 *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-1102, HIRING EFFORTS ARE NOT SUFFICIENT TO REDUCE THE PATENT APPLICATION BACKLOG (2007) (describing the patent application backlog and its burden on the U.S. Patent and Trademark Office).

134 Trans-Pacific Strategic Economic Partnership, Intellectual Property Rights Chapter (Selected Provisions), *supra* note 108, at art. QQ.E.XX.2.

135 Trans-Pacific Strategic Economic Partnership, Intellectual Property Rights Chapter (Selected Provisions), *supra* note 108, at art. QQ.E.XX.2.

136 Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 91, at art. QQ.E.12 ("US/SG propose78; CA/NZ/MY/VN/CL/PE/MX/AU/BN oppose:

> {Option 1: Each Party, at the request of the patent owner, shall adjust the term of a patent to compensate for unreasonable delays that occur in the granting of the patent.} {Option 2: If there are unreasonable delays in a Party's issuance of patents, that Party shall provide the means to, and at the request of the patent owner, shall, adjust the term of the patent to compensate for such delays}").

137 Kamholz, *supra* note 131.

Another conflicting issue is how to define unreasonable delays. The initial U.S. proposal defined an unreasonable delay as the later of four years from the date of filing or two years after an examination request. In alignment with their prior FTA commitments, Chile and Peru proposed the later of five years from the date of filing and three years after the examination request. Japan supports the three-year proposal.[138]

Subtraction of delays attributable to actions of the patent applicant is another area where Parties have two options from which to choose. Option 1 allows Parties to subtract periods attributable to actions of the patent applicant from the calculation of patent term extension. On the other hand, Option 2 allows Parties to subtract not only periods attributable to actions of the patent applicant but also the time taken to consider a third party's pre-grant patent opposition.[139]

The U.S. has withdrawn its highly controversial proposal to eliminate pre-grant opposition, a key mechanism used in TPP countries and many others to prevent patent abuse. The TPP is no longer prescriptive on the matter; it is up to Parties to decide what is best for their interests. Option 2 would allow authorities to subtract from the calculation of a patent term extension the time taken to consider a third party's pre-grant patent opposition. For countries offering a pre-grant opposition system, Option 2 seems to be more beneficial, as time taken to consider the opposition would not extend the monopoly period in the event that such an opposition was unsuccessful. An absence of this flexibility might have implications for effective operation of pre-grant opposition systems in countries that allow them.

According to footnote 81, the U.S. & Japan will work on an appropriate transition period for Parties who don't currently provide such a system for patent term extensions.[140]

V. Pharmaceutical Patent Provisions

A. Patent Term Adjustments (for regulatory approval periods)

During the TRIPS negotiations, the U.S. and EU proposed longer patent terms for certain products like pharmaceuticals, which are subject to regulatory ap-

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[138] Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 91, at art. QQ.E.12 ("For purposes of this {subparagraph/Article}, an unreasonable delay at least shall include a delay in the issuance of {the} / {a} patent of more than four [CL/PE propose: five] years from the date of filing of the application in the territory of the Party, or two [JP/CL/PE propose: three] years after a request for examination of the application has been made, whichever is later").

[139] Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 91, at art. QQ.E.12 ("{Option 1: Periods attributable to actions of the patent applicant [JP propose: and to judicial or quasi-judicial actions on the patent application] need not to be included in the determination of such delays.} / {Option 2: For the purposes of this Article, any delays that occur in the issuance of a patent due to periods attributable to actions of the patent applicant or any opposing third person need not to be included in the determination of such delay}").

[140] *Id.* at n.81 ("FN 81 Negotiator's Note: JP and US to lead work on an appropriate transition period for Parties who do not currently provide such a system").

proval. The negotiating parties rejected this proposal.[141] There are no extensions of patent terms in TRIPS. Hence, TRIPS members are not obliged to offer longer terms of protection for certain regulated products like pharmaceuticals.

The U.S. September 2011 proposal requires Parties make patent term extensions available for perceived delays in the regulatory approval process.[142] It introduces patent term adjustments not only for patents covering new pharmaceutical products but also for patents that cover methods of making or using pharmaceutical products (this should be read in conjunction with Article 8.1, which makes patent protection available for new uses, methods and forms of known products).[143]

The provision provides some flexibility for determining limitations on the period of patent term extensions. These limitations are similar to, though not entirely the same as, those found in the U.S. Patent Act,[144] i.e., a party may limit extensions to one per pharmaceutical product.[145]

This widely criticized U.S. proposal would delay market entry of generic drugs, thereby restricting access to affordable medicines. The WikiLeaks text of November 2013 revealed that ten countries have announced their opposition.[146]

Notwithstanding, the five-country proposal addressed the issue under the title of "processing efficiency" by encouraging countries "to process applications for patents, and applications for marketing, regulatory or sanitary approval of pharmaceutical products, in an efficient and timely manner."[147] In the case of delays, the parties "shall endeavour" to address those delays.[148] Under the endeavours standard, the Parties are expected to act to their own detriment considering the standards of reasonableness, which can advance traditional public health goals while addressing accountability and efficiency.

The scope of the provision is narrower than the WikiLeaks text regarding which pharmaceutical patents would be subject to a patent term adjustment. It does not apply to patents covering methods of making or using pharmaceutical

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[141] UNCTAD-ICTSD, RESOURCE BOOK ON TRIPS AND DEVELOPMENT 422-426 (Cambridge Univ. Press 2004), *available at* http://www.iprsonline.org/unctadictsd/docs/RB2.5_Patents_2.5.6_update.pdf.

[142] Trans-Pacific Partnership, Intellectual Property Rights Chapter (Sept. 2011), *available at* http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacificIP1.pdf.

[143] *Id.*

[144] Extension of Patent Term, 35 U.S.C. §156 (2011).

[145] *See* 35 U.S.C §156 (c).

[146] Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 91 at art. QQ.E.14.

[147] Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 91 at art. QQ.E.X.X.3.

[148] *Id.*

products.[149] This is an important development in the sense that it is more limited than the relevant provision in the Korea-US Free Trade agreement.[150]

Differently from the previous WikiLeaks text of November 2013, the current version of the text does not prescribe limitations, but rather allows Parties to provide for conditions and limitations within their own legal system and practice.[151]

B. Data Exclusivity (Submission of Information or Evidence Concerning the Safety or Efficacy of a New Pharmaceutical Product)

Article 39.3 of TRIPS covers the "protection of undisclosed information", which relates broadly to what are generally known as "trade secrets".[152] It does not require "data exclusivity," which prevents regulators from relying on a pharmaceutical company's data to evaluate competing products.[153] Instead, Article 39 only requires protection of undisclosed test data on new chemical entities, the collection of which involved considerable effort, against disclosure unless steps are taken to ensure that the data is protected against "unfair commercial use."

The North American Free Trade Agreement (NAFTA) includes a similar passage, but also specifically prevents regulators from relying on an originator's data for a reasonable period.[154] The U.S. sought a provision in TRIPS based on this NAFTA paragraph.[155] This proposed provision was excised from the TRIPS Dunkel Draft in 1991 and was never restored to the TRIPS Final Act of 1994.[156]

The TRIPS drafters' refusal to adopt the NAFTA provision is one of several factors demonstrating their intention to provide for data protection, not data exclusivity, in TRIPS.

On the other hand, data exclusivity prevents regulatory authorities from relying on established data regarding drug safety and efficacy in order to register

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[149] Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 91 at art. QQ.E.14 ("1. Each Party shall make best efforts to process patent applications and applications for marketing approval218 of pharmaceutical products in an efficient and timely manner, with a view to avoiding unreasonable or unnecessary delays. 2. With respect to a pharmaceutical product that is subject to a patent, each Party shall make available an adjustment219 of the patent term to compensate the patent owner for unreasonable curtailment of the effective patent term as a result of the marketing approval process. 3. For greater certainty, further to/consistent with Article QQ.A.5.220, each Party may provide for conditions and limitations in implementing the obligations of this paragraph").

[150] *See* United States-Korea Free Trade Agreement art. 18.8.6.(b), June 30, 2007, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file273_12717.pdf.

[151] Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 93, at Art. QQ.E.14.3 ("For greater certainty, further to/consistent with art. QQ.A.5220, each Party may provide for conditions and limitations in implementing the obligations of this paragraph").

[152] Agreement on Trade Related Aspects of Intellectual Property Rights art.39.3 Apr. 15, 1994, 1867 U.N.T.S. 154, *available at* http://www.wto.org/english/docs_e/legal_e/27-trips_04d_e.htm#7.

[153] *Data exclusivity in international trade agreements: What consequences for access to medicines?* (MSF technical brief May 2004), http://www.citizen.org/documents/dataexclusivitymay04.pdf.

[154] North American Free Trade Agreement, U.S.-Can.-Mex., art.1711.5, Dec. 8, 1993, 32, I.L.M. 289 (1993) [hereinafter NAFTA].

[155] NAFTA, *supra* note 154, art 1711.5-6.

[156] CORREA, *supra* note 31 at 385-87.

generic medicines. It creates patent-like monopolies over the test data by preventing generic manufacturers from relying on the original data. Apart from duplicating costly and time-consuming clinical trials, the generic manufacturers are left with no other option but to wait. Thus, data exclusivity delays generic market entry and is inconsistent with medical ethical standards against duplicating tests on humans or vertebrate animals.

The September 2011 text requires data exclusivity for new pharmaceutical products.[157] This provision provides "at least *five* years" of data exclusivity for safety and efficacy information submitted in support of marketing approval, even if it is disclosed and in the public domain.[158] The text also introduces "at least *three* years" additional data exclusivity for submission of new clinical information on new uses or indications for existing pharmaceutical products.[159] Products that are considered the same as or similar to the reference product are also prevented from relying on its protected data.

By introducing automatic data exclusivity protection for new pharmaceutical products and new clinical information, the U.S. proposal limits countries' abilities to define TRIPS compliant flexible rules for test data protection and challenges the efforts of countries to safeguard access to medicines.

According to the WikiLeaks text of November 2013, the U.S. is still insisting on its proposal, which is more aggressive than data exclusivity provisions in prior FTAs,[160] even though eight other negotiating parties oppose it.[161] In a footnote, Canada "reserves its position," and Japan states that it is still considering its position.[162]

The new version of this provision in WikiLeaks text of October 2014 mirrors the language in the Australia-U.S. Free Trade Agreement (AUSFTA). New version of the provision allows for "at least *five* years" of "data exclusivity" (technically this appears to be market exclusivity) for new pharmaceutical products, and "at least *three* years" of data exclusivity for previously approved pharmaceutical products containing a "new clinical information (other than information related to bioequivalency)" or "evidence of prior approval of the product in another territory" running from the date of marketing approval for that product in the Party's territory.[163]

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157 Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 91 at art. QQ.E.16.

158 *Id.*

159 *Id.*

160 *Comparative Table of Data Exclusivity Provisions in the U.S. Proposal to the Trans-Pacific Partnership Agreement,* Public Citizen (Sep. 2013), http://www.citizen.org/leaked-TPP-text-and-analysis2.

161 Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 91 at art. QQ.E.16.

162 *Id.*

163 *Id.* ("Article QQ.E.16: {Pharmaceutical Data Protection} (a) If a Party requires, as a condition for granting marketing approval for a new pharmaceutical product, the submission of undisclosed test or other data concerning the safety or efficacy of the product, the Party shall not permit third persons, without the consent of the person who previously submitted such information, to market the same [MY oppose: or a similar221] product on the basis of: i. that information; or ii. the marketing approval granted to the person who submitted such information for at least five years from the date of marketing approval of the new pharmaceutical product in the territory of the Party [MY propose:, or any other country where marketing approval is first granted"). *Id.*

Distinct from the WikiLeaks text of November 2013, the provision distinguishes between the information required and permitted. If a Party requires the submission of an undisclosed test or other data prior to granting marketing approval, paragraph (a) applies. If a Party relies on the marketing approval conferred in a foreign country, paragraph (b) applies.[164]

The scope of exclusivity is more limited now; data exclusivity is only provided for "undisclosed test or other data."[165]

Products that are considered to be the same as or similar to their reference product cannot rely on the reference product's protected data. Footnote 221 clarifies that a pharmaceutical product can be "similar" to a previously approved pharmaceutical product if the marketing approval of that similar pharmaceutical product is based upon the information concerning the safety or efficacy of the previously approved pharmaceutical product, or the prior approval of the reference product. Malaysia is the only country opposing the application of data exclusivity for similar products.[166]

Footnote 222 allows Parties to retain their current system if they provide data exclusivity for previously approved pharmaceutical products containing "new clinical information (other than information related to bioequivalency)" or "evidence of prior approval of the product in another territory" on the date of entry into force of this Agreement. The footnote further clarifies that additional data exclusivity protection on the submission of new chemical information does not extend to biologics and/or pharmaceutical products that receive eight years of data exclusivity[167] (as in the case of Japan[168]). The provision also includes safe-

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[164] *Id.* ("Article QQ.E.16 (b) If a Party permits, as condition of granting marketing approval for a new pharmaceutical product, the submission of evidence of prior marketing approval of the product in another territory, the Party shall not permit third persons, without the consent of a person who previously submitted such information concerning the safety or efficacy of the product, to market a same [MY oppose: or a similar] product based on evidence relating to prior marketing approval in the other territory for at least five years from the date of marketing approval of the new pharmaceutical product in the territory of the Party [MY propose:, or any other country where marketing approval is first granted].

[CL propose: Alt (b) A Party may provide for the possibility of granting marketing approval or sanitary permit for a new pharmaceutical product based on a prior marketing approval in another territory. If a Party provides for such possibility, it may also require consent or acquiescence of a person previously submitting the undisclosed test or other data to obtain marketing approval in the other territory in order to authorize a third person to market a same or similar product (in the territory of the Party) for at least 5 years from the date of the first/prior marketing approval of the new pharmaceutical product.]"). *Id.*

[165] *Id.* at QQ.E.XX.4. ("[T]he submission of undisclosed test or other data concerning the safety or efficacy of the product.")

[166] Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 93, at n. 221 ("For greater certainty, for purposes of this Section, a pharmaceutical product is "similar" to a previously approved pharmaceutical product if the marketing approval of that similar pharmaceutical products is based upon the information concerning the safety or efficacy of the previously approved pharmaceutical product, or the prior approval of that previously approved product.").

[167] Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 93, at n. 222 ("As an alternative to this paragraph, where a Party, on the date of entry into force of this Agreement for that Party, has in place a system for protecting information submitted in connection with the approval of a pharmaceutical product that utilizes a previously approved {AU/NZ/SG oppose: chemical} {AU/NZ/SG propose: active} component from unfair commercial use, the Party may retain that system, notwithstanding the obligations of this paragraph. Additionally, a Party is not required to apply Article QQ.E.16.2 with respect to pharmaceutical products covered by Article QQ.E.20 [CA oppose: or to pharmaceutical products that receive a period of at least 8 years of protection pursuant to subparagraph 1(a) and 1(b) of

guards for Parties to take measures to protect public health in accordance with the TRIPS Agreement and Doha Declaration. These safeguards are new, and they are borrowed from the previous FTAs (Peru US FTA, Korea-US FTA).[169] Malaysia proposes a provision which adds clarity and certainty to the public health safeguards mentioned above: it includes a flexible clause that would enable Parties to waive data exclusivity for the protection of public health, non-commercial public use, national emergency, or other urgent circumstances as determined by the party.[170]

Malaysia also proposes the creation of a window within which a pharmaceutical company should file a marketing approval request after the data on the product is first registered. This so-called 'access window' is eighteen months for pharmaceutical products and twelve months for previously approved pharmaceutical products.[171]

C. Exclusivity on Biologics

Since the beginning of the TPP negotiations, the pharmaceutical and biotech industries have been demanding a special 12-year exclusivity[172] period for bio-

Article QQ.E.16.][CA propose: A Party that provides a period of at least 8 years of protection pursuant to QQ.E.16.1 is not required to apply Article QQ.E.16.2.]").

168 There is no data exclusivity in Japan. Nevertheless, the Japanese Post Marketing Surveillance (PMS) system, which aims to monitor and confirm the efficacy and safety of approved new drugs, provides de facto exclusivity to pharmaceutical companies against generic entry, even in some cases after patent expiration. A re-examination period is set for most new drug approvals, and until this period is over, generics companies cannot submit their applications for drug approvals. It does not provide for exclusive use of the data, however in practice it delays the market entry of generic drugs. The re-examination period is 8 years from the date of marketing approval for active ingredients and 4-6 years from the date of marketing approval for new indications and doses. *See* Burcu Kilic, Mikyoeng Kim & Peter Maybarduk *Challenges for Health and Innovation Policy in the Trans-Pacific Partnership Agreement (TPP): Comparative Analysis of the United States' TPP Intellectual Property Proposal and the Japanese Law,* PUBLIC CITIZEN (Jan. 2014), http://www.citizen.org/documents/comparitive-table-japan-and-tpp-january-2014.pdf.

169 The text of the safeguard reads: "Notwithstanding paragraphs 1 and 2 above, a Party may take measures to protect public health in accordance with: (a) the Declaration on the TRIPS Agreement and Public Health (WT/MIN(01)/DEC/2) (the "Declaration"); (b) any waiver of any provision of the TRIPS Agreement granted by WTO Members in accordance with the WTO Agreement to implement the Declaration and in force between the Parties; and (c) any amendment of the TRIPS Agreement to implement the Declaration that enters into force with respect to the Parties." Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 91 at art. QQ.E.16.2.

170 Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 93 at art. QQ.E.16.6 ("[MY Propose: . . .(b) necessary to protect public health, national security, non-commercial public use, national emergency or other urgent circumstances as determined by the Party.]").

171 Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 93 at art. QQ.E.16.5 ("[MY propose: 5.A Party may for the purpose of granting protection under paragraph 2 require an applicant to commence the process of obtaining marketing approval for that pharmaceutical product within 12 months from the date the product is first registered or granted marketing approval, and granted protection for such information in any country.]").

172 The Affordable Care Act requires 12 years of biologics exclusivity (4 years data and 8 years market). But the White House aims to reduce this period to seven years, and has pledged to consumers and federal programs the resultant savings in its recent annual budgets. Kilic & Maybarduk, *supra* note 92 at 9.

logics.[173] Biologics, including many new cancer drugs, are exceptionally expensive and constitute one of the main drivers of rising healthcare costs.[174] The U.S. has included a placeholder for automatic monopolies on such biotech medicines in its previous TPP proposals.[175] In late November 2013, USTR reportedly proposed 12 years of data exclusivity for biologics as a part of a non-paper proposing temporary differential treatment for low-income TPP countries on three key pharmaceutical IP protections.[176]

Imposing biologics exclusivity would constitute a major change to countries' laws with potentially dramatic financial consequences for patients, medical providers, and governments.

On the other hand, half of the TPP countries have advanced an alternative, superior vision to the U.S. data exclusivity proposal.[177] This provision mirrors the language of TRIPS Article 39.3 on the protection of undisclosed information, and comes without imposing the burden of pharmaceutical monopolies.[178] Furthermore, Paragraph 3 of the proposal explicitly recognizes the Doha Declaration and any waiver or amendment of the TRIPS Agreement.[179]

The October 2014 WikiLeaks text includes a new provision that provides exclusivity for biologics. The provision makes direct reference to Article QQ.E.16 on exclusivity.[180] There are two issues where Parties have disagreements: the period of protection and the definition of biologics.[181] The period of protection

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[173] *12 Years of Data Protection in TPP*, PhRMA, http://www.phrma.org/note-media-elected-officials-support-12-years-data-protection-tpp.

[174] Kilic & Maybarduk, *supra* note 92 at 9.

[175] Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 91 at art. QQ.E.16.

[176] *In TPP, U.S. Floats 12-Year Data Period for Biologics, Flexibilities for Developing Countries*, Inside U.S. Trade (Nov. 29, 2013), http://insideepa.com/index.php?option=com_user&view=login&return=AHR0cDovL2luc2lkZWVwYS5jb20vMjAxMzExMjcyNDU0MzA2L1dUTy1EYWlseS1OZXdzL0RhaWx5LU5ld3MvaW4tdHBwLXVzLWZsb2F0cy0xMi15ZWFyLWRhdGEtcGVyaW9kLWZvci1iaW9sb2dpY3MtZmxleGliaWxpdGllcy1mb3ItZGV2ZWxvcGluZy1jb3VudHJpZXMvbWVudS1pZC05NDguaHRtbA=FC.

[177] Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 91 at art. QQ.E.XX.4.

[178] *Id.*

[179] Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 91 at art. QQ.E.XX.4.3 ("Each Party may take measures to protect public health in accordance with: (a) the Declaration on the TRIPS Agreement and Public Health (WT/MIN(01)/DEC/2) (the "Declaration . . . .").

[180] Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 93 at art. QQ.E.20 ("With respect to the first marketing approval of a pharmaceutical product that is biologic, 231 each Party shall provide the protection afforded under Article QQ.E.16.1(a)-(b), *mutatis mutandis* for a period of [0] / [5] / [8] / [12] years from the date of marketing approval of such pharmaceutical product in that Party.")

[181] Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 93 at n. 231 ("Negotiator's Note: Delegations discussed two approaches to a footnote on biologics, which are set forth below. Delegations had different views and preferences regarding these two approaches. Approach 1: {For purposes of this Chapter, a pharmaceutical product that is biological means [at least] a vaccine, a protein, or a [AU propose: plasma-derived product, US propose: blood-derivative, JP propose: blood-derived product] for use in human beings for the prevention, treatment, or, cure of a disease or condition. A Party may limit the scope of such pharmaceutical products to products that are produced [US propose: at least in part, through biological processes involving living organisms, tissues, or cells, such as those involving] [US oppose: by biotechnology [such as]/[including]] recombinant DNA technology. [CA propose: Products that] a Party may exclude [CA oppose: the following] from the scope of such pharmaceutical products, [CA: include:] blood and blood components, chemically synthesized polypeptides, and [US

ranges from zero years to twelve years including five and eight years.[182] Most of the TPP countries already provide five years exclusivity to biologics under their data exclusivity regimes.[183] That's why footnote 232 includes a grandfathering clause. Countries in which biologics can already receive exclusivity under the general data or marketing exclusivity rules have a five-year transitional period before they must provide the TPP's special terms for biologics.[184]

The definition of "biologic" is yet another matter of controversy among Parties because it will determine which products may receive the special and longer exclusivity periods under discussion in this Article. According to Footnote 231,[185] the delegations discussed two approaches and have different views and preferences regarding these two approaches. Approach 2 is the better approach: it allows for self-definition and provides flexibility to each country to implement the standards that work best for them. Biotechnology is a fast moving field; Parties would like to have flexibility to update their definitions in the future.

VI. Patent Linkage

Patent linkage is a regulatory mechanism that links drug marketing approval to patent status. The system creates a second tier for patent monopoly and shifts the burden of early patent enforcement to the regulatory authorities.[186] Under patent linkage, even spurious patents may function as barriers to generic drug registration. The TRIPS Agreement includes no requirement to provide a system for patent linkage.

The U.S. September 2011 proposal requires countries to provide a mechanism to identify patents covering an approved pharmaceutical product or its approved method of use.[187] This "linkage" provision is more aggressive than comparable measures in past FTAs.[188] The U.S. draft introduced a notification system for patent holders, an automatic stay of marketing approval and measures to block

propose: naturally occurring] animal-derived polypeptides that are derived wholly by means of extraction and purification from animal organs and tissues [CA propose: or from plants]} Note: Delegations also to consider necessity and potential drafting of the following text: [CA oppose: For greater certainty, each Party confirms that pharmaceutical products that are not defined as biologics under this provisions [are subject to]/[shall be evaluated under] Article QQ.E.16.] Approach 2: Self-defining / according to national law.").

182 Kilic & Maybarduk, *supra note* 94 at 1.

183 These countries include Australia, New Zealand, Chile, Singapore.

184 Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 93 at n. 232 ("Each Party may provide that an applicant may request approval of a pharmaceutical product that is a biologic under the procedures set forth in Article QQ.E.16 (1)(a)-(b) within 5 years of entry into force of this Agreement, provided that other pharmaceutical products in the same class of products have been approved by the Party under the procedures set forth in Article QQ.E.16(1)(a)-(b) before entry into force of this Agreement.").

185 *See U.S. Floats 12-Year Data Period for Biologics, Inside U.S. Trade*, *supra* note 176.

186 Benjamin P. Liu, Fighting Poison With Poison? The Chinese Experience With Pharmaceutical Patent Linkage, 11 J. MARSHALL REV. INTELL. PROP. L. 623, 627 (2012).

187 Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 91 at art. QQ.E. 17.

188 *Comparative Table of Patent Linkage Provisions in U.S. Free Trade Agreements and the U.S. Proposal to the Trans-Pacific Partnership (TPP) Agreement*, PUBLIC CITIZEN, Jun. 27, 2013, http://www.citizen.org/documents/patentlinkagetablewclauses.pdf.

allegedly infringing products for the duration of the patent.[189] The regulatory authorities, lacking both the jurisdiction and competence to deal with issues relating to patent validity and relevance, get involved in the enforcement of pharmaceutical patents.

Patent linkage is a particular TRIPS-plus provision, which extends the patent monopoly beyond the statutory term of twenty years.[190] Under the linkage system, a generic manufacturer can only apply for the necessary regulatory approvals after the patent has expired. The time it takes a generic drug to enter into a market varies but it usually takes a couple of years, which will result in de-facto extension of the patent term. Thus, it can facilitate abuse since the financial benefits to patent holders of deterring generic market entry may outweigh risks of penalties.

Interestingly, the Wikileaks text revealed that no comments seem to have been recorded related to this measure. Patent linkage may be the most unpopular proposal in the text.[191] The counterproposal does not include any provision on patent linkage.

The WikiLeaks text of October 2014 provides two options for the Parties. The first option[192] mirrors the language in the Australia-US FTA[193] creating a patent

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189 Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 93, at Art. QQ.E.14.3.

190 TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 33, Apr. 15, 1994 World Trade Organization, *available at* http://www.wto.org/english/tratop_e/trips_e/t_agm3c_e.htm#5 (Term of Protection: The term of protection available shall not end before the expiration of a period of twenty years counted from the filing date.).

191 Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 91 at art. QQ.E.14.

192 *Id.* Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 93 ("Article QQ.E.17 (Patent Linkage): Where a Party permits, as a condition of approving the marketing of a pharmaceutical product, persons, other than the person originally submitting the safety or efficacy information, to rely on evidence or information concerning the safety or efficacy of a product that was previously approved, such as evidence of prior marketing approval by the Party or in another territory:

> (a) that Party shall provide measures in its marketing approval process to prevent those other persons from:
>
> i. marketing a product, where that product is claimed in a patent; or ii. marketing a product for an approved use, where that approved use is claimed in a patent, during the term of that patent, unless by consent or acquiescence of the patent owner FN224 [CA propose: FN 225]; and (b) if the Party permits a third person to request marketing approval to enter the market with: i. a product during the term of a patent identified as claiming the product; or ii. a product for an approved use, during the term of a patent identified as claiming that approved use, the Party shall provide for the patent owner to be notified of such request and the identify of any such other person.").

193 *Comparative Table of Patent Linkage Provisions in U.S. Free Trade Agreements and the U.S. Proposal to the Trans-Pacific Partnership (TPP) Agreement*, *supra* note 188 (Art. 17.10.4. U.S.-Australia FTA (2005): "Where a Party permits, as a condition of approving the marketing of a pharmaceutical product, persons, other than the person originally submitting the safety or efficacy information, to rely on evidence or information concerning the safety or efficacy of a product that was previously approved, such as evidence of prior marketing approval by the Party or in another territory: (a) that Party shall provide measures in its marketing approval process to prevent those other persons from: (i) marketing a product, where that product is claimed in a patent; or (ii) marketing a product for an approved use, where that approved use is claimed in a patent, during the term of that patent, unless by consent or acquiescence of the patent owner; and (b) if the Party permits a third person to request marketing approval to enter the market with: (i) a product during the term of a patent identified as claiming the product; or (ii) a product for an approved use, during the term of a patent identified as claiming that approved use, the Party shall provide for the patent owner to be notified of such request and the identity of any such other . . . .").

linkage mechanism. A Party is required to include measures in its regulatory process to prevent the applicant from marketing a product, or a product for an approved use, that is claimed under a patent. This obligation extends to cover the entire term of the patent, unless the patent owner has consented to, or acquiesced in, the use of the information.

If a Party chooses not to implement paragraph 1, a Party can provide a system where marketing approval is linked to "consent or acquiescence" of a patentee. This language mirrors the US-Chile FTA[194]. Under this system, a Party shall not grant marketing approval to any third Party prior to expiration of the patent term, unless by "consent and acquiescence" of the patent owner. The identity of the any third party requesting marketing approval will be available to the patent owner during the term of the patent.[195]

Footnote 228 is a proposal by Chile, which allows Parties to use injunctions or other judicial proceedings within their infringement proceedings.[196]

According to footnote 229, in the absence of legal action by a right holder (the state of acquiescence) if a Party delays the issuance of marketing approval to a third party until the expiration of the patent term, the Party is not required to provide notification or make available the information about third parties applying for marketing approval.[197]

Footnote 230 clarifies that the patent linkage provision should not be interpreted so that marketing approval authority would be making validity or infringement determinations.[198]

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[194] *Id.* (Art. 17.10.2. U.S.-Chile FTA (2004): "With respect to pharmaceutical products that are subject to a patent, each Party shall: (. . .) (b) make available to the patent owner the identity of any third party requesting marketing approval effective during the term of the patent; and (c) not grant marketing approval to any third party prior to the expiration of the patent term, unless by consent or acquiescence of the patent owner.") *Id.*

[195] *See* Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 93 at art. QQ.E.17.2 ("Where a Party chooses not to implement paragraph 1, such Party shall provide that with respect to any pharmaceutical product that is subject to a patent FN226 [MX propose: FN 227]: (a) the Party shall not grant marketing approval to any third party prior to the expiration of the patent term, unless by consent or with the acquiescence of the patent owner [CL propose: FN 228]; and (b) the Party shall provide for the patent owner to be notified of, or make available to the patent owner, the identity of any third party requesting marketing approval effective during the term of the patent.").

[196] *See* Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 93 at art. QQ.E.17.2.(a) ("Footnote 228 [CL propose: For greater certainty, Parties may comply with this obligation by providing for injunctions or other judicial proceedings within their patent infringement procedures.]").

[197] *See* Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 91 at art. QQ.E.172.(b) ("Footnote 229 {For greater certainty, a Party is not required to provide the notification or to make available the information set forth in paragraph 2(b), if that Party precludes the issuance of marketing approval or sanitary permit to a third party prior to the expiration of the patent term in the absence of legal enforcement action by a right holder.}").

[198] *See* Trans-Pacific Partnership, Intellectual Property Rights Chapter, *supra* note 91 at art. QQ.E.172.(b) ("Footnote 230 For greater certainty, the Parties recognize that this Article does not imply that the marketing approval authority should make patent validity or infringement determinations.").

VII. The landing zones

The IP provisions relating to pharmaceuticals and access to medicines are likely some of the more controversial provisions in the TPP. The WikiLeaks text revealed unanimous or nearly unanimous opposition from other countries to the U.S. IP proposals, and indeed heroic efforts by some countries to advance the public interest and public domain.[199] Most importantly, there was a deadlock over the IP Chapter, leading to an impasse in the TPP talks.

In order for the negotiations to advance, the U.S. needed to show more flexibility. Hence, U.S. negotiators developed a two-tier system that sets different standards for developed countries and developing countries for pharmaceutical IP provisions.[200] A non-paper tabled[201] in late November 2013, offered temporary differential treatment for low-income TPP countries on three key pharmaceutical IP provisions; patent term adjustment for regulatory delays, data exclusivity and patent linkage. The proposal provides a transition period for some TPP parties before they are required to implement much stronger intellectual property provisions on medicines and medical devices.[202]

Reportedly, countries with per capita gross national income (GNI) under $12,616[203] would not have to apply the full set of tougher patent and data rules until they cross that income threshold.[204] This would place Malaysia, Peru, Mexico, and Vietnam, below the threshold required for differential treatment.[205] However, only Vietnam would likely have many years before it must implement the more restrictive rules.

The other TPP members, the U.S., Japan, Canada, Australia, Brunei, Chile, New Zealand and Singapore, are identified as high-income countries by the World Bank and would be subject to the standards based on language contained in the Australia, Chile, and Singapore FTAs.[206]

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[199] *See generally* Trans-Pacific Partnership, Intellectual Property Rights Chapter, proposed August 2013, *available at* https://wikileaks.org/tpp/static/pdf/Wikileaks-secret-TPP-treaty-IP-chapter.pdf.

[200] *In TPP, U.S. Floats 12-Year Data Period for Biologics, Flexibilities for Developing Countries*, supra note 176.

[201] A proposed agreement or negotiating text circulated informally among delegations for discussion without committing the originating delegation's country to the contents. It has no identified source, title, or attribution and no standing in the relationship involved. *See, Aide-mémoire* http://en.wikipedia.org/wiki/Aide-m%C3%A9moire.

[202] *In TPP, U.S. Floats 12-Year Data Period for Biologics, Flexibilities for Developing Countries*, *supra* note 176.

[203] Based on 2012 GNI figures, countries with a per capita GNI of $12,616 or more are classified as high income by the World Bank. New Country Classifications, World Bank, http://data.worldbank.org/news/new-country-classifications.

[204] *In TPP, U.S. Floats 12-Year Data Period for Biologics, Flexibilities for Developing Countries*, *supra* note 176.

[205] *See Country and Lending Groups*, The World Bank, http://data.worldbank.org/about/country-and-lending-groups#Upper_middle_income.

[206] *Stakeholder Input Sharpens, Focuses U.S. Work on Pharmaceutical Intellectual Property Rights in the Trans-Pacific Partnership*, Office of the United States Trade Representative (Nov. 29, 2013), http://www.ustr.gov/about-us/press-office/blog/2013/November/stakeholder-input-sharpens-focuses-us-work-on-pharmaceutical-IP-in-TPP.

The Wikileaks text of October 2014 revealed that there is a second proposal for transition periods. Addendum II[207] includes a proposal on patent pharmaceuticals transition periods. This proposal would enable countries to delay, for defined periods of time, the implementation of certain aspects of the intellectual property chapter based on a certain category classification. The text does not reveal which country or countries authored the proposal, nor does it show which countries support the proposal or which countries oppose it. The grounds for placement of countries in one of the three categories in Addendum II are not specified in the text. Category A includes the United States, Japan and Singapore, with other countries to be confirmed.[208] Category B includes Mexico and Brunei, with other countries to be confirmed. Category C includes only Peru and Vietnam. Australia, Canada, Chile, Malaysia and New Zealand are not yet categorized in the text.[209]

As the negotiations progressed, the parties explored the option of developing mutually acceptable packages for political decision making. The term 'landing zones' emerged to describe remaining sensitive and challenging issues. The landing zones identified pathways forward for matters related to market access, financial services, and government procurement as well as the texts covering intellectual property, competition, and environmental issues.[210]

In July 2014, Inside U.S. Trade obtained a two-page document, outlining landing zones for resolving pharmaceutical IP issues[211]. The document reflects the current state-of-play of the discussion on pharmaceutical IP rules, which demonstrates that as of its writing there were still fundamental disagreement over these provisions.[212]

By way of illustration, 12-year exclusivity for biologics is a highly politicized issue in the TPP negotiations. The landing zones paper illustrates that this U.S. proposal received significant pushback from other countries, as the options under consideration are zero years, five years and eight years.[213]

Similarly, there are three other proposals for patent linkage provisions. The first option is a hybrid based on three U.S.-FTAs (Singapore, Chile and Australia), which was likely proposed by the U.S. The second option limits the cover-

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207 *See generally* Kneivel & Kilic, *Addendum II Transition Periods Proposal for Implementation of Onerous Trans-Pacific Partnership Intellectual Property Rules*, PUBLIC CITIZEN, October 2014 available at http://www.citizen.org/documents/tpp-transition-periods.pdf.

208 *Id.*

209 *Id.*

210 *Joint Press Statement TPP Ministerial Meeting Bandar Seri Begawan, Brunei Darussalam, Office of the United States Trade Representative* (Aug. 2013), http://www.ustr.gov/Joint-Press-Statement-TPP-Ministerial-Brunei.

211 *Leaked TPP Paper on Drug IP Landing Zones Shows Extent of Divisions*, Inside U.S. Trade (Aug. 1, 2014), http://insidetrade.com/index.php?option=com_user&view=login&return=AHR0cDovL2luc2lkZXRyYWRlLmNvbS9JbnNpZGUtVVMtVHJhZGUvSW5zaWRlLVUuUy4tVHJhZGUtMDgvMDEvMjAxNC9sZWFrZWQtdHBwLXBhcGVyLW9uLWRydWctaXAtbGFuZGluZy16b25lcy1zaG93cy1leHRlbnQtb2YtZGl2aXNpb25zL21lbnUtaWQtMTcyLmh0bWw.

212 *Id.*

213 *Id.*

age to only product patents. Last but not least, the third option makes patent linkage completely optional for the countries.

For data exclusivity, the paper lays out six options ranging from a hybrid model based on three U.S. FTAs to more flexible options limiting the scope and application of data exclusivity to certain products.

VIII. Conclusion

TRIPS sets the standards for IP protection in the world today, and is binding on all Members of WTO. However, it includes certain flexibilities for Members to implement the rules in a manner supportive of their own rights in order to protect public health and access to medicines. It is far from perfect, but it provides some policy space for Members to address public health challenges.

However, there is little optimism about the future of this half-hearted IP system. The increasing inclusion of TRIPS-plus provisions in FTAs illustrates that the *status quo* must change. The economic constraints of a strong IP regime are very high, both economically and socially. Under TRIPS-plus provisions imposed by U.S. FTAs, countries are expected to take self-restrictive actions.

The Doha Declaration recognizes countries' rights to "promote access to medicines for all" and represented a significant victory for developing countries and global health. Ever since, health advocates and developing countries have worked to live up to Doha's promise.

Still, a great deal of latitude depends upon the political willingness of countries to set their IP policy in accordance with their own national needs and priorities. Some countries participating in TPP negotiations have supported a superior vision for intellectual property - one rooted in economics that also accounts for the importance of public health, competition and safeguards against abuse. Pharmaceutical industry lobbyists, by contrast, drive the U.S. vision. The U.S. has been isolated in negotiations, while others are in good company. To keep the spirit of Doha alive, TPP countries must not trade away their more balanced rules for the monopolistic rules dictated by the pharmaceutical industry.

Child Labor and Ratification of Trade and Labor Provisions in Sub-Saharan Africa: Is it a Question of Political Choices?

Dr. Caiphas Chekwoti*

Abstract

The high ratification levels of International Labour Organization (ILO) core child labor conventions and related provisions among sub-Saharan African countries should be reflected in significantly reduced incidence of child labor in the region. However, observed trends identify this region with the highest incidence of child labor and a slower reduction rate. The key question addressed in this paper is, what explains the puzzling counterintuitive high incidence of child labor despite high ratification rates of core ILO child labor conventions? This paper argues that the incentive spectrum of the key decision makers – the political elite – appears to be a key factor in explaining the observed outcome with respect to the limited enforcement of those conventions.

I. Introduction

Despite high ratification levels of the key International Labour Organization (ILO) provisions on core child labor standards and the proliferation of bilateral and regional trade agreements within sub-Saharan African countries,[1] an unexpected pattern of a high incidence of child labor in these countries has emerged.[2] Ratification of international conventions is designed to condition countries to observe and implement the provisions enshrined in the convention though domestication in the national laws. This is expected to trigger outcomes that reduce the incidence of child labor and thereby improve the welfare of children. The counter-intuitive observed trends identify the need to investigate the conditions

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[1] *See* Ratifications of C182 - Worst Forms of Child Labour Convention, Int'l Labour Org., http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312327:NO (last visited Nov. 6, 2014).

[2] Int'l Labour Org., Marking Progress Against Child Labour: Global Estimates and Trends 4 (2013) [hereinafter Progress Against Child Labour].

that characterize the enforcement mechanisms of the regulations associated with these trends. Enforcement of regulations at national and sub-national levels is likely to be driven by the effectiveness of the rule of law and the incentive spectrum of the enforcement decision-making body. The paper seeks to explain the extent to which political interests of the key decision-makers may explain the observed high ratification levels with relatively high incidence of child labor across a sample of sub-Saharan African countries. In an effort to draw insights on potential explanations for this outcome, this paper examines the implications of the regional trade agreements and ratification of the key ILO child labor provisions on the incidence of child labor in sub-Saharan African countries.

II. Background

"Child labor is a persistent human rights phenomenon in many developing countries" [3] and particularly more pronounced in sub-Saharan Africa despite efforts being made to eliminate it at national and international levels, further detailed in the second section. Partly, political support for child labor restrictions is often weak in countries in which persistence has been observed.[4] This may explain the limited enforcement of the ratified child labor regulations. Interestingly, most of the sub-Saharan African countries do have national regulatory frameworks in place aimed at mitigating child labor.[5]

Child labor is of greater concern when one considers its pernicious impact on the child's future potential. Children subjected to work which, by its nature or in the conditions under which it is carried out, harms, abuses and exploits the child, or deprives the child of an education.[6] The practice is most prevalent in agriculture, transport, mining and related sectors, fishing, construction, the urban informal sector, domestic service, trafficking, and commercial sexual exploitation of children.[7] Globally, the picture is more promising. Global trends illustrate a clear picture of the outcomes, both in the efforts and impact of mitigation measures. Within slightly more than a decade, a downward trend in the proportions of children in employment has been observed, as reflected by the ILO 2013 report on the incidence of child labor.[8] Figure 1 illustrates the observed trends in incidence of child labor on a global scale over the period from 2000 to 2012.[9] There has been a marked reduction from 23 percent in 2000 down to 16.7 percent

[3] Matthias Doepke & Fabrizio Zilibotti, *International Labor Standards and the Political Economy of Child-Labor Regulation*, 7 J. OF THE EUR. ECON. ASS'N 508, 508 (2009).

[4] *Id.*

[5] *See* U.S. DEP'T OF LABOR, BUREAU OF INT'L LABOR AFFAIRS, 2012 FINDINGS ON THE WORST FORMS OF CHILD LABOR 125, 278, 366, 422, 483, 521, 675, 726, 766 (2013).

[6] Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (ILO No. 182), open for signature June 17 1999, 2133 U.N.T.S. 161 (entered into force Nov. 19, 2000).

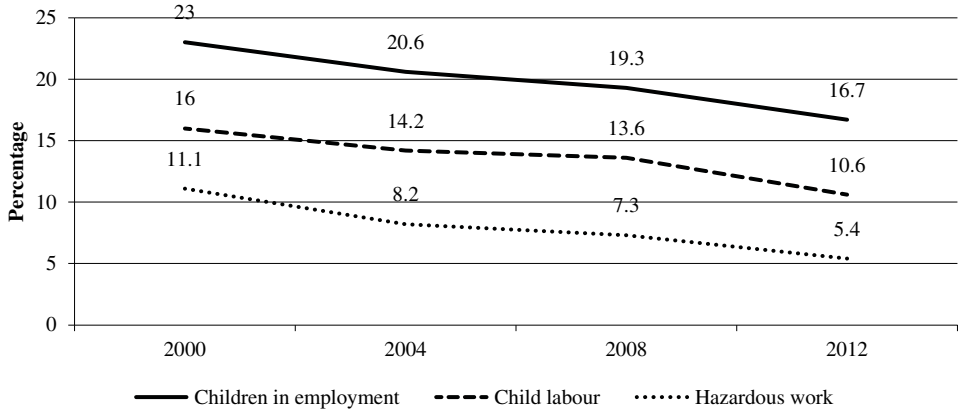
[7] ILO, International Programme on the Elimination of Child Labour (ILO-IPEC), April 2009, *available at* http://www.ilo.org/ipecinfo/product/download.do?type=document&id=9970.

[8] PROGRESS AGAINST CHILD LABOUR, *supra* note 2, at 3.

[9] *Id.*

as of 2012.[10] This translates to a 7 percent reduction in the global proportion of children in employment globally.[11]

Figure 1: Global Trends in Child Labor



Source: ILO 2013[12]

Similarly, it can be observed that child labor — in particular, children engaged in hazardous work — experienced a roughly 6 percent reduction over the 2000-2012 period respectively.[13] This implies that the global campaign towards eliminating the worst forms of child labor could be bearing fruit and consequently reinforces the need for a more concerted effort at both global and regional levels to reach this goal.

Broken down by region, the proportion of children in employment, illustrates an interesting trend, shown in Figure 2. Although there has been a general reduction in the proportion of children in economic activity between 2000 and 2012, the incidence of children in economic activity is relatively high in sub-Saharan Africa at 26.2 percent when compared to 10.1 percent and 8.6 percent in Asian and Latin American countries respectively.[14] This makes sub-Saharan Africa stand out on the matter of child labor.

[10] *Id.*

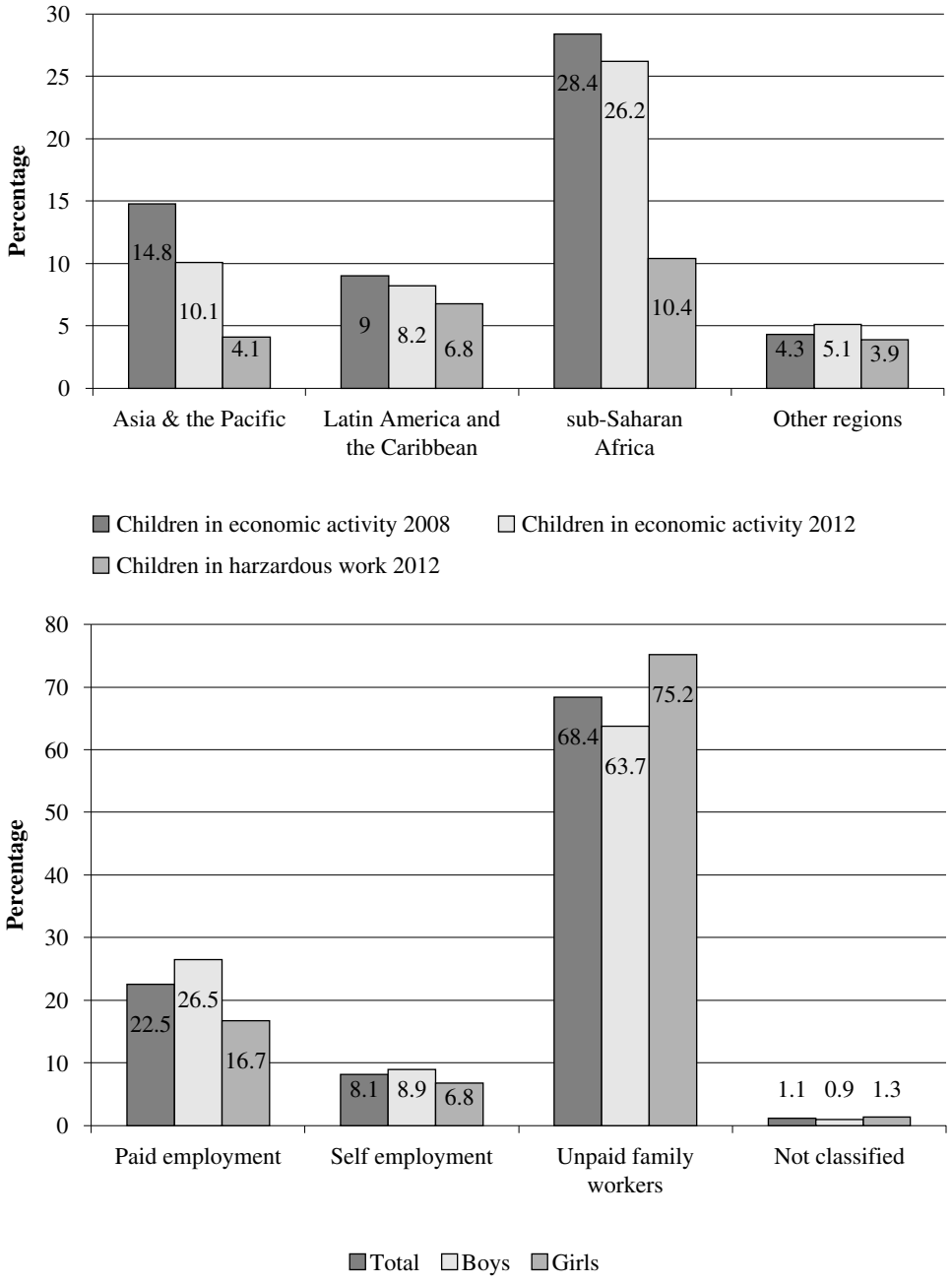
[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Yacouba Diallo et al., *Int'l Programme on the Elimination of Child Labor, Global Child Labour Trends 2008 to 2012*, ILO, 1, 5 (2013).

Figure 2: Employment Characteristics of Child Labor



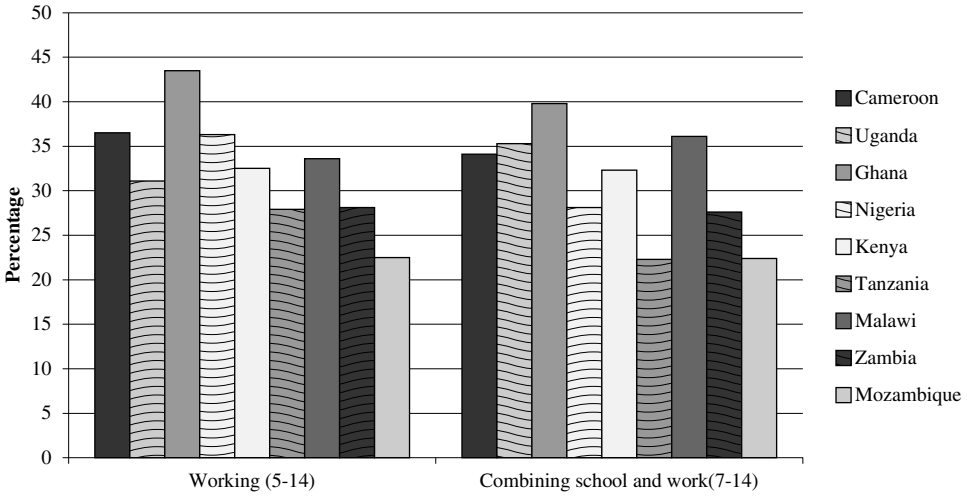
Source: ILO (2013)[15]

[15] *Id.* at 5, 15.

Statistics identify the prevalence of child labor in unpaid family settings.[16] This appears to follow the logic that poorer households constrained by tight budgets see child labor as a natural, feasible alternative to expensive hired labor. This is evident for both boys and girls with a disproportionate 68 percent of employed children working in unpaid family settings compared to 22 percent working in paid employment.[17]

Surveys conducted by the U.S. Department of Labor in 2012 do not show any significant difference in the incidence of child labor across a sample of sub-Saharan countries.[18] This lack of difference is apparent in those working and those who combine work and school.[19]

Figure 3: Distribution of Child labor Across Selected African Countries in 2012



Source: US Department of Labor[20]

A question that arises is whether or not a child's background plays a part in determining whether that child will enter the child labor force. To answer this question some econometric analysis would be relevant. However, a simple graphical presentation highlights poverty as having a significant impact on the incidence of child labor.[21] Poorer households are more likely to have a higher

[16] *Id.* at 15.

[17] *Id.*

[18] *See* U.S. Dep't of Labor, Bureau of Int'l Labor Affairs, 2012 Findings on the Worst Forms of Child Labor 125, 278, 366, 422, 483, 521, 675, 726, 766 (2013).

[19] *Id.*

[20] *Id.*

[21] Elizabeth D. Gibbons et al., United Nations Children's Fund, Child Labour, Education and the Principle of Non-Discrimination 11 (UNICEF Division of Policy and Planning Working Paper, 2005).

proportion of children providing labor in the family businesses or farms.[22] Poverty ranks as the greatest reason that children enter the child labor pool with about 45 percent contribution to the child labor pool.[23] This is corroborated by the stark 50 percent margin between rural and urban backgrounds. [24] In typical sub-Saharan family setups, the rural households are more likely to be located in poorer peasant communities where child labor is seen as a cheap source of the much needed labor input in the family garden.[25]

Age and gender do not appear to have a major influence on the incidence of child labor.[26] However, the caretaker's level of education is seen as an important factor in determining the likelihood that the child will be utilized as a source of labor.[27] More educated caretakers are more likely to prioritize education for the child, thereby limiting the probability that the child will enter the workforce, ensuring the child is able to attend school and learn.[28]

The correlation between child labor incidence and poverty levels is very high.[29] As observed earlier, poorer households are more likely to be associated with high child labor incidence.[30] This implies that one important policy solution to reducing child labor incidence requires initiatives that improve household income opportunities. This is affirmed by one stark remark by Shumba of FACT Zimbabwe, IRIN (2012) who notes, "But for as long as households have poor and unreliable sources of income, and there are many child-headed families and a dependency on cheap labor, it will be difficult to eliminate the problem."[31]

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[22] *See id.*

[23] *See id.*

[24] *Id.*

[25] *See* Keith E. Maskus, *Should Core Labor Standards be Imposed Through International Trade Policy?* (The World Bank Dev. Research Group, Policy Research Working Paper No. 1817, Aug. 1997), *available at* http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2000/02/24/000009265_3971110141359/Rendered/PDF/multi_page.pdf.

[26] *See* Gibbons et al., *supra* note 21.

[27] *See id.*

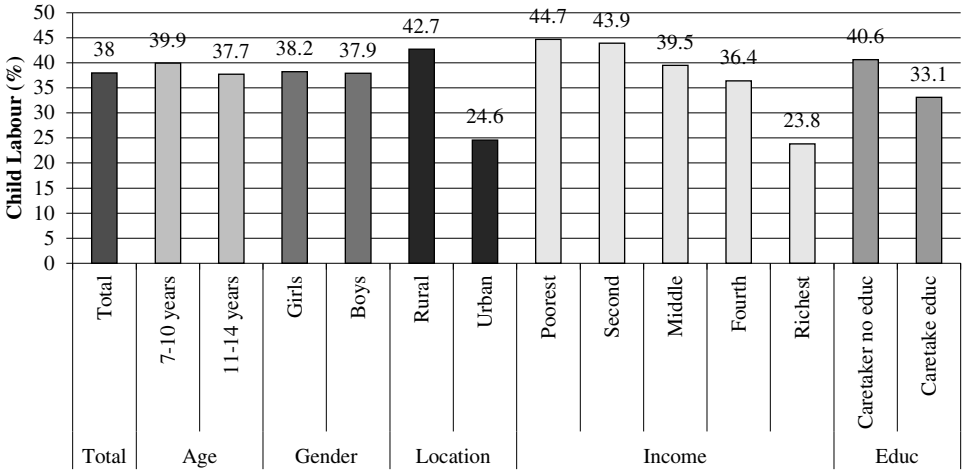
[28] *See id.* at 11-12.

[29] *See id.* at 11.

[30] *See id.*

[31] Zimbabwe: Child Labour on the Rise, IRIN (Feb. 24, 2012), http://www.irinnews.org/printreport.aspx?reportid=94939.

Figure 4: Child Labor Background Characteristics



Source: Gibbons et al (2005)[32]

We can observe from the different background characteristics of child labor that income and education of the caretaker play a significant role in the incidence of child labor.[33] Initiatives that enhance the availability of affordable education to communities can have a significant positive impact on the reduction of child labor incidence in the future. Educated children are more likely to support the education of their future children as educated parents.[34] Likewise, education can have positive impacts on the income potential of the future parents reinforcing the positive impact on child labor incidence over time.[35]

III. Does legislation matter?

In an effort to reduce child labor incidences, there has been a concerted move to ensure that ILO member states ratify the key child labor provisions – ILO core conventions No. 138 on minimum age, adopted in 1973, and No. 182 on the worst forms on child labor, adopted in 1999.[36] The motivation is derived from the perception that higher observed incidences could be attributed to the absence or limited use of enforceable regulatory instruments specific to child labor.[37] Interestingly, within a decade most of the sub-Saharan African countries ratified

[32] Gibbons et al., *supra* note 21.

[33] *See id.*

[34] *See id.* at 11-12.

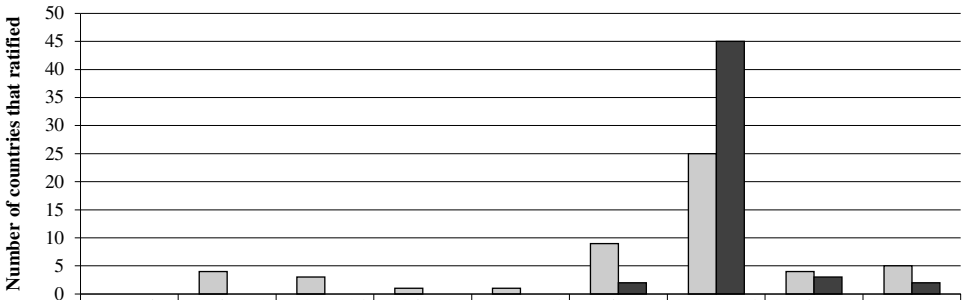
[35] *See id.*

[36] ILO Conventions and Recommendations on Child Labour, INT'L LABOUR ORG., http://www.ilo.org/ipec/facts/ILOconventionsonchildlabour/lang—en/index.htm (last visited Nov. 9, 2014).

[37] Maskus, *supra* note 25.

the key ILO child labor provisions.[38] All sub-Saharan African countries have ratified at least one of either Conventions 138 or 182 as illustrated in Figure 5.[39]

Figure 5: Ratification of ILO core Conventions on Child Labor



	<1975	1975-1979	1980-1984	1985-1989	1990-1994	1995-1999	2000-2004	2005-2009	2010-2012
C138	0	4	3	1	1	9	25	4	5
C182	0	0	0	0	0	2	45	3	2

Source: ILO website.[40]

Except for the nine countries that ratified ILO Convention 138 before 1995, most countries ratified it after 1995, with the majority after 2000.[41] This is contrasted with the highest incidence of child labor in these countries.[42] Immediately after adoption, the number of African countries ratifying Convention 182 was impressive, with forty-five of the fifty-two ratifying by 2004.[43] This is confirmed by Boockmann, who found no correlation between ratification and incidences of child labor.[44]

The U.S. Department of Labor's Bureau of International Affairs carries out periodic surveys and evaluations on the status of child labor and existing regulations to minimize the incidences.[45] In its 2012 report on the findings on the worst forms of child labor for a selected number of African countries, the Department of Labor observed minimal advances in efforts to eliminate the worst forms of child labor.[46] They observed gaps in legislation and enforcement efforts.[47] Labor

[38] *See* Int'l Labour Org., *supra* note 1; *see also* Ratifications of C138 - Minimum Age Contention, Int'l Labour Org., a*vailable at* http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312283 (last visited Nov. 9, 2014).

[39] *See* Ratifications of C182, Int'l Labour Org., *supra* note 1; *see also* Ratifications of C138, Int'l Labour Org., *supra* note 38.

[40] *See* Ratifications of C182, Int'l Labour Org., *supra* note 1; *see also* Ratifications of C138, Int'l Labour Org., *supra* note 38.

[41] Ratifications of C138Int'l Labour Org., *supra* note 38.

[42] Yacouba, *supra* note 14, at 5, 15.

[43] Ratifications of C182, Int'l Labour Org., *supra* note 1.

[44] *See generally* Bernhard Boockmann, *The Ratification of ILO Conventions: A Failure Time Analysis*, (Centre for European Economic Research (ZEW) Discussion Papers, Vol. 13, No. 3), *available at* http://econstor.eu/bitstream/10419/24360/1/dp0014.pdf.

[45] *Findings on the Worst Forms of Child Labor*, United States Department of Labor, http://www.dol.gov/ilab/reports/child-labor/findings (last visited Nov. 10, 2014).

[46] *Id.*

inspections that should be routine seem to leave out the majority of the population, particularly in rural areas where children are subjected to hazardous forms of agriculture and domestic service.[48]

Information gleaned from the country reports confirms the adoption and ratification of international conventions and selected laws on child labor and education, but also highlights evidence of significantly worse forms of child labor and insufficient enforcement of ratified labor laws.[49] Figure 6 provides the ratification status of selected African countries. The summary shows that several countries have existing regulatory framework in place to combat the child labor problem. This is in line with the information regarding the high ratification levels for the ILO core labor conventions discussed earlier. One could conclude that adequate legislation exists to tackle the problem of child labor in the countries exhibiting the highest incidence levels for child labor. In effect, this rules out the lack of legislation as a potential explanation for the high levels of child labor incidences.

[47] *Id.*

[48] *Id.*

[49] *Id.*

Figure 6: Ratification Status of the Key Child Labor Provisions

	Cameroon	Uganda	Ghana	Nigeria	Kenya	Tanzania	Malawi	Zambia	S. Africa	Mozambique	Zimbabwe
C138, Minimum Age	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
C182, Worst Forms of Child Labor	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
CRC	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
CRC Optional Protocol on Armed Conflict	Yes	Yes	No	No	Yes	Yes	Yes	No	Yes	Yes	No
CRC Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography	No	Yes	No	No	No	Yes	Yes	No	Yes	Yes	Yes
Palermo Protocol on Trafficking in Persons	Yes	Yes	No	No	Yes	Yes	Yes	Yes	Yes	Yes	No
Minimum Age for Work	14	14	15	13	16	14	14	15	15	15	15
Minimum Age for Hazardous Work	18	18	18	18	18	18	18	18	18	18	18
Compulsory Education Age	12	12	15	15	15	15	14	14	15	13	No
Free Public Education	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No

Source: US Department of Labor[50]

In line with the expected outcome, the high level of ratification should be positively correlated with lower incidence of child labor. However, current statistics rank sub-Saharan Africa as a region with the highest child labor incidence.[51] This begs the question as to whether ratification for sub-Saharan African countries presents an effective obligatory instrument or if it is treated as another formality. There is no question that legislation is essential in addressing child labor problems. The intended objective of reducing the prevalence of child labor requires that child labor provisions be coupled with effective policies and programs. It is one thing to have a good regulatory framework but it is another to

[50] *Findings on the Worst Forms of Child Labor*, *supra* note 45.

[51] Eric V. Edmonds and Nina Pavcnik, *International Trade and Child Labor: Cross-Country Evidence 18-19* (Nat'l Bureau of Econ. Research, Working Paper No. 10317, 204), *available at* http://www.nber.org/papers/w10317.

have an effective regulatory framework. The former is a necessary condition and the latter necessitates that a rigorously enforced monitoring mechanism is implemented. One of the identified challenges associated with ILO conventions is that conventions do not adequately compel change because enforcement relies on moral force.[52]

IV. FTAs and Child Labor

Complementing the increasing proliferation of FTAs, at bilateral and regional levels, are trade reforms that are perceived to enhance intra-member trade. There are two potential feasible implications of FTA-induced trade activity on child labor. If the trade reforms trigger an increased demand for child-labor-intensive exportable goods, increased demand for child labor follows.[53] This is reinforced by the fact that increased wages from the exportable goods reduces the return on schooling and as a result increases the likelihood of child labor.[54] The flipside is that the FTAs can be associated with an increased income level for the households involved in the supply chain of an exportable product whose prices has gone up.[55] The FTA consequently reduces child labor and increases child leisure.[56] This theory is supported by the findings of Edmonds & Pavcnick concerning work on Vietnam rice.[57]

Above all, FTAs can be important vehicles for providing a platform for reinforcing a drive towards enforcement of child labor eradication policies for member states.[58] This can be seen in the conditional and promotional provisions provided in the United States' African Growth and Opportunity Act or the European Union's Economic Partnership Agreement negotiations that have been assessed to have better outcomes concerning eradication of child labor. The challenge is that these policies may disadvantage children in tradable sectors. However, the conditions of the children in non-tradable sectors will not change

There are vague references to child labor provisions in the major regional integration agreements with sub-Saharan Africa. The Common Market for Eastern and Southern Africa ("COMESA"), signed in 1994, states in Article 143 that, "The Member States shall promote close co-operation between themselves in the social and cultural field particularly with respect to: (a) employment and working

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[52] Elizabeth B. Chilcoat, *Pinkie Promises or Blood Oaths? Using Social Clauses in U.S. Free Trade Agreements to Eradicate Child Labor*, 7 WASH. U. GLOBAL STUD. L. REV. 307 (2008), *available at* http://openscholarship.wustl.edu/law_globalstudies/vol7/iss2/6.

[53] Edmonds and Pavcnik, *supra* note 51, at 5-6.

[54] Ranjan Ray, *Child Labour and Child Schooling in South Asia: A Cross Country Study of their Determinants* (The Australian National University, Australia South Asia Research Centre, Working Paper 2001-09), *available at* https://crawford.anu.edu.au/acde/asarc/pdf/papers/2001/WP2001_09.pdf.

[55] Edmonds and Pavcnik, *supra* note 51, at 2-3.

[56] *Id.*

[57] *Id.* at 1313.

[58] Matthias Doepke & Fabrizio Zilibotti, *Do International Labor Standards Contribute to the Persistence of the Child-Labor Problem?*,15 J. ECON. GROWTH 1, 2 (2010).

conditions; (b) labor laws."[59] There is no clear child labor provision embedded in this provision because the COMESA agreement focuses on employment cooperation.[60] The Economic Community of West African States ("ECOWAS") makes reference to labor laws without any direct reference to child labor.[61] This thought is captured in Article 61(2)(b) of ECOWAS, which states, "harmonize their labor laws and social security legislations;" however it does not mention anything that concerns child labor laws.[62]

However, there is clear reference to the ILO convention 138 in the Southern African Development Community's ("SDAC") Charter of Fundamental Social Rights. Article 7 in the Charter of Fundamental Social Rights in SADC mentions creating an environment consistent with ILO convention 138.[63] Similarly, the East African Community Common Market Protocol, signed in 2009, makes specific reference to the abolition of child labor, particularly referring to the worst forms of child labor in Article 39(3)(e).[64]

V. Role of Political elite and the 'dilemma'

High ratification levels and limited enforcement mechanisms coupled with high poverty levels amplify the importance of the crucial support from the political elite.[65] Improved enforcement of existing provisions for child labor requires political will. Likewise, design, prioritization, budget allocation and implementation of poverty-reducing initiatives depend to a great extent on the support of the political elite.[66]

However, there is one big challenge for the political elite that presents a dilemma. The incentives of the political elite to pursue initiatives that enhance the income opportunities of households can be reduced by political uncertainty.[67] The perceived threat of economically independent households not toeing the line of the political elite appears to diminish the incentives of the political elite to pursue income improving initiatives for households.[68] This creates potentially uncertain future private benefits as a result of pursuing income improvement initiatives.[69]

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[59] Treaty Establishing the Common Market for Eastern and Southern Africa, art. 143, Nov. 5, 1993, 33 ILM 1067, 1104 [hereinafter COMESA Treaty].

[60] *Id.*

[61] Treaty of the Economic Community of West African State, May 28, 1975, 14 ILM 1200 [hereinafter ECOWAS Treaty].

[62] *Id.*

[63] Charter of Fundamental Social Rights in SADC, art. 7, August 1, 2003, *available at* http://www.sadc.int/files/6613/5292/8383/Charter_of_the_Fundamental_Social_Rights_in_SADC2003.pdf.

[64] Protocol on the Establishment of the East African Community Common Market, art. 39(3), Nov. 20, 2009, *available at* http://www.eac.int/index.php?option=com_docman&Itemid=226.

[65] François Bourguignon & Thierry Verdier, *The Simple Analytics of Elite Behaviour Under Limited State Capacity*, (UNU-WIDER, Working Paper No. 2010/104, 2010).

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

If a politician is unsure whether households that realize income improvements will be appreciative enough to support the political agenda of the politician, then the politician is bound not to prioritize income-generating initiatives.[70] This is likely to be reinforced by a scenario in which the voting patterns of the households in election cycles are highly correlated with monetary handouts to voters.[71] Naturally, higher income households become more expensive to win through monetary handouts and become more likely to be a difficult group for the politician to deal with.[72] The question is then, why would a politician pursue initiatives that improve the income potential in the future if that approach will work against the expected private interests of the politician? The one obvious case in which this would happen is if the politician is benevolent.

Judging by the observed voting patterns during election cycles in most sub-Saharan African countries that are dominated by monetary handouts to the electorate, it can be inferred that politicians who are not benevolent would not have any incentive to pursue initiatives that improve the income levels of the households.[73] Additionally, high levels of poverty coupled with huge resource potentials and high levels of corruption within the public sectors of sub-Saharan countries reinforce the perception that non-benevolent politicians are more likely to maintain the status quo.[74]

Voters' appeal and support for a particular political group or politician appears to be intricately linked to monetary incentives.[75] This breeds a particular type of behavior among both politicians and the electorate in which the central decision instruments are monetary handouts. This is particularly pronounced during the election cycles. To politicians, winning elections implies securing adequate election cash amounts to use as bait to win the electorate's support and votes.[76] Vulnerability of the electorate then becomes an important factor in winning elections for politicians. Given the high proportions of the electorate who are poor, the political elite may not have any incentive to change the status quo and change the electioneering practice game if it may increase political uncertainty. This reinforces a vicious cycle that perpetuates high levels of poverty among the population and, by implication, a higher incidence of child labor.[77] Given this scenario, the efficacy of the laws on child labor may be very limited since enforcement is

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[70] Boniface Dulani, *Incumbency and Handouts Don't Guarantee Winning an African Election*, Al Jazeera America, (May 31, 2014) *available at* http://america.aljazeera.com/opinions/2014/5/malawi-elections joycebandapetermutharikaafrica.html.

[71] *Id.*

[72] *Id*.

[73] *See supra* note 70; Eric Jonathan Kramon,*Vote Buying and Accountability in Democratic Africa* (2013)(unpublished Ph.D. dissertation, University of California, Los Angeles)(on file with University of California, Los Angeles), *available at* https://escholarship.org/uc/item/1490x02z#page-4.

[74] *See supra* note 70.

[75] *Id*.

[76] *Id*.

[77] *See* Niels-Hugo Blunch & Dorte Verner, *Revisiting The Link Between Poverty and Child Labour: The Ghanian Experience*, (World Bank, Policy Research Working Paper No. WPS2488, 2000), *available at* http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-2488.

likely to be very weak.[78] No political elite would be keen to rock the boat and complicate the election framework already in place.

Another aspect that appears to reinforce the political elite's dilemma is captured in terms of intra-generational interests.[79] It is observed that most members of the elite send their children to elite private schools while the children of poorer families go to public schools.[80] Improvements in public schools through adequate budgetary allocations translate into a higher number of potential future skilled employees.[81] This might increase job competition for the children of the political elite in future. To minimize this potential threat, the elite may not be keen to allocate adequate funding to the public schools.[82] There is no clear empirical finding supporting this claim but the observed patterns seem to give credence to this perception.

VI. Conclusion

Child labor elimination is a question of political choices. It is important to recall that once a country has ratified an ILO Convention, it has an obligation to report regularly on the measures it has taken to implement it. However, child labor driven by desperate circumstances requires interventions that reduce the desperate circumstances such as improving the living conditions of the poor.

Given that the political elite in sub-Saharan African countries are needed to pursue initiatives that reduce the desperate circumstances of the electorate, a pertinent question remains as to whether it is in the interest of the political elite. This on-going dilemma highlights the role of political elites in shaping the outcomes of the child labor fight at global, regional, and national levels. This paper elicits the need for more empirical research regarding the impact of political choices on enforcement and implementation of existing regulatory framework on child labor.

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[78] *Id.*

[79] Alessandro Maffei, Nikolai Raabe & Heinrich W. Ursprung, *Political Repression and Child Labour: Theory and Empirical Evidence*, THE WORLD ECON., VOL. 29, NO. 2, 2008, 211, 217 (2006).

[80] *Id.* at 231.

[81] *Id.*

[82] *Id.*

The U.S.-Colombia Trade Promotion Agreement: Ignoring the Paramilitary's Human Rights Abuses?

Pooja Shah*

I. Introduction

Free trade agreements allow participating countries to benefit as trade partners with remaining parties to the agreement.[1] Specifically, free trade agreements include provisions that reduce tariffs for exports.[2] United States trade policy encompasses strong attempts to expand their export markets and decrease the foreign trade barriers placed on U.S. goods and services.[3] Additionally, the United States is in a unique position to impact the international community through its relationship with trade partners.[4] The U.S. impacted labor standards in the international community through provisions in all free trade agreements entered into after 1994, starting with the North American Free Trade Agreement ("NAFTA").[5]

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[1] Kevin J. Fandl, *Bilateral Agreements and Fair Trade Practices: A Policy Analysis of the Colombia-U.S. Free Trade Agreement*, 10 Yale Hum. Rts. & Dev. L.J. 64, 67 (2007).

[2] *Id.*

[3] *See*, *e.g.*, Mylène Kherallah & John Beghin, *U.S. Trade Threats: Rhetoric or War?*, 80 Am. J. Agric. Econ. 15 (1998) (examining increased American attempts to expand the export market).

[4] Jennifer Alewelt, *The Heat Is on in Latin America: The Future and Implications of the Colombian Free Trade Agreement*, 39 Cal. W. Int'l L.J. 159, at 162 (2008).

[5] Eli J. Kirschner, *Fast Track Authority and Its Implication for Labor Protection in Free Trade Agreements*, 44 Cornell Int'l L.J. 385, 396 (2011).

The U.S.-Colombia Trade Promotion Agreement

The Colombian Trade Promotion Agreement ("CTPA") entered into force on May 15, 2012.[6] Congress passed the CTPA on October 12, 2011 and President Obama signed it into law on October 21, 2011.[7] Under the CTPA, over 80% of American exports of goods to Colombia became duty-free upon passage, while the tariffs on the remaining goods phased out over the next ten years.[8] The tariff reductions under the CTPA will expand U.S. exports to Colombia by over $1.1 billion.[9] Moreover, while the Colombian economy is the third largest in Central and South America,[10] it also presents the worst human rights and humanitarian crisis in the area.[11] Likewise, while the trade agreement increased exports between the countries, it also allowed the U.S. to protect laborers in Colombia through provisions in the CTPA.[12] However, the primary criticism of labor provisions and standards in U.S. free trade agreements is the lack of an adequate mechanism of enforcement.[13]

Part II of this Article provides insight into the violent history of Colombia and the previous failed free trade agreement with the United States. Colombia has a long and deadly history between labor unionists, the government and the paramilitary. Due to this history, as well as continued problems with labor unions, Congress declined to ratify the free trade agreement with Colombia signed by President George W. Bush.

Part III of this Article discusses the Colombian Trade Promotion Agreement, signed by President Obama and ratified by Congress. This agreement includes a plan to better protect labor unionists against violence. However, many have remaining concerns over the continued human rights violations within Colombia – especially with the paramilitary. American corporations within Colombia have even been found funding the paramilitary to prevent labor strikes and to provide protection.

Part IV of this Article analyzes the Colombian Trade Promotion Agreement. According to the U.S. government, the free trade agreement levels the playing field for American goods by removing tariffs. However, the agreement fails to adequately protect workers against human rights violations within Colombia. Further, the Alien Tort Statute does not provide legal remedy for victims of U.S. corporation actions.

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[6] Cortney O'Toole Morgan Et Al, International Trade, 47 Int'l Law 81, 83 (2013).

[7] M. Angeles Villarreal, Cong. Research Serv., RL34470, The U.S.-Colombia Free Trade Agreement: Background and Issues 1 (2014).

[8] O'Toole Morgan Et Al. *supra* note 6, at 83.

[9] Lisa Haugaard & Vanessa Kritzer, *The U.S.-Colombia FTA: Still a Bad Deal for Human Rights,* HuffPost, (Oct. 4, 2011), http://www.huffingtonpost.com/lisa-haugaard/the-uscolombia-fta-bad-deal_b_983780.html.

[10] *See, e.g., U.S.-Colombia Trade Agreement*, Office of the U.S. Trade Representative, http://www.ustr.gov/uscolombiatpa/facts (last visited Nov. 7, 2014) (providing an overview of the U.S.-Colombia trade agreement, including key economic facts about each country).

[11] Alewelt, *supra* note 4, at 167.

[12] *Id.* at 172.

[13] *Id.*

Part V of this Article considers changes that must be implemented to address and remedy human rights violations. Labor strikes still occur within Colombia even after the passage of the Labor Action Plan and the Colombian Trade Promotion Agreement. Consequently, violence against Colombian labor unionists remains high.

II. History of Colombia Labor Issues

A. Violence in Colombia

Colombia has the worst human rights and humanitarian crisis in the Latin and South American region.[14] It is considered the "most dangerous country in the world" for members of trade and labor unions, and no country is more dangerous than Colombia for those fighting for labor rights.[15] In fact, assassinations of trade activists in Colombia alone account for eighty-five percent of all trade unionist assassinations in the world.[16] Additionally, any labor activists that actively engage in any labor union activities become targets of violence.[17] The increase in assassinations of labor union members is attributed to increased activity of paramilitary groups.[18]

Paramilitary groups have a long history in Colombia. During the 1960s, the revolutionary group, Fuerzas Armadas Revolucionaria de Colombia ("FARC"), gained power.[19] The FARC is one of the world's wealthiest guerilla armies and is the largest left-wing Colombian revolutionary group.[20] Guerilla and revolutionary groups like the FARC extort payment from rural farmers for protection of the farmers' land.[21] In February 2012, the FARC proclaimed it would no longer commit kidnapping for ransom.[22] The Ejército de Liberación Nacional ("ELN") is the second largest guerilla group within Colombia.[23] The ELN formed during the same time as the FARC[24] but has stronger political motivations than the

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[14] *Id.* at 167.

[15] *Id.* at 163, 167.

[16] *Id*. at 164. *Murder and Impunity: Colombia and Guatemala*, US LEAP, http://www.usleap.org/usleap-campaigns/colombiamurderandimpunity (explaining that Guatemala is the second most dangerous country for trade unionists. In 2010 fifty-one trade unionists were murdered in Colombia compared to ten trade unionists assassinated within Guatemala).

[17] Alewelt, *supra* note 4, at 163.

[18] *Id.* at 165–66.

[19] Brian A. Ford, *From Mountains to Molehills: A Comparative Analysis of Drug Policy*, 19 ANN. SURV. INT'L & COMP. L. 197, 211 (2013).

[20] *See, e.g., Profiles: Colombia's armed groups*, BBC NEWS (2013), http://www.bbc.co.uk/news/world-latin-america-11400950 (providing an overview of Colombia's paramilitary history).

[21] J. Corey Harris, *Oppression Through Violence: The Case of Colombia – An Expansion of the Fetish Object?,* 29 N.C. CENT. L.J. 98, 106 (2006).

[22] *Profiles: Colombia's armed groups*, *supra* note 20.

[23] Virginia M. Bouvier, *Colombias' Crossroads: The FARC and the Future of the Hostages*, UNITED STATES INSTITUTE OF PEACE 3 (2008), *available at* http://www.ciaonet.org/pbei/usip/0002182/f_0002182_1282.pdf.

[24] Stephanie Hansen, *FARC, ELN: Colombia's Left-Wing Guerillas*, COUNCIL ON FOREIGN RELATIONS (2009), http://www.cfr.org/colombia/farc-eln-colombias-left-wing-guerrillas/p9272.

FARC.[25] ELN originally drew members to "advance their cause of [national] 'liberation or death'" wishing to establish a Colombia with full equality and democracy.[26] Both the FARC and ELN claim to protect the poor farmers of Colombia against the wealthy and U.S.[27] A third paramilitary group, the Autodefensas Unidas de Colombia ("AUC"), consisted mainly of former military and insurgent persons.[28] Although AUC has reportedly disbanded, attacks by former members have been reported as late as 2009.[29] Altogether, these paramilitary groups selectively kill between 800–900 people throughout Colombia each year.[30]

While paramilitary groups are not part of the Colombian government, there is evidence of close ties between the two.[31] The Colombian government states that it made efforts to shield labor activists and union members, but these efforts have not been successful.[32] Seventy to eighty percent of all human rights violations within Colombia are attributed to these paramilitary groups.[33] Human rights violations include massacres, assassinations, tortures, forced displacements, disappearances, kidnappings and drug trafficking.[34]

Likewise, paramilitary organizations were legal militias under Law 48, which was passed in 1968.[35] Law 48 gave the Colombian army permission to "organize and provide arms to groups of civilians called 'self-defense' units."[36] These self-defense units were given the power to fight back against guerilla groups such as the FARC.[37] While the FARC kept control over many of the southern and eastern regions of Colombia, the paramilitary groups in northern Colombia used aggres-

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[25] *Colombia: Prospects For Peace With The ELN*, ii, INTERNATIONAL CRISIS GROUP (2002), *available at* http://www.ciaonet.org/wps/icg291/icg291.pdf.

[26] *Id.* at 5–6.

[27] *The guerilla groups in Colombia*, UNITED NATIONALS REGIONAL INFORMATION CENTRE FOR WESTERN EUROPE, http://www.unric.org/en/colombia/27013-the-guerrilla-groups-in-colombia (last visited Nov. 7, 2014).

[28] *Id*.

[29] *United Self-Defense Forces of Colombia*, MAPPING MILITANT ORGANIZATIONS (2014), *available at* http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/85; United Self-Defense Forces/ Group of Colombia (AUC-Autodefensas Unidas de Colombia), http://www.globalsecurity.org/military/world/para/auc.htm (last visited Nov. 7, 2014) (While the AUC has technically been disbanded, the extent of their infiltration into Colombia's security forces and government departments has remained high.).

[30] Alewelt, *supra* note 4, at 168.

[31] David Spencer, *Colombia's Paramilitaries: Criminals or Political Force?* 3 (2001), *available at* www.strategicstudiesinstitute.army.mil/pdffiles/PUB19.pdf; see, e.g., Francisco Gutiérrez Sanín, Telling the Difference: Guerillas and Paramilitaries in the Colombian War, 36 Politics & Society 3 (2008) (discussing the difference between Colombian guerilla forces and paramilitary organizations).

[32] Alewelt, *supra* note 4, at 167.

[33] Lisa J. Laplante & Kimberly Theidon, *Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz*, 28 MICH. J. INT'L L. 49, 56 (2006).

[34] *Id*.

[35] *See*, e.g., Garry Leech, *Fifty Years of Violence*, COLOMBIA JOURNAL (1999), http://colombiajournal.org/fiftyyearsofviolence (examining the human rights violations repeatedly committed by paramilitary organizations in Colombia and the history of the government's role in allowing the violence to continue).

[36] *Id*.

[37] *Id*.

sion and terror tactics to introduce "aggressive counter-agrarian reform."[38] Under counter-agrarian reform, paramilitary groups forcefully took valuable lands to favor the interests of "drug traffickers, local landowners and multinationals and private companies."[39]

Under Decree 1194 of 1989, Colombian President Virgilio Barco Vargas imposed criminal penalties on those who formed or operated paramilitary groups without permission from the President of Colombia.[40] In essence, Decree 1194 abolished paramilitary groups. However, in 1994, under Decree 356, self-defense units became legal once again.[41] These self-defense groups became known as the "Convivir."[42] Decree 356 allowed the Convivir to carry side arms but nothing else.[43] The Convivir "[provides] intelligence for the [Colombian] military."[44] They are essentially government funded paramilitary groups that on occasion act together with the traditionally violent factions.[45] The government promotes the Convivir as "democratic security" and, in contrast, the paramilitary groups argue that the Convivir are the same as them, stating "[let] us not deceive ourselves" all the Convivir were ours."[46]

The Colombian military and paramilitary groups continue to have strong ties.[47] In northern Colombia, paramilitary groups and military commanders form connections to "protect" the agricultural interests of the wealthy from guerilla extortion.[48] Additionally, many officers and soldiers join the paramilitary groups upon retirement.[49] The Colombian government has been notoriously ineffective in protecting the rural population, and, as a result, the paramilitary has become a source of protection for the rural population in spite of the human rights violations the paramilitary groups commit.[50]

The AUC was disbanded between 2003 and 2006, but former paramilitary members joined forces with drug trafficking groups.[51] These groups formed pri-

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[38] *Id*.

[39] Ross Eventon, *The War on Colombia's Poor*, Trade & Investment (2012), http://www.tni.org/article/war-colombias-poor.

[40] William Aviles, Global Capitalism, Democracy and Civil-Military Relations in Colombia 112 (2006).

[41] William L. Marcy PhD, The Politics of Cocaine: How U.S. Foreign Policy Has Created a Thriving Drug Industry in Central and South America, 216 (2010).

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Bulletin No 27: Series on the rights of the victims and the application of Law 975*, Comisión Colombiana De Juristas 1 (2008), *available at* http://www.coljuristas.org/documentos/boletines/bol_n27_975_en.pdf.

[46] *Id.* at 4.

[47] Laplante, *supra* note 33.

[48] Jose E. Arvelo, *International Law and Conflict Resolution in Colombia: Balancing Peace and Justice in the Paramilitary Demobilization Process*, 37 Geo. J. Int'l L. 411, 420 (2006).

[49] Spencer, *supra* note 31, at 6.

[50] *Id.* at 18.

[51] *Colombia's New Armed Groups,* International Crisis Group 1 (2007), *available at* http://www.crisisgroup.org/~/media/Files/latin-america/colombia/20_colombia_s_new_armed_groups.pdf.

marily because of the failure of the Colombian government to dismantle the criminal networks the groups established before the AUC disbanded.[52] These successor groups are violent and commit various crimes –including massacres, killings, rapes and extortions.[53] The successor groups target human rights defenders, members of trade unions, and those in the successor group "territory" that do not follow their rules.[54] The Colombian government has been consistently ineffective in dealing with the successor groups.[55]

B. 2008 U.S.-Colombia Free Trade Agreement

Negotiations between the U.S. and Colombia over a free trade agreement first began in 2004 under President George W. Bush.[56] The process to attempt to ratify the free trade agreement was lengthy and complicated.[57] Not only was there discrepancy between the English and Spanish versions of the agreement, but there was also considerable opposition to the agreement within the U.S. Congress.[58] The Colombian government and President George W. Bush signed the free trade agreement in November 2006.[59] When President George W. Bush submitted the agreement for ratification to Congress in April 2008, the House Speaker, Nancy Pelosi, changed the House rules, effectively avoiding a vote within ninety days after a submission by the President.[60] Voting on the agreement was postponed multiple times.[61]

The agreement was never passed in Congress, in large part due to Democrats claiming the agreement was damaging to the U.S. economy and to national security.[62] However, the refusal to ratify the agreement was based on a few different issues, including the concern over the safety of workers in Colombia.[63] The 2008 agreement specifically prohibited the intervention of each nation in the enforcement of labor laws in the other.[64] The agreement ensured that if a violation occurred, any person with a legal interest in the matter would have access to

(discussing the various different paramilitary groups and the Colombian government's ineffectiveness in eliminating them).

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] Alewelt, *supra* note 4, at 161.

[57] SANOUSSI BILAL, PHILIPPE DE LOMBAERDE & DIANA TUSSIE, ASYMMETRIC TRADE NEGOTIATIONS 49 (Ashgate, 2011).

[58] *Id.*

[59] *WOLA's Human Rights Arguments Against the Colombia FTA,* WASHINGTON OFFICE ON LATIN AMERICA (2008), http://www.wola.org/publications/wolas_human_rights_arguments_against_the_colombia_fta.

[60] BILAL, *supra* note 57, at 150.

[61] *Id.*

[62] Alewelt, *supra* note 4, at 160–161.

[63] *Id.* at 161.

[64] *Id.* at 178.

tribunals, the structure of which was left to the discretion of each country.[65] For this reason, Democrats in Congress were hesitant to support the free trade agreement with Colombia.[66] There would have been plenty of potential for abuse of labor rights due to the close relationship between Colombian officials and the various paramilitary groups.[67]

According to the Washington Office on Latin America ("WOLA"), there are many human rights related reasons to prevent passing a free trade agreement with Colombia.[68] WOLA argued that a free trade agreement should not be passed because the rate of killings by the paramilitary remains very high.[69] Additionally, in 2008 Colombia had approximately 3.8 million displaced people – the second largest displaced population in the world.[70] It was feared that the trade agreement might increase the number of displaced individuals, as land used to grow crops would become more valuable.[71]

III. U.S. Involvement Within Colombia

A. Colombian Trade Promotion Agreement

In 2011, Congress passed and President Obama signed the CTPA, which entered into force on May 15, 2012.[72] A number of factors rendered the CTPA necessary, primarily increased pressure from other countries negotiating free trade agreements with Colombia. Colombia has the third largest economy in Latin and South America, making free trade with the country very important.[73] U.S. exporters were particularly concerned that they would lose their share in the Colombian market due to 2011 agreements between Colombia and Canada as well as 2013 free trade agreements between Colombia and the EU.[74] Colombia has also entered into a regional free trade agreement with Chile, Mexico and Peru.[75] Between 2000 and 2011, the share of Colombia's U.S. imports decreased from thirty-four percent to twenty-seven percent.[76] Argentina even replaced the U.S. in Colombia as the leading supplier of agricultural imports due to a trade agreement between Argentina and Colombia.[77] A free trade agreement with Co-

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65 *Id.*

66 *Id.* at 182.

67 *Id.* at 185.

68 *WOLA's Human Rights Arguments Against the Colombia FTA, supra* note 59.

69 *Id.*

70 *Id.*

71 *Id.*

72 Villarreal, *supra* note 7; *United States, Colombia Set Date for Entry into Force of U.S.-Colombia Trade Agreement,* Office of the United States Trade Representative (Apr. 2012), http://www.ustr.gov/about-us/press-office/press-releases/2012/april/united-states-colombia-set-date-entry-force-us-colom.

73 Alewelt, *supra* note 4, at 167.

74 Villarreal, *supra* note 7, at 26.

75 *Id.* at 26

76 *Id.*

77 *Id.*

lombia was necessary for the U.S. to globally compete to export U.S. products to Colombia.

Many members of Congress were opposed to a free trade agreement with Colombia due to the country's labor and human rights violations.[78] Others believed that without a free trade agreement, the situation in Colombia for labor activists would only become more problematic.[79] The Colombian government argues that while killings still occurred in the country, the problem was decreasing in severity.[80] However, the data available on the number of labor union members killed per year in Colombia vary greatly depending on the source.[81] Although the rate of violence in the country still remains high, the homicide rate in Colombia has decreased over the past decade.[82]

President Obama negotiated an Action Plan Related to Labor Rights ("Action Plan") as a response to concerns of violence against labor union members and human rights defenders.[83] The Action Plan addressed U.S. concerns over "alleged violence against Colombian labor union members, inadequate efforts to bring perpetrators of violence to justice, and insufficient protection of workers' rights in Colombia."[84] President Obama stated that the Action Plan was a necessary precondition for a free trade agreement to enter into force.[85] The Action Plan sets forth a number of target dates by which certain obligations are to be met.[86] Under the Action Plan, Colombia has an obligation to create a Labor Ministry, which it established in November 2011.[87] The criminal code was reformed to create penalties for employers that "undermine the right to organize and bargain collectively."[88] The effective date of Article 63 of the 2010 Law of Formalization and First Employment was accelerated from July 1, 2013 to June 15, 2011.[89] Under Article 63, misuse of cooperatives and labor relationships that affect labor rights are prohibited by law and fines can be inflicted on violators.[90] The Colombian Ministry of Interior and Justice broadened the definition of who was covered under its protection program to include labor activists, those engaged in efforts to form unions and former unionists who were threatened for their past activities

[78] *Id.* at 17.

[79] Villarreal, *supra* note 7, at 18.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.* at 17.

[84] Villarreal, *supra* note 7, at 18.

[85] *Id.*

[86] *Id.*

[87] *Id.* at 19.

[88] *Id.*

[89] Villarreal, *supra* note 7, at 20.

[90] *Id*.

within a union.[91] The Action Plan also created obligations for the Colombian government to create a temporary service agency and criminal justice reform.[92]

The CTPA incorporates human rights provisions into the agreement itself. The CTPA includes strong provisions to protect basic labor rights and labor standards in addition to "leveling the playing field" for U.S. workers.[93] The United States and Colombia, under the CTPA, must adopt and maintain the International Labor Organization's five fundamental workers' rights.[94] The five basic rights are the freedom of association, the effective recognition of the right to collective bargaining, the elimination of forced compulsory labor, the abolition of child labor and prohibition on the worst forms of child labor, and the elimination of discrimination of employment and occupation.[95] The two countries also have to establish a mechanism for the public to raise concerns about labor violations directly to each country's government and to provide workers with access to tribunals whose proceedings are fair and transparent.[96] The CTPA additionally ensures that Colombia will process protection requests from union members and labor activists in a more expedient manner.[97]

B. CTPA Human Rights Issues

More trade union members were killed in Colombia last year alone than in the rest of the world combined.[98] While President Obama and Colombian President Juan Manuel Santos[99] agreed to the Labor Action Plan to protect trade union members, the plan rewards promises over results.[100] There are twenty-two million workers in Colombia, but fourteen million of those workers still lack basic labor rights, such as the right to organize.[101] On top of this, companies allow workers to form "unions" with just three members, which allows the company to deny worker rights such as social security, health and pension payments.[102]

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[91] *Id*. at 20-21.

[92] *Id*. at 19-24.

[93] *Leveling the Playing Field: Labor Protections and the U.S.-Colombia Trade Promotion Agreement* 1, 3, *available at* http://www.whitehouse.gov/sites/default/files/09302011_labor_protections_and_the_colombia_trade_agreement.pdf.

[94] *Id*. at 3.

[95] Villarreal, *supra* note 7, at 8.

[96] *Leveling the Playing Field: Labor Protections and the U.S.-Colombia Trade Promotion Agreement*, *supra* note 93, at 3-4.

[97] *See generally*, *Leveling the Playing Field: Labor Protections and the U.S.-Colombia Trade Promotion Agreement*, supra note 93.

[98] Haugaard, *supra* note 9.

[99] John Otis, *Colombia's New President: A Win for the U.S.*, TIME (Jun. 21, 2010), http://content.time.com/time/world/article/0,8599,1998279,00.html (explaining that President Juan Manuel Santos was elected in 2010).

[100] *Id.*

[101] Daniel Freeman, *US-Colombia Labor Action Plan represents 'failure' with 'worsened' conditions: Report,* COLOMBIA REPORTS (Oct. 29, 2013), http://colombiareports.co/us-colombia-labor-action-plan-represents-failure-worsened-conditions-report/.

[102] *Id.*

These "unions" are called "*contractos sindicales"* where a union is not representing its members but instead contracting to provide labor to the company.[103] The *contractos sindicales*, rather than the companies themselves, are then responsible under Colombian law for paying its members social security, health and pension benefits.[104] Colombian union representatives argue that a free trade agreement will interfere with the government's ability to govern the country.[105] The Colombian government further argues that other countries do not keep records of union member assassinations, therefore, it is hard to classify Colombia as the "most dangerous country for union members" when data is not available for other countries.[106] The Colombian government also states that in professions where union membership is universal, such as educators and judicial branch members, anyone who is killed within the profession will be a union member, and thus, union members are not being specifically targeted.[107]

Colombian union members argue that a free trade agreement will have a negative effect on Colombia's economy specifically within the agricultural sector.[108] The Central Union of Workers within Colombia claims that the free trade agreement does not "go far enough to protect worker rights."[109] In fact, displacement of union members increased by seventy-six percent in 2012 from 2011, when the CTPA was implemented.[110] Colombian union members contend that the free trade agreement only made the violent situation within Colombia worse and accordingly President Obama must take some sort of action to stop the violence.[111]

The CTPA will devastate the poor farmers, or *campesinos*.[112] The Colombian *campesinos* are financially dependent on the crops that they grow; with the free trade agreement, their crops would compete with U.S. grown products causing the *campesinos* to lose anywhere from forty-eight percent to seventy percent of their total income.[113] It was estimated that the CTPA would take away at least 250,000 jobs, mostly related to agriculture, within Colombia.[114] The free trade

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[103] *The U.S.- Colombia Labor Action Plan: Failing on the Ground*, A Staff Report on behalf of U.S. Representatives George Miller and Jim McGovern to the Congressional Monitoring Group on Labor Rights in Colombia 1, 10 (Oct. 2010), *available at* http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/Colombia%20trip%20report%20-%2010.29.13%20-%20formatted%20-%20FINAL.pdf.

[104] *Id.* at 10.

[105] Villarreal, s*upra* note 7, at 28.

[106] *Id.* at 31.

[107] *Id.*

[108] *Id.* at 28.

[109] *Id*.

[110] *On One-Year Anniversary of U.S. Free Trade Agreement, Colombia Remains Deadliest Country for Union Members*, Common Dreams (May 15, 2013, 4:18PM), https://www.commondreams.org/newswire/2013/05/15-6.

[111] *Id*.

[112] Haugaard, *supra* note 9.

[113] *Id*.

[114] Heidi Andrea Restrepo Rhodes, *The US-Colombia FTA and National Insecurity: A Call for Ethical Foreign Policy*, Upside Down (Apr. 28, 2009), http://upsidedownworld.org/main/colombia-archives-61/1835-the-us-colombia-fta-and-national-insecurity-a-call-for-ethical-foreign-policy.

agreement provides that tariffs on agricultural products will be phased out over a three to nineteen year period.[115] Quota tariffs will be eliminated in Colombia in twelve years for corn and feed grains, fifteen years for dairy products, eighteen years for chicken legs, and nineteen years for rice.[116] In August 2013, over two hundred thousand agricultural workers went on strike claiming that the CTPA have made small farmers within Colombia more exposed to market fluctuations.[117] Allegedly, the Colombian police fired tear gas at the strikers while the Colombian army patrolled the streets.[118] On the same day, two hundred strikers outside of a Drummond Company coal mine also went on strike.[119] The coal mine strikers were fighting for an increase in wages while the agricultural strikers calling for an increase in government subsidies.[120]

C. U.S. Corporation Involvement

The successor groups to the AUC regularly violate human rights by committing massacres, killings, forced displacements, rape and extortion.[121] The Colombian government has continuously failed to disband these successor groups.[122] Part of this failure is caused by U.S. corporate connections to the AUC and their successor groups. U.S. corporations involved with the paramilitary include Chiquita Brands International, Coca-Cola, and the Drummond Company. Under the Alien Tort Statute ("ATS"), a U.S. federal law, federal courts have the jurisdiction to hear suits filed by non-U.S. citizens for violations of international law.[123] International law includes the protection of human rights.[124] The ATS is an eighteenth century law that has expanded from crimes such as piracy and war crimes to include human rights violations.[125] A suit can be brought under the ATS against corporations for human rights violations committed abroad as long as the corporation has sufficient contacts with the United States, acted with a government entity and had sufficient control over the violations.[126] The Torture

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115 Villarreal, *supra* note 7, at 4.

116 *Id*.

117 M. Angeles Villarreal, *The U.S.-Colombia Free Trade Agreement: Background and Issues*, Congressional Research Service 1, 27 (2014), *available at* http://fas.org/sgp/crs/row/RL34470.pdf.

118 *Id*.

119 Andrew Willis, *Strikes Surge as Killings of Colombian Union Leaders Fall*, Bloomberg (2013), http://www.bloomberg.com/news/2013-10-25/strikes-surge-as-killings-of-colombian-union-leaders-fall.html.

120 *Id*.

121 *Human Rights Watch Comments to the Office of the US Trade Representative Concerning the US-Colombia Free Trade Agreement,* Human Rights Watch (Sept. 15, 2009 9:34AM), http://www.hrw.org/news/2009/09/15/human-rights-watch-comments-office-us-trade-representative-concerning-us-colombia-fr.

122 *Id.*

123 *The Alien Tort Statute,* The Center for Justice & Accountability, http://www.cja.org/article.php?id=435.

124 *Id.*

125 *Id.*

126 *Id.*

Victim Protection Act makes individuals liable "only if they have committed torture or extrajudicial killings under actual of apparent authority, or color of law, of any foreign nation."[127] Suits were filed against U.S. corporations such as Chiquita Brands International, the Drummond Company, Inc., and the Coca-Cola Company for contracting with Colombian paramilitary groups.

1. In re Chiquita Brands International Inc.

In the 2011 case, *In re* Chiquita Brands International Inc. Alien Tort Statute and Shareholder Derivative Litigation, the plaintiffs were the family members of the trade unionists, workers at the banana plantation, and others that were tortured and killed by the AUC.[128] The plaintiffs alleged that the decedents were killed in the 1990s to early 2000s in the banana growing plantation regions within Colombia.[129] The plaintiffs alleged that Chiquita Brands International ("Chiquita") violated the Alien Tort Statute and the Torture Victim Protection Act.[130] On March 19, 2007, Chiquita pled guilty for violating federal anti-terrorism laws for their relationship with a Foreign Terrorist Organization.[131] Chiquita was sentenced to a twenty-five million dollar criminal fine and five years probation and was required to implement compliance and ethics programs.[132] It was after Chiquita's guilty plea that the plaintiffs began filing their civil suits against Chiquita.[133]

The AUC's mission was to remove all guerilla sympathizers who opposed AUC paramilitary control of the AUC territories.[134] Under Decree 356, private groups were allowed to provide "Special Vigilance and Private Security Services."[135] These groups were called *convivir* and they worked closely with the Colombian military and the AUC.[136] The AUC was deemed a Foreign Terrorist Organization by the U.S. government on September 10, 2001.[137] The plaintiffs alleged that the AUC received support from Chiquita and in exchange for that support the AUC would remove the FARC and ELN guerillas from the banana growing region and provide security and "labor quiescence."[138]

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[127] SALLY J. CUMMINS, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 485 (2006).

[128] *In re* Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig., 792 F.Supp.2d 1301, 1305 (2011).

[129] *Id.*

[130] *Id.* at 1305-06.

[131] *Id.* at 1310.

[132] *Id.*

[133] *In re Chiquita*, 791 F. Supp. 2d at 1310.

[134] *Id.* at 1306.

[135] *Id.* at 1307.

[136] *Id.*

[137] *Id.*

[138] *In re Chiquita*, 791 F. Supp. 2d at 1308.

Chiquita was an American corporation that operated in the Colombian banana-growing region under its subsidiary, Banadex.[139] In 1995, Chiquita and the AUC first formed an agreement wherein Chiquita paid the AUC to suppress union activity and drive the guerilla groups out of the territory.[140] Chiquita either paid the AUC directly or paid the AUC's *convivir* groups and claimed the payments were for security services.[141] Chiquita also paid the AUC indirectly by having Banadex employees withdraw money and pay the AUC in cash.[142] Chiquita top executives were aware that the AUC was an illegal paramilitary group.[143] In 2003, Chiquita consulted with a U.S. firm who stated that the payments to the AUC were in violation of U.S. Law.[144] On April 24, 2003, Chiquita disclosed the payments to the U.S Department of Justice who informed Chiquita that these payments were illegal.[145] Regardless, Chiquita continued to make payments to the AUC until February of 2004.[146] The plaintiffs also allege that Chiquita facilitated arms shipments to the AUC.[147]

Initially, the ATS only recognized violations of international law when there were "violation[s] of safe conduct[s], infringement of rights of ambassadors, and piracy."[148] In *Sosa v. Alvarez-Machain*, the Supreme Court expanded the scope of the Alien Tort Statute to allow claims where, "the conduct violates an international law norm that is sufficiently well-defined and universally accepted."[149] The Court in *In re Chiquita Brands International*, needed to determine whether terrorism fell under the scope of the ATS. The court considered the fact that two other district courts previously determined that terrorism was not a recognized violation of the law of nations due to differences in the international community regarding the definition of terrorism.[150] While the International Convention for the Suppression of the Financing of Terrorism does codify a definition of terrorism, the convention has not been universally accepted because an "overwhelming majority of states" have not ratified the convention.[151] Therefore, the District Court held that the plaintiff's claims of terrorism against Chiquita could not be tried under the ATS.[152]

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[139] *In re Chiquita*, 792 F. Supp. 2d at 1309; Iulia Filip, *Chiquita Can't Shuck Colombia Terror Claims,* COURTHOUSE NEWS SERVICE (2011) (In June 2004, Chiquita sold Banadex but continues to import bananas from Colombian suppliers).

[140] *In re Chiquita*, 792 F. Supp. 2d at 1309

[141] *Id.* at 1310.

[142] *Id.*

[143] *Id.*

[144] *Id*.

[145] *Id*.

[146] *Id*.

[147] *Id*.

[148] *Id*. at 1312.

[149] *Id*. at 1310.

[150] *Id*. at 1317.

[151] *Id*. at 1317-9.

[152] *Id*. at 1322.

The District Court in *In re Chiquita Brands International* ultimately left the plaintiffs without much recourse for the actions of Chiquita. In later cases, such as *Mohamed v. Palestinian Authority,* the court held that the Torture Victim Protection Act did not apply to corporations.[153] Additionally, the District Court in *In re Chiquita Brands International*, failed to acknowledge that a large majority of courts have recognized that terrorism is a violation of the law of nations.[154]

2. *Estate of Rodriquez v. Drummond Co., Inc.*

The plaintiffs in this suit were the family members of the decedents Valmore Locarno Rodriquez ("Rodriquez"), Victor Hugo Orasita Amaya ("Amaya"), and Gustavo Soler Mora ("Soler") in addition to the trade union Sintramienergetica ("union").[155] The plaintiffs alleged wrongful death and aiding and abetting against Drummond Co., Inc. under the Alien Tort Statute and the Torture Victim Protection Act.[156]

According to a Colombian journalist, the paramilitary had secret workers within the Drummond coal mines and regularly hired paramilitary members for "private security" positions.[157] Additionally, the journalist claimed that the paramilitary would ship cocaine back to the United States on Drummond shipping boats that were transporting coal.[158]

The plaintiffs in *Rodriquez* argued that under international law the right to associate and organize are established and therefore should be actionable under the ATS.[159] Drummond Co. ("Drummond") is a company based in Alabama with coal operations in Colombia.[160] The plaintiffs alleged that the AUC acting for Drummond killed Rodriquez, Amaya and Soler.[161] All three of the decedents were members of the union.[162] The District Court held that the rights to associate and organize are actionable as customary and well-established international

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153 Ryan A. Keefe, Case Comment, *Transnational Law- Terrorism and Material Support of Terrorism Do Not Constitute Alien Tort Statute Claims Under The Law Of Nations- In re Chiquita Brands Int'l, Inc., 792 F. Supp. 2d 1301* (S.D. Fla. 2011), 36 SUFFOLK TRANSNAT'L L. REV. 235, 247 (2013).

154 *Id*. at 247.

155 Estate of Rodriquez v. Drummond Co., Inc., 256 F.Supp. 2d 1250, 1253 (2003).

156 *Id.* at 1253-1254.

157 Stephen F. Jackson, *Taking it to Drummond: Paramilitaries and Mining Companies in Colombia*, INTERNATIONAL LABOR RIGHTS FORUM (May 5, 2007), http://www.laborrights.org/end-violence-against-trade-unions/news/10858; *See generally* Nicolas Bedoya, *Why Drummond and Glencore are accused of exporting Colombian blood coal*, COLOMBIA REPORTS (2014) (explaining that as a result of the "blood coal" coming from Drummond's Colombian mines there have been an estimated 2,600 homicides all committed by members of the paramilitary and death squads whose growth was financed in part by Drummond).

158 Jackson, *supra* note 157; Bedova, *supra* note 157.

159 MICHAEL KOEBELE, CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE: ENFORCEMENT OF INTERNATIONAL LAW THROUGH US TORTS LAW 141 (2009).

160 Estate of Rodriquez, 256 F.Supp. 2d at 1254.

161 *Id.*

162 *Id.* at 1253; *see* Bedoya *supra* note 157 (Drummond nowadays does not "do anything to protect victims of violence, human rights lawyers, and trade unionists from current violence.").

law.[163] However, in July 2013 the case was dismissed by the District Court in light of the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*[164]

3. Sinaltrainal v. The Coca-Cola Company

The case, *Sinaltrainal v. The Coca-Cola Co.,* combined four different suits filed against the Coca-Cola Co. ("Coca-Cola"). The *Gil* case, the *Galvis* case, the *Leal* case, and the *Garcia* case were all filed against Coca-Cola and brought under the ATS, the Torture Victims Protection Act and 28 U.S.C. § 1350; all four cases alleged that Coca-Cola worked together with the paramilitary to murder and torture the plaintiffs.[165] In the *Garcia* case, the plaintiffs alleged that Coca-Cola was "vicariously liable for tortious conduct allegedly committed by the local police."[166] In the *Gil* case, the plaintiffs claimed that the defendants hired and conspired with the paramilitary who murdered and tortured members of the trade union that represented workers at the bottling factory.[167] In the *Galvis* case, the plaintiffs alleged that the facility where the decedent worked collaborated with the paramilitary to erase union presence within the facility.[168] Similarly, in the *Leal* case, the plaintiffs alleged that the facility collaborated with the paramilitary to rid the facility of union presence in addition to kidnapping and torturing Leal for his connection to the union.[169]

The court in *Rodriquez v. Romero* considered that the ATS had been previously expanded to include corporate defendants and that private individuals could be held liable for violations of the law of nations.[170] The plaintiffs in *Sinaltrainal* contended that the dangerous situation in Colombia for members of trade unions was growing more violent and that there is no appropriate legal system for the people of Colombia.[171] The fact that the Colombian government allowed the private security forces to exist does not make the private actors state actors.[172] Under the ATS, war crimes exist only when the country is involved in a civil war.[173] A claim under the Torture Victim Protection Act must allege that the paramilitaries are state actors or have sufficient contacts with the government to be acting under the color of the law, and the defendants conspired with the state actors to carry out the alleged torture.[174] In this case, the plaintiffs failed to meet

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163 NEILS BEISINGHOFF, CORPORATIONS AND HUMAN RIGHTS: AN ANALYSIS OF ATCA LITIGATION AGAINST CORPORATIONS 255-256 (2009).

164 *Drummond lawsuit (re Colombia)* BUSINESS & HUMAN RIGHTS RESOURCE CENTRE http://business-humanrights.org/en/drummond-lawsuit-re-colombia#c9319; *see infra* part IV.

165 Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1257-1258 (11th Cir. 2009).

166 *Id.* at 1258.

167 *Id.*

168 *Id.* at 1259.

169 *Id.*

170 *Sinaltrainal*, 578 F. 3d at 1264-1265.

171 *Id.* at 1265.

172 *Id.* at 1266.

173 *Id.* at 1267.

174 *Id.* at 1270.

the requirements to bring a claim under the ATS and the Torture Victim Protection Act because they failed to sufficiently allege that the abuses were committed during war or that the paramilitary groups were acting under the color of the law.[175]

IV. Impact of the Colombian Trade Promotion Agreement

While the CTPA removes trade barriers between the U.S. and Colombia and does "even the playing field" for the U.S. with regards to tariff protections, it does not weigh the human rights issues evenly.[176] Not only do labor unions, farmers and *campesinos* in Colombia oppose the CTPA, members of the U.S. Congress, as well as many human rights organizations are also against it. The primary human rights issue with the CTPA is the lack of protection for members of labor unions and the lack of any adequate action union members may take against the government, paramilitary and U.S. corporations.

The U.S. and Colombia have long been close allies, and it is argued that Colombia is the United States' closest ally in the South American region.[177] Supporters of the CTPA contend that the trade agreement provides many opportunities for the Colombian people.[178] These benefits include creating alternative ways for Colombians to make money that do not involve drug trafficking, and having a stronger rule of law and system for workers' rights.[179] The CTPA requirements include a commitment on behalf of both parties to adhere to the International Labour Organization's five fundamental workers' rights and requires that workers have access to tribunals when their rights are infringed upon.[180] Further, the CTPA is important and necessary, as Colombia has ratified free trade agreements with other countries.

Those opposed to the CTPA argue that the U.S. is more concerned with trade protection than the many human rights violations that occur within Colombia. Under the Andean Trade Preference Act ("ATPA"), over ninety percent of imports from Colombia into the U.S. enter the United States duty free.[181] However,

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[175] *Id.*

[176] *See generally U.S.-Colombia Trade Agreement*, *supra* note 10.

[177] *Fast Facts on Colombia and the Colombian Economy,* LATIN AMERICA TRADE COALITION (last visited Jan. 18, 2015), www.latradecoalition.org/files/2010/09/04-Fast-Facts-on-Colombia1.pdf.

[178] *Why Support the U.S.-Colombia Trade Promotion Agreement? Growth, Hope, and Opportunity,* LATIN AMERICA TRADE COALITION, 6, *available at* http://www.aapa-ports.org/files/PDFs/Why%20Support%20Colombia%20Trade%20Agreement.pdf.

[179] *Id.*

[180] *Leveling the Playing Field: Labor Protections and the U.S.-Colombia Trade Promotion Agreement, supra* note 94, at 3.

[181] Why Support the U.S.-Colombia Trade Promotion Agreement? Growth, Hope, and Opportunity, supra note 178. Andean Trade Preference Act, Office of the United States Trade Representatives http://www.ustr.gov/trade-topics/trade-development/preference-programs/andean-trade-preference-act-atpa (ATPA was enacted in December 1991 to assist Bolivia, Colombia, Ecuador and Peru to fight drug production and trafficking within their countries); Andean Trade Preference Act (ATPA) – Expiration of duty-free treatment, U.S. Customs and Borer Protectiont https://help.cbp.gov/app/answers/detail/a_id/325/~/andean-trade-preference-act-(atpa)---expiration-of-duty-free-treatment (The ATPA expired on February 12, 2011 and offered duty free protection until July 31, 2013.).

U.S. exports to Colombia are subject to tariffs – fourteen percent for manufactured goods and over fifty percent for agricultural exports.[182] The CTPA also protects U.S. intellectual property rights in the manner that they are protected within the U.S. itself, especially with regards to copyrighted works, trademark counterfeiting, and copyright piracy.[183]

Within Colombia, some argue that the supposed decrease in violence since the CTPA entered into force is greatly skewed.[184] According to the NGO Consultario para los Derechos Humanos y el Desplazamiento ("CODHES"), the number of displaced Colombians continues to grow due, in part, to the *campesinos'* use of valuable farmland.[185] Approximately two hundred fifty-nine thousand Colombians were displaced in 2011 alone.[186] Prior to the CTPA, the Colombian Ministry of Agriculture said that the trade agreement would further harm the rural Colombians and leave them with only three options: "migration to the cities or other countries. . .working in drug cultivation zones, or affiliating with illegal armed groups."[187] CODHES states that displacement in 2012 increased by eighty-three percent.[188] The fact that the violence has not changed within Colombia shows that the U.S. and President Obama are not as invested in the horrific human rights situation within Colombia. The Labor Action Plan clearly has not bettered life for labor unionists or rural Colombians.

It is against U.S. law for corporations to interact with paramilitary groups such as the AUC and FARC.[189] However, U.S. corporations such as Chiquita Brands International, Coca-Cola, Dole Food Company and Drummond Cole Company have all either been accused or have admitted to associating with paramilitary organizations.[190] Chiquita Brands International admitted to paying the AUC and was fined twenty-five million dollars in a plea agreement with the U.S. Department of Justice; however, it was later discovered that Chiquita was also shipping guns and ammunition for the paramilitary's use.[191] U.S. corporations associate with the paramilitary to keep their costs of production at a minimum and avoid negotiating with labor unions.[192] Furthermore, the paramilitary often works in

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[182] *Id.* at *Why Support the U.S.-Colombia Trade Promotion Agreement? Growth, Hope, and Opportunity*.

[183] *U.S.-Colombia Trade Agreement*, *supra* note 10.

[184] Michael Norby & Brian Fitzpatrick, *The Horrific Costs of the US-Colombia Trade Agreement*, TRUTHOUT (Jun. 3, 2013), http://truth-out.org/news/item/16737-the-horrific-costs-of-the-us-colombia-trade-agreement.

[185] *Id.*

[186] *Id.*; *See generally World Report 2014: Colombia*, HUMAN RIGHTS WATCH, http://www.hrw.org/world-report/2014/country-chapters/colombia (explaining that contrary to CODHES, Human Rights Watch states over 150,000 Colombians are displaced every year with currently over 5 million Colombians who have been displaced).

[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] Norby & Fitzpatrick, *supra* note 184.

[191] *Id.*

[192] *Id.*

conjunction with the local Colombian government authorities,[193] further endangering any labor unionists that conflict with U.S. corporations and ensuring that the U.S. corporations can continue to "protect" their interests. Within the U.S., corporations continue to fund paramilitary groups with minimal repercussions. The lawsuits filed against Coca-Cola and the Dole Food Company were dismissed, which left the victims with no legal recourse.[194] Part of the problem is that international law is not defined and paramilitary actions are not always considered violations of international law.

Further, the applicability of the ATS was greatly reduced under the 2013 U.S. Supreme Court decision in *Kiobel v. Royal Dutch Petroleum*.[195] The Supreme Court stated "[t]he ATS covers actions by aliens for violations of the law of nations, but that does not imply extraterritorial reach."[196] Under *Kiobel* the question became "not whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law. The question is instead whether the court has authority to recognize a cause of action under U.S. law to enforce a norm of international law."[197] Further, nothing in the text of the ATS states that the United States is responsible for enforcing customary international law.[198] The court held that because all the conduct in question took place outside of the U.S., mere corporate presence was not sufficient to bring a cause under the ATS.[199] Further, "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[200] Essentially, the Supreme Court found that the ATS only applies to conduct that occurs on U.S. soil.[201] Therefore, it has become extremely difficult if not impossible for victims of U.S. corporations' overseas actions to force the corporations to take responsibility for their actions.[202]

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193 *World Report 2014: Colombia supra* note 186 ("Since the 'parapolitics' scandal erupted in 2005, more than 55 current and former members of Congress have been convicted for conspiring with paramilitaries.").

194 *Id*.; Juan Smirh, *Colombia: Ex-Paramilitary Implicates Two U.S. Companies in Murder of Trade Unionists*, North American Congress on Latin America (2009) https://nacla.org/news/colombia-ex-paramilitary-implicates-two-us-companies-murder-trade-unionists (describing that a civil suit was also filed against Dole Food Company by the families of the victims of purported paramilitary acts within Colombia. Dole denied involvement with Colombian paramilitary groups unlike Chiquita); *Frivolous Lawsuit Filed Against Dole By Colombian Plaintiffs Dismissed With Prejudice*, Dole (2009) http://www.dole.com/Company-Info/Press-Releases/Press-Release-20100916 (explaining that the lawsuit against Dole was dismissed without prejudice).

195 *See generally* Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013).

196 *Id*. at 1665.

197 *Id*. at 1666.

198 *Id*. at 1668.

199 *Id*. at 1669.

200 *Id*.

201 Rich Samp, *Supreme Court Observations: Kiobel v. Royal Dutch Petroleum & the Future of Alien Tort Litigation*, Forbes (2013) (noting that Congress' intention in adopting the ATS was purportedly to give foreign ambassadors the ability to seek reparation in the U.S. if attacked on U.S. soil).

202 Daimler AG v. Bauman, 134 S. Ct. 746 (2014) (noting that the Supreme Court confirmed *Kiobel v. Royal Dutch Petroleum Co.* and held that Daimler could not be subjected to suit within California where

V. Necessary Improvements to Improve the Colombian Trade Promotion Agreement

President Obama stated that the CTPA will help Colombian workers as the CTPA includes "strong protections."[203] Unions within the U.S., as well as within Colombia, are strongly opposed to the free trade agreement between the two countries. However, the U.S. government favors the CTPA because of the trade protections it offers the U.S. and the potential to diminish the violence against trade unionists and rural landowners within Colombia. Before President Obama considered implementing the CTPA, he proposed that Colombia implement a Labor Action Plan. Labor unionists in Colombia state that the Labor Action Plan has not been effective in protecting those belonging to labor unions.[204] In October 2012, Human Rights Watch released a study that found "virtually no progress" was made in the amount of convictions for killings that have occurred in the last four years.[205]

It is clear that the CTPA is not working. In fact, strikes within Colombia still occur but receive little to no media coverage. In August 2013, Colombian farmers went on strike to protest the effects of the CTPA.[206] The strike included coffee, cacao, potato and rice farmers, as well as cargo truckers, gold miners, and teacher and labor unions.[207] The strike originally began with the rural peasants before spreading to the miners, teachers, medical professionals and students.[208] The strikers are demanding reduced fuel and fertilizer prices, higher subsidies and the cancellation of all free trade agreements.[209] The free trade agreements have made it impossible for Colombian farmers and workers to compete with international products. The strike has been met brutally by the Colombian police who have been reported to use shootings, sexual assault, torture, and tear gas among other abuses to quell the strike.[210]

It is clear that something must be done for the CTPA to be a mutually beneficial agreement. As it stands currently, the U.S. is benefitting far more than the Colombian people. Colombia remains the most dangerous country in the world for trade unionists even with the implementation of the Labor Action Plan and the CTPA. U.S. corporations are still able to get away with paying the paramilitary to prevent and quell labor strikes leaving no recourse for labor unionists.

neither Daimler nor its Argentinean subsidiary was incorporated in California and all activity occurred outside of the U.S. within Argentina).

203 Julie Pace, *Obama: US, Colombia trade deal a 'win'*, BLOOMBERG BUSINESSWEEK (Apr. 15, 2012), http://www.businessweek.com/ap/2012-04/D9U5K7F81.htm.

204 *Id.*

205 *Id.*

206 *See generally* Dave Johnson, *Strike in Colombia Highlights Free Trade Failure,* CAMPAIGN FOR AMERICA'S FUTURE (Aug. 26, 2013), http://ourfuture.org/20130826/big-columbia-strike-hilites-free-trade-fail.

207 *Id.*

208 Jeanine Legato, *Are Colombian Protests the 'Opening Salvo in a Full-Frontal Attack' on Free Trade?*, COMMON DREAMS (Sept. 5, 2013), https://www.commondreams.org/view/2013/09/05-5.

209 Dave Johnson, *supra* note 206.

210 Legato, *supra* note 209.

Action needs to be taken in order for a free trade agreement that upholds human rights in Colombia to exist. The U.S. needs to execute stricter punishment for U.S. corporations that associate with the criminal paramilitary groups. U.S. corporations cannot be allowed to simply pay a fine, and not be forced to change their behavior.

Furthermore, the Colombian government must be held accountable for upholding the human rights provisions within the CTPA. The Colombian government needs to reduce the number of paramilitary organizations and find a way to end the government's close relationship with the paramilitary. The Colombian government must also provide an adequate forum for dispute resolution, one that is widely available and guarantees the safety of the labor unionists. Lastly, within international law, a definition of terrorism must be agreed upon and widely accepted by the international community. A widely accepted definition of terrorism may provide the victims of violence in Colombia a legal remedy.

VI. Conclusion

Colombia remains a dangerous country rife with human rights violations. President Obama used the Colombian Trade Promotion Agreement as a way to reduce trade barriers between Colombia and the U.S. and to make Colombia safer for trade unionists. However, the Colombian Trade Promotion Agreement has not made life better or safer for Colombians. Instead, it made competition with U.S. goods extremely difficult for Colombian farmers and failed to change the violent situation in Colombia.

Trade unionists continue to be killed for being associated with unions. Paramilitary groups continue to work with U.S. corporations and the Colombian government. Unfortunately, even under the ATS and the Torture Victim Protection Act, the family members of the killed Colombian trade unionists have no legal remedies. The narrow limits of both laws often do not include U.S. corporation paramilitary involvement. While the CTPA does remove trade barriers between the U.S. and Colombia, it does little to alleviate human rights issues. Until a change is made, the violence against trade unionists within Colombia will continue.

Scott Lively and Free Trade: United States Free Trade Agreements as a Mechanism for Advancing Human Rights Abroad

Nicholas K. Fedde*

I. Introduction

Uganda's anti-homosexuality bill recently resurfaced in international news,[1] as has the case against Scott Lively, who is credited with influencing the bill's creation.[2] In December of 2013, the Ugandan parliament passed the legislation, which was first introduced in 2009.[3] The bill, signed by President Musevini in

* J.D., Loyola University of Chicago School of Law, May 2014. Thanks to Whitney Hutchinson and Professor James Gathii for their suggestions regarding this article, and to Marcela Fedde for her love, patience, and support.

[1] *See, e.g.,* Musaazi Namiti, *Uganda Anti-Gay Bill Close to Becoming Law*, ALJAZEERA (Jan. 6, 2014, 8:59 AM), http://www.aljazeera.com/indepth/features/2014/01/uganda-anti-gay-bill-close-becoming-law-20141681452366858.html; Faith Karimi, *Ugandan Parliament Passes Anti-Gay Bill that Includes Life in Prison*, CNN (Dec. 23, 2013, 2:11 PM), http://www.cnn.com/2013/12/21/world/africa/uganda-anti-gay-bill/.

[2] *See, e.g.,* Meredith Bennett-Smith, *Scott Lively, American Pastor, Takes Credit For Inspiring Russian Anti-Gay Laws*, THE HUFFINGTON POST (Sep. 22, 2013, 6:34 PM), http://www.huffingtonpost.com/2013/09/19/scott-lively-russian-anti-gay-laws_n_3952053.html; Dahlia Lithwick, *Hate Preach: An American Brags that He's the Father of the Ugandan Anti-Gay Movement. Can He Be Prosecuted in the U.S.?*, Slate (Aug. 21, 2013, 6:05 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/08/scott_lively_can_he_be_punished_in_the_u_s_for_speech_against_gay_ugandans.html.

[3] Karimi, *supra* note 1.

February,[4] makes certain homosexual acts punishable by life in prison, and adds a broader spectrum of activities to the existing list of gay crimes, including prison time for those supporting homosexuals.[5] Its passage has elicited condemnation from much of the international community, and has already resulted in the withdrawal of some foreign aid.[6]

The anti-homosexuality bill is but one manifestation of the persecution faced by members of the lesbian, gay, bisexual, and transgender (LGBT) community in Uganda. The past few years have seen a surge in violence against homosexuals in Uganda, where lynching and murder of gay activists and citizens have become commonplace.[7] And while Scott Lively, even by his own account, contributed to the development of Uganda's anti-homosexuality bill, the United States-based evangelical leader has also been blamed for the rise in violence and oppression toward gay Ugandans. With the help of a United States-based legal advocacy organization, LGBT activists within Uganda reacted by suing Lively in United States federal court for aiding and abetting this persecution, under the Alien Tort Statute (ATS).[8] Although the case survived dismissal after the seventy-nine-page opinion was handed down in August 2013,[9] its novel basis under the ATS casts some doubt on the lawsuit's chance for overcoming summary judgment.[10]

The Lively suit's final disposition may, indeed, prove the shortcomings of the ATS as a mechanism for bringing American instigators to justice for their role in persecuting unpopular political minorities abroad. At any rate, the ATS's reliance on American actors severely limits its viability when the instigators are free from this jurisdictional nexus. Acknowledging these limitations begs the question of which alternative legal mechanism might be best suited to combat such persecution, so that political minorities abroad are afforded protection consistent with the values of the United States.

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[4] Al Jazeera and the Associated Press, *Uganda's President Signs Anti-Gay Bill*, ALJAZEERA AM. (Feb. 24, 2014, 12:21 PM), http://america.aljazeera.com/articles/2014/2/24/uganda-s-presidentsignsantigaybill.html.

[5] Karimi, *supra* note 1.

[6] *See id.*; *see also* Namiti, *supra* note 1 (discussing business leader and billionaire Richard Branson's call for companies and tourists to boycott Uganda).

[7] *See, e.g.,* Jeffrey Gettleman, *Ugandan Who Spoke Up for Gays is Beaten to Death*, N.Y. TIMES (Jan. 27, 2011), http://www.nytimes.com/2011/01/28/world/africa/28uganda.html (discussing the 2011 murder of David Kato, the most outspoken advocate for gay rights in Uganda, after a Ugandan newspaper ran an anti-gay segment urging readers to hang him); Codrin Arsene, *Uganda: Hang Gay List Goes Public*, AFRICAN POLITICS PORTAL (Oct. 21, 2010), http://www.african-politics.com/uganda-hang-gay-list-goes-public/ (discussing a Ugandan newspaper's publication of the country's "top homos," which contained photos, names, and addresses of gay men and resulted in the some of the listed men being attacked and harassed); Jonathan Cunningham, *Pride and Prejudice: Life under Uganda's 'Kill the Gays' Bill*, SEATTLE GLOBALIST (Jun. 27, 2014), http://www.seattleglobalist.com/2014/06/27/uganda-anti-homosexuality-bill-pride/27155 (discussing an incident in January 2014 where two gay Ugandan men were fleeing from a lynch mob when they were arrested for engaging in "acts against the order of nature").

[8] 28 U.S.C. § 1350.

[9] *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 309 (D. Mass. Aug 14, 2013) (Memorandum And Order Regarding Defendant's Motions to Dismiss).

[10] *Id.* at 321-323 (discussing the plaintiff's obstacles in Sexual Minorities Uganda v. Lively).

This Comment attempts to answer that question by leveraging the topic of this Law Review's 2014 symposium as one possible solution.[11] Specifically, this Comment explores the extent to which human rights provisions within United States free trade agreements (FTAs) might serve as an effective legal mechanism to protect political minorities abroad from persecution. It does so primarily by using the alleged actions perpetrated by Scott Lively against the Ugandan LGBT community as an example. Congress has posited that "leadership by the United States in international trade fosters open markets, democracy, and *peace* throughout the world."[12] The United States Trade Representative (USTR) is currently leading efforts to forge a new trade partnership with the East African Community (EAC).[13] Moreover, the African Growth and Opportunity Act (AGOA) is set to expire in September 2015, unless renewed.[14] With Uganda directly benefiting from both of these trade initiatives, exploring this solution could not be timelier.

Part II of this Comment provides background on the plight of the LGBT community within Uganda, Scott Lively's role in cultivating their plight, and the pending lawsuit against him under the ATS. Part II also provides background on United States FTAs and preferential trade agreements (PTAs) generally, including the incorporation of human rights provisions within these agreements. Part III discusses the challenges of using the ATS as a basis for dispensing justice in the case against Scott Lively, as gleaned from the court's opinion denying Lively's motion to dismiss, and then further discusses existing trade agreements between the United States and Uganda. Part IV analyzes the strengths and challenges of relying on United States FTAs as a vehicle for securing human rights with trade partner nations generally, and specifically with Uganda. Finally, Part V considers the efficacy of the Court of Justice of the East African Community (EACJ) in order to propose that the court could be used to enforce FTAs between Uganda and the United States as a solution to overcome shortcomings in Uganda's rule of law.

II. Background

Before discussing the shortcoming of the ATS as a basis for the suit against Scott Lively, it is important to understand the allegations against him and his contribution to the plight of the LGBT community in Uganda. And before exploring United States FTAs as an alternative vehicle for adjudicating the transgressions of likes of Scott Lively, it is imperative to first understand the usage of FTAs generally and how they might incorporate human rights provisions. Thus, this Part endeavors to supply an understanding of both prerequisites.

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[11] In 2014 the Loyola University Chicago International Law Review hosted a symposium entitled "Assessing the New Generation of Human Rights Provisions in U.S. Free Trade Agreements."

[12] Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. § 3801 (emphasis added).

[13] *Uganda*, OFF. U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/countries-regions/africa/east-africa/uganda (last visited Nov. 21, 2013). The EAC is a regional intergovernmental organization. *Id.*

[14] Williams Mullen, Evelyn M. Suarez and Singleton B. McAllister, *Debate Concerning Renewal of African Growth and Opportunity Act has Begun*, LEXOLOGY (Dec. 17, 2013), http://www.lexology.com/library/detail.aspx?g=F450a65f-de82-494d-9086-e365fecbb935. *See*, *infra* Part III.B for a description of the AGOA.

A. Gay Persecution in Uganda and the Case against Scott Lively

Persecution against homosexuality is prominent in Africa. Thirty-six African nations have laws against same-sex conduct, forcing some citizens to seek asylum elsewhere.[15] Amnesty International has said that anti-gay attacks have reached dangerous levels in sub-Saharan Africa, while African leaders preach that homosexuality is un-African and the "toxic message" is spread that LGBT people are criminals.[16] Uganda is no exception, as it is experiencing a time of unparalleled animus and violence towards its LGBT citizens.[17]

Against a backdrop of existing anti-sodomy laws in Uganda, the situation for members of the LGBT community has been made worse, in no small part, due to the efforts of Scott Lively. Lively is an evangelical minister, attorney, author, and self-proclaimed expert on "the gay movement."[18] Based in the United States, he has taken his agenda abroad, consulting with the Ugandan and Russian governments in an attempt to persuade them to pass anti-gay legislation.[19] In 2009, he played an instrumental role at an anti-gay conference in Uganda, which soon thereafter led to the drafting of a bill proposed to its Parliament.[20] This Anti-Homosexuality Bill of 2009, if adopted, would have made a variety of conduct punishable by death, including homosexual sex with a minor, homosexual conduct by a serial offender, homosexual sex while HIV-positive, homosexual sex with one's children, using anything to overpower another to have homosexual sex, and homosexual sex with a disabled person.[21] The proposed bill made attempting any of these acts punishable by life in prison.[22] Further, it imposed prison for an authority figure's failure to report a homosexual activity to the police within 24 hours and criminalized conduct promoting homosexuality.[23]

On March 14, 2012,[24] Sexual Minorities Uganda (SMUG), an LGBT rights activist group, responded to Lively's efforts by filing a civil action against him in

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[15] Rob Williams, *Fear of Imprisonment for Being Gay in African Countries is Grounds for Asylum, EU Court Rules*, THE INDEPENDENT (Nov. 7, 2013), *available at* http://www.independent.co.uk/news/world/africa/fear-of-imprisonment-for-being-gay-in-african-countries-is-grounds-for-asylum-eu-court-rules-8927557.html (discussing how the European Union's highest court ruled that the fear of prison for homosexuality in African is grounds for asylum in the European Union).

[16] *Id*.

[17] Waymon Hudson, *American Evangelical Lou Engle Promotes 'Kill the Gays' Bill at Sunday's Rally in Uganda*, THE HUFFINGTON POST (May 4, 2010, 6:31 PM), http://www.huffingtonpost.com/waymon-hudson/american-evangelical-lou_b_560819.html.

[18] *Sexual Minorities Uganda*, *supra* note 9, at 1-2.

[19] Lithwick, *supra* note 2.

[20] *Id*.

[21] Lucy Heenan Ewins, Note, *"Gross Violation": Why Uganda's Anti-Homosexuality Act Threatens Its Trade Benefits with the United States*, 34 B.C. INT'L COMP. L. REV. 147, 148, 150-52 (2011).

[22] *Id*.

[23] *Id*.

[24] *LGBTI Uganda Fights Back!*, CENTER FOR CONST. RIGHTS, http://ccrjustice.org/lgbtuganda/ (last visited Nov. 20, 2013).

the United States District Court for the District of Massachusetts.[25] Invoking federal jurisdiction under the ATS, the complaint alleged that Lively, a US citizen residing in Massachusetts, attempted and succeeded in fomenting an atmosphere of repression against lesbian, gay, bisexual, transgender, and intersex (LGBTI) people in Uganda.[26] The complaint sought monetary damages, injunctive relief, and declaratory judgment holding that Lively's actions violate the law of nations.[27]

B. United States FTAs and Human Rights Provisions

In light of strong efforts to increase international trade and decrease tariff barriers to American goods, the birth of the twenty-first century has brought a new era of FTAs.[28] These FTAs exist between the United States and individual countries throughout the world, as well as between the United States and collective geographic regions.[29] Currently, there are only two such regional FTAs: the North America Free Trade Agreement (NAFTA) and the Central America Free Trade Agreement (DR-CAFTA).[30] However, negotiations are currently underway between the United States and eight other nations to implement the Trans-Pacific Partnership (TPP).[31]

In addition to FTAs, the United States also employs unilateral trade preference programs. These programs are granted by one country to another without requiring the latter's consent.[32] The United States establishes unilateral trade programs primarily with developing countries, as a means to promote their economic development.[33] These programs share much in common with FTAs.[34] For example, both include labor standards, as well as a review process to evaluate whether the grantee country is meeting those standards.[35] In addition, both unilateral programs and FTAs occasionally link tariff exemptions to adherence to labor rights.[36]

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[25] *Sexual Minorities Uganda*, *supra* note 9, at 1. The plaintiff, Sexual Minorities Uganda, is an organization that advocates for "for the fair and equal treatment of lesbian, gay, bisexual, transgender, and intersex (LGBTI) people" in Uganda, and is located in that country. *Id.*

[26] *Id*. at 2.

[27] *Id*.

[28] Lyndsay D. Speece, *Beyond Borders: CAFTA's Role in Shaping Labor Standards in Free Trade Agreements*, 37 SETON HALL L. REV. 1101, 1102 (2007).

[29] *Id*.

[30] Deirdre Salsich, *International Workers' Rights Enforced Through Free Trade Agreements: DR-CAFTA and the DOL's Case Against Guatemala*, 25 N.Y. INT'L L. REV. 19, 31 (2012).

[31] *Id*.

[32] Paula Church Albertson, *The Evolution of Labor Provisions in U.S. Free Trade Agreements: Lessons Learned and Remaining Questions Examining the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR)*, 21 STAN. L. & POL'Y REV. 493, 497-98 (2010).

[33] *Id*.

[34] *Id*. at 498.

[35] *Id*.

[36] *Id*.

Unilateral preferential schemes, when combined with bilateral and regional trade agreements such as FTAs form a category of agreements coined "preferential trade agreements" (PTAs).[37] Globally, PTAs often regulate spheres of social governance, which increasingly include human rights standards.[38] Some PTAs include "hard" standards—provisions that condition market benefits upon compliance with specific human rights principles, and delegate authority for interpreting law.[39] Others include "soft" standards—provisions that vaguely tie market access to human rights principles and appeal to voluntary cooperation rather than making compliance mandatory.[40]

III. Discussion

A. Shortcomings of the ATS as a Vehicle for Protecting Political Minorities Abroad

In June of 2012, Lively filed a motion to dismiss SMUG's complaint against him.[41] In a 104-page brief in support of his motion, Lively set out several key arguments for dismissal.[42] First, he argued that persecution based on sexual orientation and gender identity does not violate international norms with the clarity and historical lineage necessary for jurisdiction under the ATS.[43]tuyi Second, the court, according to Lively, lacks jurisdiction under the ATS for actions outside of the United States, per *Kiobel v. Royal Dutch Petroleum*.[44] Third, he contended that SMUG lacked standing to file the complaint on its own behalf or on behalf of Uganda's LGBTI community.[45] Fourth and finally, Lively argued that he was

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[37] Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT'L ORG. 593, 594, 594 n.5 (2005).

[38] *Id*.

[39] *Id*. at 594, 594 n.8. The Euro-Mediterranean Association Agreements are an example of a PTA with "hard" standards. *Id.* at 594.

[40] *Id*. at 594, 594 n.8. One example of a PTA with "soft" standards is the West African Economic Monetary Union. *Id.* at 594.

[41] *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 309 (D. Mass. Aug 14, 2013), Defendant Scott Lively's Motion to Dismiss Plaintiff's Complaint, 1 (D. Mass. June 22, 2012). SMUG subsequently amended its Complaint and Lively filed a Motion to Dismiss Plaintiff's First Amended Complaint. *See Sexual Minorities Uganda v. Lively*, C.A. No. 3:12-cv-30051-KPN, Defendant Scott Lively's Motion to Dismiss Plaintiff's First Amended Complaint (D. Mass. Aug. 9, 2012).

[42] *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 309 (D. Mass. Aug 14, 2013), Memorandum of Law in Support of Defendant Scott Lively's Motion to Dismiss Plaintiff's First Amended Complaint, 104 (D. Mass. Aug. 10, 2012).

[43] *Sexual Minorities Uganda*, *supra* note 9, at 2-3.

[44] *Id.* at 3 (referring to the recent United States Supreme Court decision in Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659 (2013)). For an analysis of the Kiobel decision, see Meir Feder, *Commentary: Why the Court Unanimously Jettisoned Thirty Years of Lower Court Precedent (and what that Can Tell Us about How to Read Kiobel)*, SCOTUSBLOG (Apr. 19, 2013, 11:30 AM), http://www.scotusblog.com/2013/04/commentary-why-the-court-unanimously-jettisoned-thirty-years-of-lower-court-precedent-and-what-that-can-tell-us-about-how-to-read-kiobel.

[45] *Sexual Minorities Uganda*, *supra* note 9, at 3.

exercising protected speech under the First Amendment; therefore, SMUG could not use the court to restrict his expression.[46]

In a lengthy court opinion handed down in August 2013, Judge Ponsor rejected all of Lively's arguments and denied the motion.[47] Responding to Lively's jurisdictional challenge based on extraterritorial actions, the court ruled that the restrictions established in *Kiobel* did not apply to this case because a substantial portion of the alleged conduct took place in the United States.[48] Ponsor reasoned that Lively, through his United States headquarters, allegedly "maintained what amounts to a kind of Homophobia Central."[49]

The court's holding regarding international norms was less definitive. As to Lively's argument that persecution based on sexual orientation and gender identity does not violate international norms, Ponsor recognized that it was a "closer question" whether the alleged crime constitutes "one of the relatively modest set of actions alleging violations of the law of nations for which the ATS furnishes jurisdiction," per *Sosa v. Alvarez-Machain*.[50] Rather than deciding the issue in the Motion to Dismiss, the court elected to postpone ruling on the "*Sosa* issue" until a "fully developed record" was accumulated following discovery.[51] Clearly, this reasoning of the court on an admittedly close issue opens the possibility that the complaint could be defeated on summary judgment, after sufficient discovery occurs.

Similarly, the court's holding on the protected speech defense, again, opens the door to the complaint's future defeat. In rejecting Lively's affirmative defense as a basis for dismissal, Ponsor opined that the argument was "premature."[52] The court reasoned that the complaint alleged sufficient facts to support the claim that Lively's behavior crossed over the protective boundary provided by the First Amendment.[53] Specifically, the opinion points to allegations that Lively's speech advocated imminent criminal conduct in the form of crimes against humanity, and managed actual crimes such as repressing free expression through intimidation, and committing assaults and false arrests.[54] Ponsor indicated, however, "discovery may, or may not, reveal that the argument is correct, and this issue will almost certainly be front and center at the summary judgment stage of this case."[55]

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[46] *Id*. Additionally, Lively's brief argued that the two state law claims alleged in the complaint lacked adequate legal foundation. *Id*.

[47] *Id.* at 1, 3.

[48] *Id.* at 4-5.

[49] *Id.* (internal quotation marks omitted).

[50] *Id.* at 4 (internal quotation marks omitted) (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 720 (2004)). The ATS states in its entirety, "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in *violation of the law of nations* or a treaty of the United States." 28 U.S.C.A. § 1350 (West 2013) (emphasis added).

[51] *Id*.

[52] *Sexual Minorities Uganda*, *supra* note 9, at 5-6.

[53] *Id*.

[54] *Id.* at 62.

[55] *Id.* at 57.

Thus, the court opinion in *Sexual Minorities Uganda*, while denying the defendant's motion to dismiss, suggested that the case may be defeated at summary judgment after sufficient discovery, either under the First Amendment defense or on the *Sosa* issue. These issues could be interpreted as significant hurdles to the success of the lawsuit. Legal analysts have recognized that the complaint brings a novel legal argument under the ATS,[56] further lending doubt that the ATS is an adequate basis for addressing persecution of political minorities abroad. That the specific type of persecution must violate international law or a US treaty,[57] and the conduct must originate within the United States,[58] are both significant legal limitations.

Legal hurdles aside, public policy arguments also question the ATS as a solution. To begin, our federal courts may be ill-equipped to handle international human rights cases. It has been observed that "quantitatively, international human rights law is not a major, or even a minor, component of the business of federal courts: it is a minuscule part of what [they] do."[59] Moreover, international human rights issues may be better addressed by foreign policy through the prerogative of the political branches of government.[60] The United States Supreme Court has cautioned against the risk of overstepping its role under the ATS and has chosen to tread lightly.[61] These concerns, when coupled with the legal limitations of the ATS, provide ample justification for seeking an alternative vehicle for protecting political minorities from persecution abroad.

B. Existing PTAs between the United States and Uganda

Before analyzing whether a United States PTA could serve as an effective mechanism to protect political minorities, such as the LGBT community in Uganda, it is necessary to understand the *status quo* related to trade between the United States and Uganda. This section examines the existing trade relationship between the two countries.

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[56] *See, e.g.*, Lithwick, *supra* note 2.

[57] 28 U.S.C.A. § 1350 (West 2013).

[58] *See Kiobel*, 133 S. Ct. at 1664, 1669 ("The question here is . . . whether a claim [under the ATS] may reach conduct occurring in the territory of a foreign sovereign. . . . We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption. . . . And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.").

[59] Hon. John M. Walker, Jr., *Domestic Adjudication of International Human Rights Violations Under the Alien Tort Statute*, 41 ST. LOUIS U. L.J. 539, 539 (1997) (discussing the ATS and Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995)).

[60] *See id.* ("[S]ome believe the courts have no business dealing with such matters which, they argue, fall squarely within the realm of foreign policy and are best left to the political branches to manage.").

[61] *See* Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659, 1664 (2013) (discussing "the danger of unwarranted judicial interference in the conduct of foreign policy", and "the need for judicial caution" in considering which claims c[an] be brought under the ATS" and "whether a cause of action under the ATS reaches conduct within the territory of another sovereign", so that the court does not "imping[e] on the discretion of the Legislative and Executive Branches in managing foreign affairs").

The United States is not a major trading partner with Uganda, but it has established multiple trading programs that extend to it. Only 1.4% of Uganda's exports reach the United States, which are worth approximately $35 million annually.[62] The existing trade relations are fostered in part by the AGOA,[63] which is described by American officials as the "cornerstone" of United States trade policy with Africa.[64] Signed into law by President Bill Clinton in 2000,[65] the AGOA is a unilateral trade preference program in which the United States grants trade preferences to eligible countries in sub-Saharan Africa, allowing virtually all of their goods to enter the United States duty-free.[66] Eligibility is determined each year by the President of United States and is based on meeting a set of criteria that include progress toward establishing the rule of law, protecting internationally recognized worker rights, combatting corruption, and establishing a market-based economy.[67] Uganda has maintained eligibility under the AGOA; however, the Act will expire in 2015 unless renewed.[68]

In addition to the AGOA, trade between the United States and Uganda is also fostered by two overlapping trade and investment framework agreements (TIFAs)—agreements that provide "strategic frameworks and principles for dialogue on trade and investment issues" between the United States and other TIFA parties.[69] The first, signed in 2001, is geographically more extensive, as it is between the United States and the Common Market for Eastern and Southern Africa (COMESA).[70] The second TIFA is between the United States and the EAC, signed in 2008.[71] Further, the USTR is currently leading efforts to forge a

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62 UGANDA BUREAU OF STATISTICS, 2012 STATISTICAL ABSTRACT 231, 233 (2012), *available at* http://www.ubos.org/onlinefiles/uploads/ubos/pdf%20documents/2012StatisticalAbstract.pdf (based on figures for the year 2011).

63 UGANDA, *supra* note 13. The AGOA is codified as 19 U.S.C. §§ 2466a, 2466b, 3701-3706, 3721-3724, 3731-3741 (2000); *See* Mullen et al., *supra* note 14

64 *See* Mullen et al., *supra* note 14.

65 *Id.*

66 *African Growth and Opportunity Act (AGOA)*, OFF. U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/trade-topics/trade-development/preference-programs/african-growth-and-opportunity-act-agoa (last visited Nov. 21, 2013). *See* background *supra* Part II.B for an explanation of unilateral trade preference programs generally.

67 *Id.* Duty-free treatment provided to beneficiary sub-Saharan African countries under the AGOA remains in effect through September 30, 2015. 19 U.S.C.A. § 2466b (West 2013).

68 *See* Mullen et al., *supra* note 14.

69 *Trade & Investment Framework Agreements*, OFF. U.S. TRADE REPRESENTATIVE, http://www.ustr.gov/trade-agreements/trade-investment-framework-agreements (last visited Nov. 21, 2013) (discussing TIFAs generally, and providing hyperlinks to all existing TIFAs).

70 *See* UGANDA *supra* note 13 (reciting the existing trade agreements between the United States and Uganda).

71 *Id.*

new trade and investment partnership with the EAC.[72] Uganda is a member of both regional organizations.[73]

In July of 2013, President Obama launched a new initiative coined "Trade Africa."[74] The program seeks to increase trade within Africa, and expand economic ties and trade between Africa and the United States.[75] Initially, Trade Africa's focus will be limited to member states of the EAC, including Uganda.[76] Its goals include doubling intra-regional trade in the EAC, and increasing exports from the EAC to the United States under the AGOA by forty percent.[77] The strategy involves facilitating trade by moving goods across EAC member borders cheaper and faster, through means such as "moderniz[ing] customs, mov[ing] to single more efficient border crossings, reduc[ing] bottlenecks, [and] reduc[ing] the roadblocks that stymie the flow of goods to market."[78]

In sum, trade between the United States and Uganda is governed by the AGOA, the United States–COMESA TIFA, and the United States–EAC TIFA. Additionally, United States–Uganda trade will likely be further stimulated by the President's Trade Africa initiative, as well as a new trade and investment partnership between the United States and the EAC, which is in the works.

IV. Analysis

Having discussed the landscape of existing PTAs between the United States and Uganda, this Part of the Comment will first analyze the extent to which any of these agreements provide for human rights so as to serve as a basis for protecting political minorities such as Uganda's LGBTI community.[79] Next, it will explore the challenges of utilizing United States PTAs as a basis for providing such protection.[80]

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[72] *Id. See also* Ron Kirk et al., *Joint Statement on the United States-East African Community Trade and Investment Partnership*, OFF. U.S. TRADE REPRESENTATIVE (June 15, 2012), http://www.ustr.gov/about-us/press-office/press-releases/2012/june/joint-statement-US-East-African-Community-Trade-Investment-Partnership (press release announcing the pursuit of the partnership, discussing its purpose, objectives, strategy, and the specific items that the countries have agreed to explore together); *The United States and East African Community Announce Progress under Trade and Investment Partnership*, OFF. U.S. TRADE REPRESENTATIVE (Oct. 19, 2012), http://www.ustr.gov/about-us/press-office/press-releases/2012/october/us-eac-announce-progress (press release announcing progress and next steps regarding the partnership).

[73] *See* UGANDA, *supra* note 13.

[74] Office of the Press Secretary, *Fact Sheet: Trade Africa*, THE WHITE HOUSE (July 1, 2013), http://www.whitehouse.gov/the-press-office/2013/07/01/fact-sheet-trade-africa; Merle David Kellerhals Jr., *Obama Launches Major African Trade Initiative*, U.S. EMBASSY: IIP DIGITAL (July 1, 2013), http://iipdigital.usembassy.gov/st/english/article/2013/07/201307012779 44.html#axzz2qPxmeXFL; Olga Khazan, *3 Reasons Why Obama Wants to Expand Trade With Africa*, THE ATLANTIC (July 2, 2013, 5:23 PM), http://www.theatlantic.com/international/archive/2013/07/3-reasons-why-obama-wants-to-expand-trade-with-africa/277493.

[75] *See* Office of the Press Secretary, *supra* note 74.

[76] *Id.*

[77] *See* Kellerhals Jr., *supra* note 74.

[78] *Id.*

[79] *See* analysis *infra* Part IV.A.

[80] *See* analysis *infra* Part IV.B.

A. Extent of Human Rights Provisions within Existing United States–Uganda PTAs

Perhaps the most obvious place to start is to examine the language of the AGOA, as it appears to be the most developed of the PTAs extended by the United States to Uganda. The Congressional findings that preface the AGOA focus primarily on the economic conditions and economic goals for establishing the Act.[81] While the findings do point to some political goals, namely encouraging continued progress in broadening participation in the political process[82] and enhancing political ties between the United States and sub-Saharan Africa,[83] none of the findings speak of human rights or social issues.[84]

Similarly, the AGOA's Statement of Policy is also primarily focused on economic issues.[85] It does, however, point to some non-economic objectives such as focusing on countries committed to the rule of law[86] and combating bribery of public officials.[87] Moreover, the Statement of Policy references two goals that could be interpreted as relating to human rights. First, it states that "Congress supports . . . strengthening and expanding the private sector in sub-Saharan Africa, especially enterprises *owned by women*."[88] More relevant to this Comment, it also states that "Congress supports . . . facilitating the developing of . . . *political freedom*" in the region.[89]

The section of the AGOA establishing country eligibility requirements provides the most fertile basis for addressing human rights.[90] Among the laundry list of criteria are the requirements that the country "has established, or is making continual progress toward establishing . . . the right to equal protection under the law,"[91] as well as "protection of internationally recognized worker rights."[92] Ad-

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[81] *See*, *e.g.*, 19 U.S.C.A. § 3701(1) (West 2013) ("[I]t is in the mutual interest of the United States and the countries of sub-Saharan Africa to promote stable and sustainable economic growth and development in sub-Saharan Africa."; 19 U.S.C.A. § 3701(5)-(6) ("[C]ertain countries in sub-Saharan African have increased their economic growth rates", however, "despite those gains the per capita income . . . averages approximately $500 annually.").

[82] 19 U.S.C.A. §§ 3701 (West 2013).

[83] 19 U.S.C.A. § 3701 (West 2013).

[84] *See* 19 U.S.C.A. § 3701 (West 2013).

[85] *See, e.g.,* 19 U.S.C.A. § 3702(1) (West 2013) (supporting "encouraging increased trade and investment between the United States and sub-Saharan Africa"); 19 U.S.C.A. § 3702(2) (supporting "reducing . . . obstacles to sub-Saharan African and United States trade"); § 3702(4) (supporting "negotiating reciprocal and mutually beneficial trade agreements"); 19 U.S.C.A.§ 3702(5) (supporting "focusing on countries committed to . . . economic reform, and the eradication of poverty").

[86] 19 U.S.C.A. § 3702 (West 2013).

[87] *Id.*

[88] 19 U.S.C.A. § 3702(6) (West 2013) (emphasis added).

[89] 19 U.S.C.A. § 3702(7) (West 2013) (emphasis added).

[90] *See* 19 U.S.C.A. § 3703 (West 2013).

[91] 19 U.S.C.A. § 3703 (West 2013).

[92] 19 U.S.C.A. § 3703(a)(1)(F) (West 2013). This provision provides a non-exhaustive list of such worker rights: right of association, right to organize and bargain collectively, a prohibition on compulsory labor, a minimum employment age, and acceptable working conditions with respect to minimum wage, hours of work, and occupational safety and health. *Id.*

ditionally, a country is ineligible if it "engage[s] in gross violations of internationally recognized human rights."[93]

In contrast to the AGOA, the TIFAs between the United States and Uganda (as a member of the signing regional organizations) provide no language raising the issue of human rights.[94] This is not surprising; as framework agreements, the United States–COMESA and United States–EAC agreements are fairly barebones,[95] focused primarily on establishing guiding principles[96] and a mechanism for devising future programs.[97] Of the two agreements, the TIFA with the EAC comes closest to including a human rights-related provision. It provides that "[t]he Council shall . . . identify relevant issues, such as . . . worker rights . . . that may be appropriate for negotiation in an appropriate forum."[98]

Of the existing PTAs between the United States and Uganda, it appears that AGOA eligibility requirements provide the most direct reference to human rights and, likewise, provide the most substantial basis for protecting political minorities, such as Uganda's LGBT community, from persecution. For example, the requirement that countries demonstrate progress toward achieving equal protection under the law in order to maintain trade preferences could operate to reduce homosexual persecution. This result, however, would likely require that Uganda acknowledge such persecution to be an equal protection issue. The AGOA's explicit reference to ineligibility based on gross violations of internationally recognized human rights might, at first glance, appear as another basis for reducing persecuting. However, at least for the LGBT community, they must overcome the same hurdle they face under the ATS; it is a close question whether persecution on the basis of sexual orientation violates the law of nations.

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[93] *Id.*

[94] *See* Trade and Investment Agreement Between the United States of America and the East African Community, U.S.-E.A.C., July 16, 2008, T.I.A.S. No. 08-716.1, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/tifa/asset_upload_file413_15020.pdf [hereinafter *U.S.–EAC TIFA*]; Agreement Between the Government of the United States of America and the Common Market for Eastern and Southern Africa Concerning the Development of Trade and Investment Relations, U.S.-C.O.M.E.S.A., Oct. 29, 2001, OFF. U.S. TRADE REPRESENTATIVE, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/tifa/asset_upload_file367_7725.pdf [hereinafter *U.S.–COMESA TIFA*]. A review of both agreements indicates the absence of any language referring to human rights or similar concepts.

[95] The United States–COMESA TIFA is comprised of one and a half pages of recitals, followed by two pages of terms. *See U.S.–COMESA TIFA*, *supra* note 94. The United States–EAC TIFA is similarly brief, containing approximately one page each of recitals and terms. *See U.S.–EAC TIFA*, *supra* note 94.

[96] *See U.S.–COMESA TIFA*, *supra* note 94, at art. 2 ("The Parties affirm their desire to establish cooperation between the member states of COMESA and the United States of America to: (a) develop and expand trade in products and services; (b) promote the adoption of appropriate measures to encourage and facilitate trade in goods and services; and (c) secure favorable conditions for long-term investment, development and diversification of trade."); *U.S.–EAC TIFA*, *supra* note 94, at art. 1 ("The Parties affirm their desire to promote an attractive investment climate and to expand and diversity trade in products and services between the East African Community and the United States.").

[97] Almost half of the Articles to the United States–EAC TIFA concern establishing the United States–EAC Council on Trade and Investment, setting frequency of Council meetings, and setting forth the Council's duties and procedures. *See U.S.–EAC TIFA*, *supra* note 94, at art. 2-4. The United States–COMESA TIFA similarly dedicates a significant portion of its text to defining Council operations. *See U.S.–COMESA TIFA*, *supra* note 94, at art. 3-6.

[98] *See* U.S.–EAC TIFA, *supra* note 94, at art. 3.

B. Challenges of Utilizing United States PTAs to Protect Political Minorities

Having analyzed whether existing PTAs between the United States and Uganda provide a basis for protection of political minorities, the next question is whether PTAs are an effective vehicle for enforcing such protection. This section analyzes obstacles to success. First, it addresses issues generally, then it analyzes additional issues specific to Uganda.

1. General Challenges

In one sense trade agreements have been the cause of, rather than a vehicle for remedying, human rights violations. For example, it is theorized that free trade has fostered competition among underdeveloped nations to attract foreign corporations by relaxing labor and environmental laws.[99] This "race to the bottom" has been blamed as a major cause of "abhorrent human rights violations" among the working conditions in factories.[100] Care must be taken, however, to differentiate between human rights violations among working conditions, on the one hand, and human rights violations in the form of persecuting political minorities, on the other. It is doubtful the race to the bottom that occurs to increase profit margins would have a negative effect on the latter category of human rights. Nonetheless, it would be important to scrutinize any proposed PTA from a pragmatic standpoint, so to minimize any unintended consequences for human rights.

Where United States PTAs have included special emphasis on improving labor rights, some commentators doubt their success. If they are right, human rights provisions could suffer a similar fate. For example, in the opinion of Human Rights Watch,[101] the signatories of NAFTA's side agreement on labor conditions (the NAALC) have worked together to minimize the effectiveness of the agreement, as they are incentivized to ignore abuses so that they may mutually reap economic gains.[102]

2. Challenges Specific to Uganda

A United States PTA with Uganda, in any form, could fail to yield the desired human rights benefits for the simple reason that the stakes are not very high. With only 1.4% of its exports going to the United States,[103] Uganda might not heavily rely on the United States as a driver of its GDP. With such little reliance, Uganda might choose to opt out of a human rights-focused PTA with the United

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[99] Travis Robert-Ritter, Note, *Achilles' Heel: How the ATS and NAFTA Have Combined to Create Substantial Tort Liability for US Corporations Operating in Mexico*, 42 U. MIAMI INTER-AM. L. REV. 443, 444 (2011).

[100] *Id.*

[101] Human Rights Watch is an international non-governmental organization (NGO) that investigates and publicizes human rights violations and advocates human rights worldwide. About Us, HUMAN RIGHTS WATCH, http://www.hrw.org/about (last visited Oct. 19, 2014).

[102] *See* Travis Robert-Ritter *supra* note 99 at 450-51; *NAFTA Labor Accord Ineffective: Future Trade Pacts Must Avoid Pitfalls*, HUMAN RIGHTS WATCH (Apr. 16, 2001), http://www.hrw.org/en/news/2001/04/15/nafta-labor-accord-ineffective.

[103] *See* UGANDA BUREAU OF STATISTICS, *supra* note 62.

States. On the other hand, Uganda might wish to comply with PTA conditions if it sees trade with the United States as an under exploited opportunity that could be tapped to dramatically improve Uganda's economic condition.

More challenging is Uganda's struggle with maintaining the rule of law. The organization Human Rights Watch has expressed "serious concerns about Uganda's respect for the rule of law," citing as examples threats to freedom of assembly, association, and expression, along with impunity for torture and extra-judicial killings by security forces.[104] It has been observed that all persons and authorities are not bound by and equal under the law in Uganda.[105] Instead, the executive branch flouts provisions of Uganda's constitution that do not suit its convenience, the freedom of speech is exercised at the whim of the police and political activists are subject to "preventative arrest."[106] Furthermore, court orders are subject to police interpretation and the Attorney General.[107] The government's reluctance to enforce human rights guarantees casts doubt on Uganda's ability to uphold PTA provisions meant to address political persecution.[108]

V. Proposal

This section offers up some mechanics that could help bring positive results to a United States PTA-based solution to LGBT persecution in Uganda, considering the current state of PTAs between the two countries[109] and the challenges of a PTA-based solution[110] as discussed in the previous sections.

The most effective PTA-based solution would be one structured as a bilateral trade agreement between the United States and the EAC, which incorporates human rights provisions setting forth hard standards to be interpreted and enforced by the EAC's judicial organ, the EACJ.[111] This solution is superior for several reasons. A bilateral (or multilateral) agreement is preferable to a unilateral trade preference program because, like a treaty, it has the capacity to legally compel conduct.[112] Unilateral programs, in contrast, do not bind the beneficiary.

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[104] *World Report 2013: Uganda*, HUMAN RIGHTS WATCH, http://www.hrw.org/world-report/2013/country-chapters/uganda (last visited Jan. 15, 2014).

[105] David F.K Mpanga, *Is it Rule of Law or Rule by Law in Uganda's Politics?*, DAILY MONITOR (Dec. 7, 2013), http://www.monitor.co.ug/OpEd/Commentary/Is-it-rule-of-law-or-rule-by-law-in-Uganda-s-politics-/-/689364/2102166/-/riqciuz/-/index.html.

[106] *Id.*

[107] *Id.*

[108] James Gathii, *Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy* 6 (Loyola University Chicago School of Law, Research Paper No. 2012-019, 2012), *available at* http://ssrn.com/abstract=2178756.

[109] *See* discussion *supra* Part III.B; *see also* analysis *supra* Part IV.A.

[110] *See* analysis *supra* Part IV.B.

[111] *See* Gathii, *supra* note 108, at 6 (explaining the function of the EACJ). The EAC is a customs union and common market for the region, consisting of five members: Uganda, Kenya, Tanzania, Rwanda, and Burundi. *Id.*

[112] *See* Mikhail Klimenko, Garey Ramey, and Joel Watson, *Recurrent Trade Agreements and the Value of External Enforcement*, 74 J. INT'L ECON. 475, 478 (2008) (discussing the increased role of international legal systems to resolve conflicts arising within the context of multilateral and bilateral trade agreements, including reliance on the World Trade Organization's judicial mechanism of dispute

If the benefitting party violates conditions of the program, it simply loses eligibility.

Human rights provisions setting hard standards are preferable to those setting soft standards.[113] "In the area of human rights, hard laws are essential: change in repressive behavior almost always requires legally binding obligations that are enforceable."[114] When PTAs implement hard standards for human rights, they are likely to coerce repressors to change their behavior within a shorter timeline, as opposed to waiting for them to change their deeply held preferences toward human rights.[115]

The experience of the COMESA treaty is instructive in this regard.[116] Article 6 of the treaty calls for the "recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights; accountability, economic justice and popular participation in development; [and] the recognition and observance of the rule of law."[117] This human rights provision sets soft standards because the treaty contains no active mechanism to sanction member countries that do not adhere to the principles.[118] Due to the treaty's toothless position on human rights violations, acts of terror within member states such as Zimbabwe have not been formally observed by COMESA.[119]

Given the choice between entering into a PTA with Uganda directly or with one of the regional organizations to which it belongs, the best option is for the United States to craft the agreement with the EAC. The United States has already expressed interest in establishing a new partnership with the EAC,[120] so there is already momentum to be leveraged. Moreover, the EACJ has a proven track record of adjudicating human rights violations and does not share Uganda's deficient rule of law.[121] While it is, strictly speaking, a regional trade court, the EACJ has decided significant human rights cases, including the 2007 *Katabazi*

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resolution); Alan O. Sykes, *Public vs. Private Enforcement of International Economic Law: Of Standing and Remedy* 1-2 (The University of Chicago Law School, Working Paper No. 235, 2005), *available at* http://ssrn.com/abstract=671801 (discussing trade agreements whose members create adjudicative bodies to hear complaints alleging breach of obligations, providing both public and private means of enforcement).

113 *See* background *supra* Part II.B (explaining the difference between hard and soft standards in trade agreements).

114 *See* Hafner-Burton, *supra* note 37 at 594-95.

115 Hafner-Burton, *supra* note 37, at 595.

116 Treaty Establishing the Common Market for Eastern and Southern Africa, Nov. 5, 1993, 33 I.L.M. 1067 [hereinafter *COMESA Treaty*]. Note that the treaty referred to here is between the African nations that comprise COMESA, not to be confused with the United States–COMESA TIFA discussed in Parts III.B and IV.A of this Comment.

117 *Id.*, at art. 6(e)-(g).

118 *See* Hafner-Burton, *supra* note 37 at 606.

119 *Id.*

120 *See* discussion *supra* Part III.B (the USTR is currently leading efforts to forge a new trade and investment partnership with the EAC).

121 *See* Gathii, *supra* note 108, at 3. ("[T]he EACJ has developed a strong reputation within multiple networks of civil society, professional and other groups at the national and regional levels as a defender of human rights, the rule of law and good governance.").

case where fourteen people were placed under military arrest for unlawful possession of firearms and terrorism after the High Court of Uganda had granted them bail.[122] Although the EACJ's constitutive treaty does not specifically grant jurisdiction to hear human rights cases, the court has broadly construed its power to decide such cases in order to fill the vacuum created by reluctant member states,[123] and the EAC Treaty explicitly provides that the court could have human rights jurisdiction if its member states conclude a protocol to operationalize the extended jurisdiction.[124]

Alternatively, the United States could choose to influence Uganda's human rights climate by revoking Uganda's status as a beneficiary of the AGOA while promising to reinstate its privileges upon a measurable improvement in the persecution of political minorities including the LGBT community. This approach however provides only a temporary solution rather than establishing a sustainable mechanism for continual enforcement. Furthermore, it is a drastic measure, with the people of Uganda suffering lost trade with the United States until its government brings human rights guarantees into compliance. This solution, therefore, is best viewed as a "plan B."

VI. Conclusion

Given the attenuation of relying on the ATS to protect political minorities from persecution abroad, as gleaned from the case against Scott Lively, it is ripe to consider alternative vehicles. United States PTAs might be one such vehicle. For Uganda, and its LGBT community in particular, the most effective PTA-based solution would be one crafted as a bilateral agreement between the United States and the EAC, which incorporates specific human rights backed by hard standards to be enforced by the EACJ. As for other countries and other persecuted minorities, this Comment's proposal may point to possible solutions, to the extent that they share commonalities with the plight of Uganda.

[122] *Id.* at 6, 12-14.

[123] *Id.*at 6-7.

[124] *Id.* at 7 n.3.