

**Foreign Policy in the Shadow of a Global Financial Crisis: U.S – Africa
Trade and Investment Relations under an Obama Administration**

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“To the people of poor nations, we pledge to work alongside you to make your farms flourish and let clean waters flow: to nourish starved bodies and feed hungry minds.”

- President Barack Obama

“American can do more to promote investment in Africa.”

- President Barack Obama

“[T]he Obama Administration has strategies to help spur economic development in Sub-Saharan Africa and create conditions that will improve the lives of the African people.”

- Secretary of State, Hilary Rodham Clinton

I. Introduction

The global financial crisis appears to have induced two negative external shocks in African countries: a financial shock and export trade shock. Amidst the financial crisis, President Barack Obama assumed the position as the 44th President of the United States of America (USA) and is having to craft his foreign policy agenda while struggling to contain the financial crisis on the home court. Will Obama’s emerging policies enable Africa to mitigate, cope and reduce the risks associated with the financial crisis? Will the Administration’s trade and investment policies expand trade and investment opportunities for countries in Sub-Saharan Africa (SSA)? Will it help the continent as it attempts to expand and diversify exports? Against the backdrop of the global economic crisis, this paper aims to identify and define the main features of United States-African policy under the Obama Administration, critically evaluate the strengths and weaknesses of this emergent foreign policy from an African view point, and offer suggestions for a desirable policy framework going forward. Where necessary, comparisons may be drawn between Obama’s African policy and China’s African policy. The paper will also discuss the potential role of the African Diaspora

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community in the U.S. in the shaping of U.S.-African policy under an Obama Administration. Many details of Obama's African policy have yet to emerge. Several questions were raised and addressed. Will there be a change in the nature and structure of U.S.-African relations? In other words, is the U.S.-African policy changing; is it changing in a positive direction? How do plans currently underway in the United States to tackle rising U.S. unemployment and address the financial crisis undermine Obama's stated intentions regarding Africa? What issues outrank, or threaten to outrank, Africa in the scale of priorities in U.S. foreign affairs? How should African states respond to Obama's emerging policy? Overall, the paper aims to define and evaluate the level and quality of U.S. commitment to Africa in the wake of the financial crisis and to suggest desirable policy responses for the future. The time has come for strategic and principled U.S.-African policy. Africa deserves no less and should demand no less. However, African leaders must be ready to seize the opportunities that a positive, trade-enhancing Obama-African policy offers in order to transform the continent and pull their population out of poverty, disease and misery.

The paper argues that in the context of the global financial crisis and bleak forecasts about economic growth in SSA, Obama's African policy will be judged, first and foremost, by how effective the main tools that the Administration plans to use to assist SSA are in helping the continent address the two negative external shocks presently faced by the continent as a result of the global economic crisis—a financial shock and export trade shocks. These tools include, bilateral investment treaties and trade preference schemes, particularly, the African Growth and Opportunities Act (AGOA), and U.S. Trade and Investment Framework Agreements. Second, Obama's African policy will also be judged by the extent to which it targets women, prioritizes issues of importance to this group and implements programs that target women.¹ Although, during her trip to Africa, Secretary Hilary Clinton promised to make gender issues an important aspect of her African agenda, the details of her agenda are far from clear, however. Finally, Obama's African policy will also be judged by its ability to shape and influence the policies and practices of international institutions such as the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (the World Bank), and the World Trade Organization (WTO) and move these organizations in a new, positive and pro-development direction.²

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² Uche Ewelukwa Ofodile is the author of *"Patent Wars in the Valley of the Shadow of Death: Pharmaceutical Industry, Ethics and the Global Trade,"* 59(2) UNIVERSITY OF MIAMI LAW REVIEW 203 (2005) and the author of *"Special and Differential Treatment in International Trade Law: A Concept in Search of Content,"* 79(4) NORTH DAKOTA LAW REVIEW (2004).

II. Africa and the Global Financial Crisis

Countries in SSA have not been immune to the secondary effects of the global financial crisis. The crisis is having a direct impact on financial markets, foreign exchange markets and commodity markets in SSA. SSA's economic growth dropped from 6.9% in 2007 to 5.5% in 2008. In January of 2009, the International Monetary Fund (IMF) cut the organization's forecast for growth in SSA by 1.6% to 3.5%. The situation has grown increasingly worse. The latest projection for growth in SSA is a measly 1.7%. As a result of the financial crisis, trade opportunities are dwindling and private capital flows—foreign direct investment (FDI) inflow, portfolio equity flows and debt flows—into SSA have dropped significantly.

Overall, the global financial crisis appears to have induced two negative external shocks in African countries: a financial shock and export trade shock. The financial shock (a financial crisis) is a result of the declining availability of credit and the increasing cost of securing international credit. The trade shock (an economic crisis) is a result of declining demand for African goods and the fall in commodity prices. Unless important mitigation, coping, and risk reduction strategies are urgently taken, the two shocks would seriously, and perhaps permanently, undermine Africa's growth and development prospects. Economists project weaker demand for Africa's exports, weaker export revenues, lower investments and growth rates, lower migrant remittances, and lost employments. What is needed are specific measures to reduce Africa's vulnerability to adverse changes in global finance and trade as well as a strengthening of the continent's resilience or coping mechanisms. Some necessary mitigation techniques that have been suggested include: closer monitoring of the impact of the crisis, expanding trade and avoiding creeping protectionism, and expanding trade finance. Regarding effective coping mechanisms, experts suggest: expanding self employment, technical assistance, and expanding domestic demand. Risk reduction strategies recommended include: expansion of South-South trade, promoting manufacturing, promoting tourism, investing in infrastructure, expanding access to finance, and encouraging financial innovation.

III. Trade and Investment Between U.S.-Africa: Trends

What is the profile of U.S.-African trade and investment today; and, what room is there for improvement under the Obama Administration?

a. U.S. Africa Trade Profile

In 2008, U.S. total trade with Sub-Saharan Africa increased by 28 percent.³ While U.S. exports to Africa stood at \$18.5 (a 29.2 percent increase

³ International Trade Administration, Department of Commerce, U.S.-Africa Trade Profile, available at: http://www.goa.gov/resources/US_African_Trade_Profile_2009.pdf

from 2007), U.S. imports from Africa totalled a record 86.1 billion (a 27.8 percent increase from 2007). In 2008, the African Growth and Opportunity Act (AGOA) accounted for \$66.3 billion of U.S. imports from SSA.

Despite increases in U.S. imports from Africa, there is cause for concern. Crude oil imports accounted for 79.5 percent of U.S. total imports from SSA. Although U.S. imports under AGOA were 29.8 percent higher than in 2007, petroleum products accounted for the largest share of AGOA imports.⁴ Petroleum products account for 92.3 percent of the overall AGOA imports. Thus, when fuel products are excluded, AGOA imports stand at a mere \$5.1 billion.⁵ Worse, U.S. non-energy imports under AGOA favoured one country—South Africa—and concentrated on transportation equipments. Even more worrying, AGOA agricultural imports decreased by 7.9 percent, while AGOA textile and apparel imports declined by 10.4 percent.⁶ Although the U.S. is Africa's largest single country market, SSA accounts for a mere three percent of U.S. merchandise imports; of these imports, 81 percent are petroleum products.

Thus, U.S. imports from Africa are highly concentrated in one sector (petroleum) and are highly concentrated among a small number of countries. Four countries alone—Angola, South Africa, Nigeria and Republic of Congo—accounted for 83.7 percent of U.S. imports from Africa in 2008. Oil imports alone account for 82.8 percent (\$71.2 billion) of all U.S. purchases from Africa. A look at the top ten U.S. imports from Africa indicates that many countries in the region are completely ignored. The top ten imports are: Oil, Platinum, Motor Vehicles and Parts, Diamond, Iron and Steel, Woven and Knit Apparel, Ores, Cocoa, Organic Chemicals, and Petroleum Gases.

b. U.S.-Africa Investment Profile

The U.S.-Africa investment profile is also grim. Overall, Africa trails other regions in terms of the volume of FDI the continent is able to attract. FDI flow into SSA represents an embarrassing 1.8 percent of worldwide inflow in 2007 and 6.6 percent inflow to developing countries. As with trade, the majority of FDI flow into Africa is concentrated in the oil and gas sector and the mining sector. Hence the largest recipients of FDI inflow are countries with large reserves of natural resources: Nigeria (\$12.5 billion), South Africa (\$5.7 billion), Sudan (\$2.4 billion), Equatorial Guinea (\$1.7 billion), Madagascar (\$997 million), and Zambia (\$984 million).

Regarding U.S. investment in Africa, the picture is bleak especially compared to U.S. investment in other regions. SSA accounts for less than one percent of U.S. direct investment position worldwide.⁷ Moreover, six countries

⁴ *Id.*

⁵ *Id.*, at 2.

⁶ *Id.*

⁷ *Id.*, at 17.

account for 87.8 percent of U.S. FDI in Africa: South Africa (36.5%; \$4.8 billion), Mauritius (21.9%; \$2.9 billion), Equatorial Guinea (16.2%; \$2.2 billion), Angola (6.6%; \$876 million), Liberia (3.4%; \$456 million), and Gabon (3.2%; \$421 million).

IV. Obama's Emergent Africa Policy

As a member and, later, Chair of the Senate Foreign Relations Committee's Subcommittee on European Affairs, President Obama championed several African causes. As a candidate for the U.S. presidency, Obama promised to place Africa squarely on his foreign policy agenda. As the President of the United States of America, public pronouncements by President Obama and his foreign affairs team, as well as his key appointments, suggest a positive change in U.S.-African relations. However, the Administration has announced no specific initiatives that target Africa. While some of the new initiatives that the Administration has announced look promising, details are yet to emerge on how the initiatives will be developed and implemented. Thus, going beyond rhetoric, there is as yet very little cause for celebration. Even if the initiatives that have been announced are actually implemented, there are few guarantees that they will be effective and will tackle the real obstacles to Africa's development. Furthermore, tension between Obama's foreign policy pronouncements and measures underway in the US to address the financial crisis are a cause for concern. On the one hand, Obama has appointed African advocates to some of the highest positions in U.S. foreign affairs. On the other hand, under President Obama, Congress passed a USD 787 billion stimulus package bill featuring a "buy American" provision that essentially subsidizes American businesses and hurts foreign competition. Moreover, the U.S. is increasingly concerned about security on the African continent and is devoting a lot of attention to military aid and military issues within the context of AFRICOM in ways that may undermine the continent's trade, investment and development interests.⁸

President Obama's Key Appointments with Implications for Africa

- **Hilary Clinton:** Secretary of State
- **Susan Rice :** U.S. Ambassador to the United Nations
- **Michelle Gavin:** Assistant Director for African Affairs for the National Security Council
- **Samantha Power:** Director for Multilateral Affairs, National Security Council
- **Scott Gratton:** Special Envoy to Sudan
- **Johnnie Carson:** Assistant Secretary of State for Africa

⁸ Uche Ewelukwa Ofodile is the author of *Trade, Aid and Human Rights: China's Africa Policy in Perspective* in THE DYNAMICS OF TRADE: LAW AND ECONOMICS 265-284 (Sylvia M. Kierkegaard, ed., 2008).

- **Dr. Michael Battle:** Ambassador-Designate to the African Union
- **Walter Crawford Jones:** United States Executive Director, African Development Bank
- **Eric Goosby:** Global AIDS Coordinator
- **Phil Carter:** Acting Assistant Secretary for African Affairs (left office May 6, 2009)
- Dr. Rajiv Shah: Nominated as Administrator of the United States Agency for International Development (USAID).

From July 10 to July 11, 2009, President Obama paid a visit to Africa. On August 5, 2009, Secretary of State, Hillary Rodham Clinton, commenced a seven nation trip to Africa at the 8th U.S. - Sub-Saharan Africa Trade and Economic Cooperation Forum (known as the AGOA Forum) in Nairobi, Kenya.⁹ Both President Obama's July visit and Secretary Clinton's August visit arguably highlight the Obama Administration's commitment to making Africa a priority in U.S. foreign policy. Barely seven months into the new Administration, this is the earliest in any U.S. administration that both the President and the Secretary of State have visited Africa. In a speech to Ghana's Parliament on July 11, 2009,¹⁰ President Obama addressed four areas that he considers critical to the future of Africa: democracy, opportunity, health, and the peaceful resolution of conflict. Present Obama:

- hinted at a future partnership between U.S. and Africa—one that is grounded in mutual responsibility and mutual respect,
- reiterated a pledge to substantially increase U.S. foreign assistance,
- suggested that “transformational change” was possible and that the U.S. will partner with Africa in building the necessary capacity for this change,
- promised support to “strong and sustainable democratic governments in Africa,”¹¹
- promised a more targeted and efficient foreign assistance program, specifically hinting at a possible end to tied food aid,¹²
- hinted at possible help in addressing climate change,¹³

⁹ In addition to Kenya, Secretary of State Hilary Clinton visited South Africa, Angola, the Democratic Republic of the Congo, Nigeria, Liberia, and Cape Verde.

¹⁰ President Obama, *African's Future Is up to Africa*, July 11, 2009.

¹¹ *Id.*, “America will not seek to impose any system of government on any other nation – the essential truth of democracy is that each nation determines its own destiny. What we will do is increase assistance for responsible individuals and institutions, with a focus on supporting good governance....”

¹² *Id.*, “By cutting costs that go to Western consultants and administration, we will put more resources in the hands of those who need it, while training people to do more for themselves. That is why our \$3.5 billion food security initiative is focused on new methods and technologies for farmers – not simply sending American producers or goods to Africa. Aid is not an end in itself.”

¹³ *Id.*, “All of us – particularly the developed world – have a responsibility to slow these trends – through mitigation, and by changing the way that we use energy. But we can also work with Africans to turn this crisis into opportunity.”

- pledged to support global health initiatives in the region,¹⁴ and
- pledged to support Africa's peace keeping initiatives "not just with words, but with support that strengthens African capacity."

With specific regards to trade and investment, President Obama was less specific. On the one hand, the President observed that "America can ... do more to promote trade and investment" with Africa, boldly suggested that "wealthy nations must open [their] doors to goods and services from Africa in a meaningful way," and promised that this will be the goal of his Administration. On the other hand, President Obama did not announce any new initiatives during his visit to Africa and conditioned what promises that were made on "good governance."

Although many promises were made, Secretary of State Hillary Clinton did not announce any new trade or investment initiatives during her seven nation Africa trip in August.¹⁵ The point of the trip, according to the Secretary of State, was "to underscore the importance of Africa to the Obama Administration." Significantly, the Secretary was joined in Kenya by Secretary of Agriculture Tom Vilsack, U.S. Trade Representative Ron Kirk, Assistant Secretary for African Affairs Johnnie Carson, and three representatives of Congress: Congressman Donald Payne, Congressman Jim McDermott, and Congresswoman Nita Lowey. Like President Obama, the Secretary of State stressed "shared opportunity" and the need for good governance and transparency. Her remarks at the 8th AGOA Forum on August 5, 2009, focused on four issues: trade, development, good governance and women. Regarding trade, even while acknowledging that AGOA "has not met its full potential,"—the fact that Africa accounts for only two percent of global trade, that African agricultural exports have declined in the past three decades, and the need for product diversification—the Secretary of State did not address these issues in any specific way. According to her, the Administration:

- is "exploring ways to lower global trade barriers to ease the burdens on African farmers and producers."
- will "strive to meet the G-20 leaders pledge in London to complete the Doha Round and make it a success."
- is "committed to working with our African partners to maximize the opportunities created by our trade preference programs."
- will "enhance ongoing efforts to build trade capacity across Africa."
- wants "to provide assistance to help new industries take advantage of access to [U.S.] markets."
- will "pursue public-private partnerships, leveraging the efforts of our export-import bank and OPEC and organizations like the

¹⁴ *Id.*, America will support these efforts through a comprehensive, global health strategy. That is why my Administration has committed \$63 billion to meet these challenges. Building on the strong efforts of President Bush, we will carry forward the fight against HIV/AIDS."

¹⁵ In addition to Kenya, Secretary of State Hilary Clinton visited South Africa, Angola, the Democratic Republic of the Congo, Nigeria, Liberia, and Cape Verde.

Corporate Council on Africa that identify and invest in young entrepreneurs with innovative ideas,”

- is “on a path to double foreign assistance by 2014, but will spend the money differently.”
- will “work to expand the number of bilateral investment treaties with African nations,” and
- will “create stronger and more sensible links between [U.S.] trade policies and [U.S.] development strategies.”

Two months latter, at the Corporate Council on Africa’s Seventh Biennia U.S.-Africa Business Summit on October 1, 2009, the Secretary of State told attendees that “the Obama Administration has strategies to help spur economic development in Sub-Saharan Africa and create conditions that will improve the lives of the African people.” Five areas of concern were emphasized in her speech: trade, development, good governance, energy security and public/private partnership. Again, no new Africa-specific initiatives were announced.

Thus far in their public statements, therefore, President Obama and his team have emphasized six themes: trade, development, good governance, energy security, women, and public/private partnership. Regarding trade, no noticeable action has been taken to address core trade-related issues of concern to SSA countries such as, crippling subsidies, preference erosion, the need to diversity African exports, complex and narrow rules of origin, expanded market access for key African exports, and the Doha Round negotiations more generally. Regarding investment, there are hints at future moves by the Administration to conclude bilateral investment treaties with countries in SSA. In her AGOA remarks, the Secretary of State stated: “We will work to expand the number of bilateral investment treaties with African nations, one of which Ambassador Kirk and I will be signing this afternoon.” And, in her remarks at the Corporate Council on Africa’s Seventh Biennia U.S.-Africa Business Summit on October 1, 2009, she told the audience that the U.S. is “look[ing] forward to more bilateral investment treaties like the one [it] signed with Mauritius” in August. Even on the issue of investment, the Secretary of State did not indicate whether the controversial U.S. 2004 Model Bilateral Investment Treaty will guide future treaty discussions or whether a radical reform of the U.S. BIT program was in the offing.

Energy security—the third pillar—in the Administration’s African strategy is not totally clear but could mean an intensification of the scramble for Africa’s oil resources. In August, the position of Coordinator for International Energy Affairs—a new position in the State Department—was created. The U.S. is also making impressive overtures to Angola. During her visit to Angola on August 9-10, 2009, the Secretary of State and her Angolan counterpart “discussed ways to deepen and strengthen ... energy partnership.” The Secretary of State also held talks with the Angolan petroleum minister “to explore ways to advance energy

security while ensuring that energy resources are a force for development and progress in Angola and Africa.” On November 16, U.S. and Angola inaugurated consultative meetings under a new Strategic Partnership Dialogue that will consist of regular bilateral working group meetings to discuss issues of mutual concern. The two working groups on November 16—the first within the Strategic Partnership Dialogue—were: (1) Security Cooperation; and (2) Energy Cooperation. In a November 17 address commemorating “U.S.-Angola Day” at the Woodrow Wilson Center for International Scholars in Washington, Assistant Secretary of State for African Affairs, Johnnie Carson, said, “The United States and Angola have always enjoyed close collaboration in the energy field, where Angola has been a major supplier of U.S. crude oil and where American private sector companies have been major investors.” It is reported that the U.S. Embassy in Luanda, in partnership with the Angolan Energy Ministry, is arranging for a U.S. expert on renewable energy to visit Angola in February 2010.

Will energy security provide the framework for addressing renewable energy issues and provide tools that will help SSA countries mitigate the effects of climate change? Will an energy security initiative mean that the Administration will support renewable energy technology transfer to SSA countries? Does it mean that the Administration will work to ensure that transnational oil companies operating in SSA are socially responsible and are held accountable? Not too clear. While visiting Nigeria, the Secretary of State merely told her audience that she “*will be reaching out to the energy companies here who do business in the Niger Delta to figure out what we can do to try to resume a more productive outcome for the people of the Niger Delta in the production of energy.*” Also, the Administration plans to “help new producers devise transparent revenue management systems,” and in September contributed \$6 million to the World Bank’s multi-donor trust fund for the Extractive Industries Transparency Initiative. “Africa is key to the United States and to global energy security,” the Secretary of State observed in

President Obama’s Africa Policy Timeline

- **September 30, 2008:** Whitney Schneidman – “*Africa: Obama’s Three Objectives for Continent*”¹⁶
- **February 2009:** Hilary Clinton’s Confirmation Hearing -- Testimony as Secretary of State-designate
- **March 20, 2009:** Memorandum on Deferred Enforced Departure for Liberians
- **May 13, 2009:** The Global Food Security Act of 2009(S. 384) introduced.
- **June 2009:** The State Department and USTR request the establishment of a Subcommittee to review the Model BIT.

¹⁶ Whitney Schneidman was an adviser on Africa to the campaign to elect Senator Barack Obama as President of the United States.

- **July 8-10:** L'Aquila Joint Statement on Global Food Security.
- **July 9:** President Obama's announcement of a multibillion dollar food security initiative for Africa
- **July 10-11:** President Obama's first visit to SSA since taking office as the president of the United States
- **July 26:** **The Foreign Assistance Revitalization and Accountability Act of 2009 (S. 1524) introduced.**
- **August 5-18, 2009:** Secretary of State Hilary Clinton seven nation Africa Trip
- **August 5, 2009:** United States launches investment treaty negotiations with Mauritius
- **September 25:** PEPFAR, USAID and General Mills Partner to Improve Food Processing in Africa
- **September 26:** A Proposal from UN Secretary General Ban Ki-moon and United States Secretary of State Hillary Clinton
- **September 28:** Unveiling of the Global Hunger and Food Security Initiative: Consultation Document
- **September 30:** Report of the Advisory Committee on International Economic Policy Regarding the Model Investment Treaty
- **October 19, 2009:** Statement of President Barack Obama on Sudan Strategy
- **October 24, 2009:** Renewal of a Declaration of a National Emergency with Respect to Sudan
- **October 28:** United States and Uganda Sign Open-Skies Agreement
- **November 9:** Senate Resolution 312 - Expressing the sense of the Senate on empowering and strengthening the United States Agency for International Development (USAID)
- **November 10:** Dr. Raj Shah appointed as the Administrator of the United States Agency for International Development (USAID)
- **November 16:** U.S. and Angola Hold Strategic Partnership Dialogue Meetings

October. However, it is not too clear what the Obama Administration plans to do to ensure that Africa's resources bless not just the West but Africa as well.

U.S. African policy cannot, however, be wholly judged by statements and commitments that President Obama and the Secretary of State made during their respective visits to Africa. Since January, a lot of initiatives have been announced and new legislations introduced in the Senate that could have wide-ranging implications for Africa. These include:

- review of the U.S. bilateral investment program
- unveiling of the Global Hunger and Food Security Initiative
- introduction of the Global Food Security Act of 2009 (S.384)

- introduction of the Foreign Assistance Revitalization and Accountability Act of 2009 (S.1524)
- first-ever Quadrennial Diplomacy and Development Review

The devil is in the detail and there is much that is yet to be worked out regarding the Administration's initiatives and the new bills introduced in the Senate. Will the review of the 2004 Model BIT bring about radical reform in the U.S. BIT Program? Will the Global Food Security Act of 2009 and the Foreign Assistance Revitalization and Accountability Act of 2009 get Senate approval? Will the Global Hunger and Food Security Initiative target the problems faced by small farmers in Africa, particularly women, taking into account the views of those most affected by the problem? Much remains to be seen.

V. Trade and Investment Agreement

Four types of trade and investment agreements feature strongly in U.S. trade and investment policy: Trade and Investment Framework Agreements (TIFA), bilateral investment treaties (BITs), Free trade agreements (FTAs), and multilateral trade agreements. Since President Obama assumed office, the U.S. has signed one TIFA with a country in SSA and has launched bilateral investment treaty (BIT) negotiations with another. On 15 May, 2009, the USTR and Angola Minister of External Affairs Assunção Afonso de Sousa dos Anjos signed a Trade and Investment Framework Agreement (TIFA). On August 5, 2009, the United States launched BIT negotiations with Mauritius.¹⁷ TIFA and BITS are not new foreign policy tools, however, and are, arguably, of questionable utility to countries in SSA.

a. Trade and Investment Framework Agreements

For the U.S., TIFAs "provide strategic frameworks and principles for dialogue on trade and investment issues between the United States and the other parties to the TIFA."¹⁸ Specifically, TIFAs "serve as a forum for the United States and other governments to meet and discuss issues of mutual interest with the objective of improving cooperation and enhancing opportunities for trade and investment."¹⁹ Topics for consultation are wide-ranging and have usually included market access issues, protection and enforcement of intellectual property rights, labor, and the environment.

¹⁷ U.S. Department of State, United States Launches Investment Treaty Negotiations with Mauritius, available at: <http://www.state.gov/r/pa/prs/ps/2009/aug/126888.htm>

¹⁸ Office of the United States Trade Representative, Trade and Investment Framework Agreements, available at: <http://www.ustr.gov/trade-agreements/trade-investment-framework-agreements>

¹⁹ *Id.*

Under previous administrations, the U.S. signed a total of 15 TIFA with countries and regional economic groups in Africa: the East African Community (2008),²⁰ the Common Market for Eastern and Southern Africa (2001),²¹ Liberia (2007),²² Mauritius (2006),²³ Rwanda (2006),²⁴ Nigeria (2000),²⁵ Ghana (1999),²⁶ South Africa (1999),²⁷ the West African Economic and Monetary Union (???)²⁸. The U.S.-Angola TIFA is the first and only TIFA under the Obama Administration. In terms of their economic implications, TIFAs are really not very significant. Most TIFAs start with a preamble, the establishment of a body, comprising representatives of the Parties or their designees, which is expected to serve as a forum for consultation, and define the framework and modalities for meetings and consultation. For example, pursuant to Article Two of the U.S.-EAC TIFA, the Parties established “a United States-East African Community Council on Trade and Investment” (“the Council”). The Council is expected to meet “at such times and in such places as the Parties may agree.” However, the Parties agreed to “endeavour to meet no less than once every two years.” The Council has four specific functions: (1) “monitor trade and investment relations between [the Parties], identify opportunities for expanding trade and investment, and identify relevant issues, such as those related to the protection of intellectual property rights, workers rights, and the environment, that may be appropriate for negotiations in an appropriate forum;” (2) “consider specific trade and investment matters of interest to the Parties;” (3) “identify and work to remove impediments to trade and investment between [the Parties];” and (4) “seek the advice of the private sector and civil society, where appropriate, on matters related to the Council’s work.” The U.S.-Angola TIFA, concluded under President Obama, follows the same pattern as earlier TIFAs. According to the Assistant Secretary of State for African Affairs Johnnie Carson, “Under the trade and investment framework agreement, the United States and Angola will create a joint council to

²⁰ Trade and Investment Framework Agreement Between the East African Community and the Government of the United States (16 July 2008)

²¹ *Agreement Between the Government of the United States of America and the West African Economic and the Common Market for Eastern and Southern Africa Concerning the Development of Trade and Investment Relations*. (29 October 2001).

²² *Trade and Investment Framework Agreement Between the United States of America and the Government of the Republic of Liberia* (15 February 2007)

²³ *Trade and Investment Framework Agreement Between the Government of the United States of America and the Government of the Republic of Mauritius* (18 September 2006)

²⁴ *Trade and Investment Framework Agreement Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Development of Trade and Investment Relations* (7 June 2006).

²⁵ *Agreement Between the Government of the United States of America and the Government of the Federal Republic of Nigeria Concerning the Development of Trade and Investment Relations* (16 February 2000).

²⁶ *Agreement Between the Government of the United States of America and the Government of the Republic of Ghana Concerning the Development of Trade and Investment Relations* (26 February 1999).

²⁷ *Agreement Concerning the Development of Trade and Investment Between the Government of the Republic of South Africa and the Government of the United States* (18 Feb. 1999).

²⁸ *Agreement Between the Government of the United States of America and the West African Economic and Monetary Union Concerning the Development of Trade and Investment Relations*.

address financial and business issues that include but are not limited to trade capacity building, intellectual property rights, environmental issues and enhancing the participation of small and medium-sized enterprises in trade and investment,”

b. Bilateral Investment Treaties

The U.S. BIT program was initiated in 1977 and is designed primarily to “encourage and protect U.S. investment in developing countries.” Since the 1970s the U.S. has used BITs to protect private investment, to develop market-oriented policies in partner countries, and to promote U.S. exports. Out of a total of 40 U.S. BITs in force worldwide, the U.S. has five BITs in force in Sub-Saharan Africa. All five BITs were signed by previous administrations: Senegal (1983),²⁹ the Democratic Republic of Congo (1984),³⁰ Cameroon (1986),³¹ the Republic of Congo (1990),³² Mozambique (1998).³³ The U.S.-Rwanda BIT was signed in February 2008 and is still awaiting ratification by the Senate.

The launch on August 5 of negotiations of a BIT between the U.S. and Mauritius suggests that as in the past, BITs will be a tool of foreign policy under the Obama Administration. Indeed, at the launch of the BIT negotiations with Mauritius, Secretary of State, Hilary Clinton, remarked: “There are many ways that the Obama Administration intends to demonstrate its commitment to Africa.... But this investment treaty is a real example that we would like others to look at and see what steps need to be taken to move along this path with us.... And we hope to collaborate with other AGOA partners, such as Ghana, to deepen trade and investment ties—including work that could lead to bilateral investment treaties.” The State Department has also noted that BITs “are one of the many tools that the Obama Administration is using to assist reform-minded African countries.” Given this trend, should countries in SSA be worried? Would more BITs be in the interests of countries in the region? Is there a need for a review of the U.S. BIT program?

i. Background to BITs

Since 1959 when the first BIT was signed, BITs have become the primary vehicle through which foreign direct investment is regulated today. BITs are typically signed between developed and developing countries, although treaties between developing countries exist. BITs rose in prominence to address the demise of the Hull Rule—the rule which provided that in the event of an expropriation, the host government was obliged to provide “prompt, adequate,

²⁹ Signed December 6, 1983 and entered into force October 25, 1990.

³⁰ Signed August 3, 1984 and entered into force July 28, 1989.

³¹ Signed February 26, 1986 and entered into force April 6, 1989.

³² Signed February 12, 1990 and entered into force August 13, 1994.

³³ Signed December 1, 1998.

and effective” compensation to the investor.³⁴ From the early 1960s through the mid 1970s, attack on the Hull Rule, from developing countries, was fierce and sustained. These attacks culminated in the adoption of a host of United Nations declarations and resolutions that, taken together, appeared to threatened the investment interests of capital-exporting nations. These include: the 1962 Resolution on Permanent Sovereignty over Natural Resources (Resolution 1803),³⁵ the 1973 Resolution on Permanent Sovereignty over Natural Resources (Resolution 3171),³⁶ the 1974 General Assembly resolution declaring a New International Economic Order (Resolution 3201),³⁷ and the 1974 Charter of Economic Rights and Duties of States (Resolution 3281).³⁸ The U.S. is not the only country with an established BIT and has in fact signed far fewer BITs that the major European countries.

Thus, BITs arose and were developed by countries in response to efforts by developing countries to defeat the Hull Rule. BITs are also likely to maintain their dominant position for the foreseeable future given the failure of the OECD countries to agree on the contents of a Multilateral Agreement on Investment (MAI) and the fact that investment issues do not form part of the Doha Work Program. In short, BITs are very popular and are used by most developed countries as a tool to protect their investments in developing countries. Between 1959 and 1991, over 400 BITS were signed. Today, it is estimated that every country on the globe is a party to at least one BIT.

ii. U.S. BIT Program: Overview

The basic aims of the U.S. BIT program, according the information on the USTR website, are: “to protect investment abroad in countries where investor rights are not already protected through existing agreements (such as modern treaties of friendship, commerce, and navigation, or free trade agreements),”³⁹ “to encourage the adoption of market-oriented domestic policies that treat private

³⁴ The Hull Rule was expounded in a diplomatic note that one-time U.S. Secretary of State, Cordell Hull send to his Mexican Counterpart following Mexico’s confiscation of various agrarian and oil properties between 1915 and 1940. In the said note, Hull stated: “The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equality, no government is entitled to expropriate private property, for whatever purposes, without the provision for prompt, adequate, and effective payment therefor.” See 3 Green H. Hackworth, *Digest of International Law* 228, at 655-59 (1942). See generally, Andrew Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 *Va. J. Int’l L.* 639 (1998).

³⁵ G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962), reprinted in 2 *I.L.M.* 223 (1963).

³⁶ G.A. Res. 3171, U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9030 (1974), reprinted in 13 *I.L.M.* 238 (1974).

³⁷ G.A. Res. 3201, U.N. GAOR, 6th Special Sess., Supp. No. 1, at 3, U.N. Doc. A/9559 (1974), reprinted in 13 *I.L.M.* 715 (1974).

³⁸ G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50-55, U.N. Doc. A/9631 (1974), reprinted in 14 *I.L.M.* 223 (1975).

³⁹ See <http://www.ustr.gov/trade-agreements/bilateral-investment-treaties>

investment in an open, transparent, and non-discriminatory way;⁴⁰ and “to support the development of international law standards consistent with these objectives.”⁴¹ The U.S. BITs program is designed to offer investors six core benefits. First, U.S. BITs have a standard non-discrimination clause and afford investors the better of national treatment or the most favored nation treatment. Second, the BITs establish limits on the expropriation of investment and provide for payment of prompt, adequate, and effective compensation in the event of expropriation. Third, BITs provide for prompt and near unrestricted transferability of investment-related funds into and out of a host country. Fourth, BITs restrict the power of host countries to impose performance requirements as a condition for the establishment, acquisition, expansion, management, conduct, or operation of an investment. Fifth, BITs protect the right of investors to engage the top managerial personnel of their choice, regardless of nationality. Finally, U.S. BITs bypass host-country’s domestic courts and provide for international arbitration.

The U.S. has a model BIT which was developed in 1981 and has undergone several modifications. The 2004 Model BIT is presently in use; although under Obama Administration a Subcommittee has been established to review the Model BIT. The 2004 Model BIT consists of a preamble and thirty-seven articles. Article 1 offers definitions of key terms such as “covered investment,” “freely usable currency,” and “investment.” Investment is very broadly defined to cover “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.” The definition covers hard investments as well as financial assets, intellectual property rights, and contractual rights (“licenses, authorizations, permits, and similar rights conferred pursuant to applicable domestic law”). Article 2 defines the scope and coverage of BITs. A broad scope is envisaged. The treaty applies to “measures *adopted or maintained* by a Party” relating to investors of the other Party and covered investments.⁴² Of importance is the provision that a Party’s obligation under the treaty shall apply to: “a state enterprise or other person when exercising any regulatory, administrative, or other governmental authority delegated to it by that Party” and “to the political subdivisions of that Party.” Article 3 and 4 lay down the national treatment requirement⁴³ and the most-favored nation requirement⁴⁴

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² 2004 Model BIT, Article 2(1)(a) and (b).

⁴³ “Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.” *Id.*, Article 3(1).

⁴⁴ “Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.” *Id.*, Article 4(1).

respectively. Article 5 (Minimum Standard of Treatment) is significant and requires each party to a BIT to ‘accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.’⁴⁵ Fair and equitable treatment is defined to include “the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.”⁴⁶ And, “full protection and security” requires each Party “to provide the level of police protection required under customary international law.”⁴⁷

Also significant for countries in SSA is Article 5(4) of the 2004 Model BIT which requires each Party to “accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.” Article 6 prohibits the expropriation or nationalization except: “for a public purpose; in a non-discriminatory manner; on payment of prompt, adequate, and effective compensation; and in accordance with due process of law and Article 5 [Minimum Standard of Treatment]....”⁴⁸ The Article covers both direct expropriation and indirect expropriation “through measures equivalent to expropriation and nationalization.” Article 8 deals with performance requirements and is extremely broad. Parties may not “impose or enforce [specified requirements], or enforce any commitment or undertaking, in connection with the *establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory.*” Seven such requirements are expressly prohibited.⁴⁹ Article 9 prohibits Parties from requiring that “an enterprise of that Party that is a covered investment appoint to senior management positions natural persons of any particular nationality.” The 2004 Model BIT also provides for the prompt publication of laws and decisions respecting investments (Article 10), imposes transparency obligation on Parties (Article 11), and introduces an environmental provision (Article 12) and a workers rights provision (Article 13). Perhaps the most significant aspects of the 2004 Model BIT are the provision relating to dispute settlement. Only investor-state and state-state arbitration is

⁴⁵ *Id.*, Article 5(1)

⁴⁶ *Id.*, Article 5(2)(a).

⁴⁷ *Id.*, Article 5(2)(b).

⁴⁸ *Id.*, Article 6(1).

⁴⁹ These are the requirements: (i) “to export a given level or percentage of goods or services;” (ii) “to achieve a given level or percentage of domestic content;” (iii) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;” (iv) “to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;” (v) “to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;” (vi) “to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory;” or “to supply exclusively from the territory of the Party the goods that it produces or the services that it supplies to a specific regional market or to the world market.”

envisaged. In other words, the resolution of disputes in the domestic courts of host governments is not required or envisaged.

iii. The U.S.-Mozambique BIT and the U.S.-Rwanda Treaty

The U.S.-Mozambique BIT is based on the 1994 U.S. Model BIT and “satisfie[d] the U.S. principal objectives in bilateral investment negotiations.”⁵⁰ Investment is broadly defined and covers hard assets and intangible assets such as intellectual property rights and contractual rights.⁵¹ The treaty follows the 1994 Model BIT closely providing for: national treatment and MFN (Article II), prohibition against expropriation (Article III), free and unrestricted transfer of assets (Article V), prohibition against performance requirements (Article VI), and investor-state arbitration (Article XI). One interesting provision in the U.S.-Mozambique treaty is Article IV which States: “Each Party shall accord national and most favored treatment to covered investment ... as regards any measures relating to losses that investments suffer in its territory owing to war or other armed conflict, revolution, state of emergency, insurrection, civil disturbance, or similar events.” Does such a clause make it impossible for Mozambique to claim force majeure in the event of a war that makes it impossible for the government to fulfill an investment contract?

Unlike the U.S.-Mozambique treaty, the U.S.-Rwanda BIT is modeled after the 2004 Model BIT. Comparing both treaties, a noticeable shift towards BITs that afford stronger protection to U.S. investors is evident. In general, while the 1994 Model BIT consists of a preamble and thirteen articles, the 2004 Model BIT consists of a preamble and thirty-seven articles. There are other substantive differences between the two treaties. First, while the U.S.-Mozambique treaty envisages the settlement of investment disputes in the domestic court of the Party that is party to the dispute (Article IX), this is not an option under the U.S.-Rwanda treaty. Under the later, only two possibilities exist: investor-state arbitration and state-to-state dispute settlement. There is no obligation on an investor to exhaust domestic remedies. Second, the U.S.-Rwanda BIT contains a minimum standard of treatment (Article 5) clause which is absent in the U.S.-Mozambique treaty. Article 5(1) of the U.S.-Rwanda BIT obliges each Party to “accord to covered investments treatments *in accordance with customary law*, including fair and equitable treatment and *full protection and security*.”⁵² Third, the performance requirement in the U.S.-Rwanda BIT is much stricter. While in the U.S.-Mozambique treaty, such requirements “do not include conditions for the receipt or continued receipt of an advantage” (Article VI), Article 8(2) of the U.S.-Rwanda Treaty expressly stipulate that “Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment,

⁵⁰ *Investment Treaty with Mozambique: Message from the President of the United States* (2000).

⁵¹ *Treaty Between the United States of America and the Republic of Mozambique Concerning the Encouragement and Reciprocal Protection of Investments*, Article I (d)(hereinafter “U.S.-Mozambique Treaty”).

⁵² *Emphasis added*.

acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with” requirements: “to achieve a given level or percentage of domestic content;” “to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;” “to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;” or “to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.” The U.S.-Rwandan BIT also has provisions on transparency (Article 11), provisions requiring prompt publications of laws and decisions respecting investment (Article 10), and provisions regarding the appointment of senior management and the board of directors (Article 9), all of which are absent from the U.S.-Mozambique treaty. This is not to suggest that the provisions of the 2004 Model BIT are all skewed in favour of foreign investors. Unlike the 1994 Model BIT, the 2004 Model BIT has a provision on the environment (Article 12) and another provision dealing with labor rights (Article 13).

In sum, BITs are not new in U.S. investment policy. Past administrations have used BITs and there is a clear indication that the Obama Administration will continue this trend. A comparison between the U.S.-Mozambique BIT and the U.S.-Rwanda BIT indicate a trend towards even stronger investor protection. As the U.S. commences BIT negotiations with Mauritius and as the U.S. “work[s] to expand the number of bilateral investment treaties with African nations,” the 2004 Model Treaty, unless amended, will be the basis for negotiations. Whether this trend is in the long-term interest of African nations is the critical question that SSA countries must seriously consider. Whether treaties modelled after the 2004 Model Treaty equip African states with the tools needed to reduce their vulnerability to adverse changes in global finance and trade as well as strengthens their resilience or coping mechanisms in the face of deepening global financial crisis, is a question that must be addressed. Have BITs resulted in welfare gains for the countries in Africa that have ratified them? A more fundamental question is, do treaties modelled after the 2004 Model BIT constrain the ability of foreign governments to protect the public interest?

iv. U.S. BIT Program: Areas of Concerns

While the U.S. and other industrialized countries enter into BITs primarily to protect the investment of their citizens in developing countries and encourage free market reforms, developing countries see BITs primarily as a tool to promote investment. However, studies suggest that as a tool for promoting investment, BITs have been a failure. Several questions arise. Going through the 2004 Model BIT and a review of the six existing treaties between the U.S. and countries in SSA, areas of concern include: the broad definition of investment; the provisions on investor-state dispute resolution; the overly broad and much-expanded

provision on expropriation which fails to appropriately distinguish between indirect expropriation and legitimate regulatory governmental action; the likely effect of the provisions on capital transfer on the ability of governments to address financial crisis and instability; the absence of clear and enforceable provisions relating to environmental protection or the protection of worker's rights and other human rights; the absence of broad exceptions, comparable to Article 20 of the General Agreement on Tariffs and Trade; and the absence of provisions establishing obligations for investors and corporations in the communities in which they operate.

1. Negotiation Process:

The announcement that the U.S. was launching negotiations of a BIT with Mauritius suggests that provisions of the 2004 Model BIT are open to negotiation. What room is there really for countries to negotiate the specific provisions of any investment treaty? Although in principle there is room for individual countries to negotiate the terms of their respective treaty with the U.S., in practice, the BITs signed by the U.S. are very similar to the model treaty. A 'take it or leave it approach' in U.S. treaty negotiation is noticeable. An examination of the six BITs that the U.S. has signed with countries in SSA clearly indicates that most of the core provisions of the model treaty are not open to negotiation. Essentially, the U.S. "is committed to the basic structure of the model treaty and will accept only small changes." In transmitting the U.S.-Mozambique BIT to the Senate in 2000, President William J. Clinton specifically noted in his letter of transmittal that the treaty "is based on the 1994 U.S. prototype BIT and satisfies the U.S. principle objectives in bilateral investment negotiations." Are BITs which do not take into account the different economic and social conditions of countries really in the interest of countries in SSA given their diversities? What are the principle objectives of countries in SSA in bilateral investment negotiations? Did past treaties with the U.S. satisfy these objectives? What are the chances that future treaties will satisfy the identified objectives given the limited room that presently exists for serious negotiations? Is it time for countries in the region to develop their own model BITs?

2. Capacity to Negotiate and Involvement of Civil Society Groups:

Regarding the U.S. Mozambique Treaty, although the treaty allows for limited exception to the national treatment and most-favored nation requirement and although the U.S. availed itself of this exception, Mozambique took no exception to the national treatment obligation or its MFN obligation.⁵³ Why? One

⁵³ With respect to its national treatment obligation, U.S. excepted the following sectors: atomic energy; customhouse brokers; licenses for broadcast, common carrier, or aeronautical radio station; COMSAT; subsidies or grants, including government-supported loans, guarantees, and

possible reason could be the lack of preparedness and the lack of capacity to “negotiate” the terms of such a treaty. Another reason is the lack of coordination among the necessary agencies in countries in SSA. For the U.S., BIT negotiations are usually jointly led by the Office of the United States Trade Representative and the Department of State, but with assistance from other departments such as the Department of Commerce and the Department of Treasury and with active involvement of relevant private sectors. For many countries in Africa, investment treaty negotiations and subsequent agreement are often shrouded in mystery with little, if any, involvement of private sector interests and with minimal coordination among the government agencies and departments. This is a problem.

3. Capital Controls:

In light of the financial crisis, concerns about provisions on capital transfer in the 2004 Model BIT have resurfaced. Article 7 of the U.S.-Rwanda BIT, for example, obliges each Party to “permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory.” Transfers cover all assets relating to the investment including: contributions to capital, “profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;” “payments made under a contract, including a loan agreement” and “payments arising out of a dispute.” Further, each Party is required to permit such transfers “to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.”⁵⁴ Does this provision restrict the ability of a country like Rwanda to respond to the current crisis and reduce the chance of future crisis with appropriate regulatory, structural, and macro-economic reforms? The question is pertinent because, as the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System (U.N. Commission) rightly notes, “Developing countries need policy frameworks that can enable them to protect themselves from regulatory and macro-economic failures in systemically significant countries. To achieve this, policy space is a necessary precondition. Policy space is restricted not only by a lack of resources, but also by multilateral and bilateral agreements.”⁵⁵

The U.N. Commission further notes that, although Article 7(4) provides some exception, it does not go far enough. Pursuant to Article 7(4) a Party “may

insurance, State and local measures exempt from Article 1102 of the North American Free Trade Agreement pursuant to Article 1108 thereof; and landing of submarine cables. Regarding its national treatment and MFN obligations, the U.S. took exception for: fisheries; air and marine transport, and related activities; banking, insurance, securities, and other financial services; and one-way satellite transmissions of Direct-to-Home (DTH) and Direct Broadcasting Satellite (DBS) television services and of digital audio services.

⁵⁴ U.S.-Rwanda Treaty, Article 7(2).

⁵⁵

prevent a transfer through the *equitable, non-discriminatory, and good faith application of its laws* relating to: bankruptcy, insolvency, or the protection of the rights of creditors; issuing, trading, or dealing in securities, futures, options, or derivatives; criminal or penal offenses; financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or ensuring compliance with orders or judgments in judicial or administrative proceedings. For one thing, the term “*equitable, non-discriminatory, and good faith application of [] laws*” is very ambiguous and open to interpretation. More important, legitimate measures by governments that are designed to restrict the flow of capital in order to address financial instability are not exempted. In light of a 2009 report by the International Monetary Fund that capital control in several countries mitigated the effects of the financial crisis, provisions in BIT that require full capital account liberalization must be rethought. According to the Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System UN Commission:

“Countries that have fully opened their capital accounts, have engaged in financial market liberalization, and relied on private finance from international capital markets are among those most likely to be most adversely affected. Many countries have come to rely on foreign banks, some from countries that were poorly regulated and that followed inappropriate macro-economic policies and now find their capital badly impaired. These institutions are now repatriating capital, with obvious adverse effects on developing countries. The difficulty is compounded by the fact that many developing countries have entered into free trade agreements (FTA), bilateral investment treaties (BIT) and World Trade Organization (WTO) commitments which enshrine the policies of market fundamentalism ... and limit their ability to regulate financial institutions and instruments or manage capital flows. ...”⁵⁶

In short, capital controls provisions of the 2004 Model BIT may make it impossible for countries to respond to the recommendations regarding necessary regulatory measures needed to address the present crisis and reduce risks of future crisis. As it presently stands, Article 7 of the Model BIT does not provide sufficient policy space that governments need to take measures needed to deal with the present crisis and to forestall future crisis. The UN Commission suggests that “Agreements which restrict countries’ revising their regulatory regimes in light of what has been learned about their deficiencies in this crisis obviously have to be altered.”⁵⁷ More specifically, the U.N. recommends that: “All trade

⁵⁶ Available at <http://www.un.org/ga/president/63/interactive/financialcrisis/PreliminaryReport210509.pdf>

⁵⁷ Available at <http://www.un.org/ga/president/63/interactive/financialcrisis/PreliminaryReport210509.pdf>

agreements ...to be reviewed to ensure that they are consistent with the need for an inclusive and comprehensive international regulatory framework which is conducive to crisis prevention and management, counter-cyclical and prudential safeguards, provision of development and inclusive finance.” According to the commission, “[c]ommitments and existing multilateral agreements (such as GATS) as well as regional trade agreements, which seek greater liberalization of financial flows and services, need to be critically reviewed in terms of their balance of payments effects, macroeconomic stability and financial regulation. This is of particular importance for small and vulnerable economies with weak institutional capacities.”

4. Sustainable Development—Human Rights and Environmental Concerns:

Does the 2004 Model BIT contain provisions that could possibly undermine development? In the preamble to the U.S.-Mozambique treaty, the parties recognized that the agreement “will stimulate the flow of private capital and the economic development of the Parties,” recognized that the development of economic and business ties “*can* promote respect for internationally recognized worker rights,” and agreed that the objectives of the Treaty (investment protection) “*can* be achieved without relaxing health, safety and environmental measures of general application.” Yet, concerns abound regarding several provisions of the Model BIT.

The 2004 Model BIT introduced environmental and labor protection legislations, for the first time. The overall goal of the provisions is to discourage developing countries from lowering environmental and labor rights provisions in order to attract investment. Article 11(1) states:

The Parties recognize that it is *inappropriate* to encourage investment by weakening or reducing the protections afforded in domestic environmental laws.⁵⁸ Accordingly, each Party shall *strive to ensure* that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws *in a manner that weakens or reduces the protections afforded in those laws* as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. *If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.*

⁵⁸ For the United States, “laws” for purposes of this Article means an act of the United States Congress or regulations promulgated pursuant to an act of the United States Congress that is enforceable by action of the federal government.

Article 12(2) goes on to provide that “Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure *otherwise consistent with this Treaty* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.” There are several things wrong with this provision. First, the language is largely aspirational. It is not clear what obligation the “strive to ensure” phrase imposes on host governments. Second, in the event that the section is violated, only consultation between State parties is contemplated, and is not mandatory. Unlike other provisions of the BIT, the environmental and labor provisions are not subject to formal dispute settlement. Third, while Article 12(1) contains a commitment by Parties to enforce their domestic laws, it does not require them to actively adopt measures to protect the environment nor does it commit them to enforce and comply with obligations in international environmental treaties or other agreements that the Parties have ratified. Thus, the provision can be totally ignored where there are no domestic measures in place.

Article 13(1) relating to labor rights is very similar to Article 12(1). “Labor laws” is defined to mean “each Party’s statutes or regulations, or provisions thereof, *that are directly related to*” certain “internationally recognized labor rights” such as the right of association, the right to organize and bargain collectively, and prohibition on the use of any form of forced or compulsory labor or the use of child labor. Article 13 does not impose any positive obligation on host governments to regulate investment activity in ways that do not violate worker’s rights. Article 13 is not triggered where a Party’s laws do not expressly address worker’s rights and, even then, such laws must be directly related to internationally recognized labor rights. Thus, broader human rights are not covered. So what if a host government fails to adopt appropriate legislation to prevent a multinational oil company from spilling oil, thus endangering the lives of citizens in the vicinity? The BIT does not address such legitimate concerns. State parties merely recognize that “it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws.” Each Party merely undertakes to “strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights ... as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.”

5. Questioning Reciprocity. Absence of Any Duty to Promote Investment or Promote Sustainable Development

With the possible exception of South Africa, countries in Africa are not capital-exporting and have nothing to gain, at present, from BITs that afford broad protection to investors. Unfortunately, although the primary reason countries in SSA enter into BITs is to stimulate private capital flows and promote

overall development, BIT partners generally assume no obligation to actively encourage their citizens to invest in countries that have signed these treaties; this is the case with the 2004 Model BIT. Neither the 2004 Model BIT nor the U.S.-Rwanda treaty establishes obligations for investors in the communities where they operate. Furthermore, nowhere in the Model Bit does the U.S. government undertake to encourage companies to invest in countries that sign the U.S BIT or even to undertake mild investor promotion activities. Moreover, there is no convincing evidence to show that BITs actually increase foreign direct investment. The fact that signing a BIT with the U.S. does not necessarily advance the goal of investment promotion is reflected in the absence of any correlation between the existence of such a treaty and the level of U.S. investment in a given country. Of the top five AGOA beneficiary countries, only one (the Republic of Congo) has a BIT with the United States.

U.S. Direct Investment Position (Stock of FDI) in Africa, 2007	Countries that have BITS with the U.S. Ratified and/or Signed
South Africa (\$4.8 billion)	Senegal (1983)
Mauritius (\$2.9 billion)	The Democratic Republic of Congo (1984)
Equatorial Guinea (\$2.2billion)	Cameroon (1986)
Angola (\$876 million)	The Republic of Congo (1990)
Liberia (\$456 million)	Mozambique (1998)
Gabon (\$421 million)	Rwanda (2008)

In his letter transmitting the U.S.-Mozambique treaty to the Senate, President Clinton stated: "It is the U.S. policy ... to advise potential treaty partners during BIT negotiations that conclusion of such a treaty does not necessarily result in increase in private U.S. investment flows."

The foregoing is not to suggest that countries in SSA should not provide an enabling environment for domestic and foreign investors. They should. There is enough evidence to show that factors such as peace and stability, clear rules, transparency, an independent judiciary, and adequate infrastructure drive investment. However, it is one thing to create an enabling environment that encourages and supports investment and quite another thing to sign BITs that afford minimal benefits to host countries, constrain the policy space of developing countries and generally undermine sustainable development efforts. Although President Obama acknowledges in his Ghana speech that the U.S. can do more to promote investment in Africa, there is yet no concrete plan on how this will be achieved.

6. Policy Space:

Does the 2004 Model BIT's provide sufficient policy space for host governments to address development concerns as they arise? Article 14 of the 2004 Model BIT allows for exceptions to four obligations: (i) national treatment;

(ii) MFN treatment; (iii) performance requirement; and (iv) the hiring of senior management and boards of directors. However, countries do not often avail themselves of these exceptions. One reason for this could be the lack of preparation and capacity for BIT “negotiations.” Second, it is frequently impossible for countries to anticipate all the future changes that may make reliance on such exceptions necessary. Regarding the national treatment and MFN obligations, the Model BIT adopts a negative lists approach. Thus, exceptions not taken at the time the treaty is concluded are forever foreclosed.

Article 18 of the 2004 Model BIT (Essential Security Interest) also provides some policy space. Article 18 stipulates that “Nothing in this Treaty shall be construed ... to preclude a Party from applying measures that it considers *necessary* for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or *the protection of its own essential security interests*.” Several questions arise. In the event of an investment dispute, how will terms such as “necessary” and “essential security interests” be construed? Construed broadly, “essential security interests” could include matters that affect the economic life of a nation. Construed narrowly, the term may be limited to threats to the political existence of a nation.

Article 14 is clearly narrow, limited as it is to four BIT obligations. Can a more permissive exception clause be envisaged? Is a provision comparable to Article XX of the General Agreement on Tariffs and Trade (GATT) possible? Such a provision can be crafted to provide blanket exceptions that ensure that developing countries in general and countries in SSA retain the ability to respond to health, safety, and environmental threats as they arise without risking liability under the BIT. Such a broad exception removes the pressure on poor countries to identify, at the outset of “negotiations,” all the areas where an exception might be needed and to include these measures in their non-conforming annexes under Article 14, can make-up for the lack of negotiation capability, and equips countries to address new threats not previously envisaged.

7. Investor-State Dispute Settlement

Under the 2004 Model BIT, an investor is not obliged to exhaust domestic remedies but, in the event of an “investment dispute,” can submit claims directly to international arbitration (Article 24, U.S.-Rwanda BIT). Claimants can bring claims alleging: (i) breach of obligations specified in Articles 3 through 10; (ii) breach of “an investment authorization; (iii) breach on “an investment agreement;” and (iv) that “the claimant has incurred loss or damage by reason of, or arising out of, that breach. The broad definition of the relevant terms lends credence to fears, expressed in some quarters, that the Model BIT exposes governments to suits for regulation adopted to protect vital public interests. For example, the “Investor of a Party” means “a Party or state enterprise thereof, or

a national or an enterprise of a Party, *that attempts to make, is making, or has made an investment* in the territory of the other Party.” An investment agreement means “a written agreement ... between a national authority of a Party and a covered investment or an investor of the other Party that grants the covered investment or investor rights: with respect to natural resources or other assets that a national authority controls; and *upon which the covered investment or the investor relies in establishing or acquiring a covered investment* other than the written agreement itself.” These are very broad definitions that arguably give investors “inappropriate leverage to undermine legitimate measures to promote sustainable development, environmental protection, and human health and safety.” While President Obama, in his speeches, stresses the U.S. commitment to good governance and the rule of law, eliminating the exhaust of domestic remedies requirement removes any incentives developing countries have to establish the rule of law and develop expertise in international investment disputes.

The lack of coherence in interpretations of investment provisions of trade agreements is a major problem today; provisions of BITs that allow investors to directly submit claims to international arbitrators only exacerbates the problem. Given resource constraints, particularly the lack of skilled legal personnel, countries in SSA must be wary about ambiguous provisions in investment agreements that invite ad hoc tribunals to misread domestic laws and broadly construe investor rights guarantees in ways that undermine the interest of host countries. NAFTA cases such as *Ethyl Corporation v. Government of Canada* (challenging statute banning imports of the gasoline additive MMT for use in unleaded gasoline),⁵⁹ *S.D. Myers, Inc. v. Government of Canada* (challenging Canada's ban on the export of PCB wastes),⁶⁰ *Pope & Talbot, Inc., v. Government of Canada* (challenging Canada's implementation of the U.S.-Canada Softwood Lumber Agreement),⁶¹ and *Metalclad Corp. v. United Mexican State*⁶² (challenging Mexican municipality 's refusal to grant construction permits for toxic waste) should serve as a lesson. Significantly, in all four cases claimants alleged violations of provisions of NAFTA relating to national treatment (Article 1102), performance requirement (Article 1106), expropriation (Article 1110) and in three of the cases, the claimant alleged a violation of the NAFTA provision on minimum standard of treatment (Article 1105).

In conclusion, several provisions of the 2004 Model BIT are troubling and should be a concern for countries in SSA. There are real concerns that the Model

⁵⁹ Claimant sought \$201 million. Case settled for \$13 million in favor of Ethyl Corporation.

⁶⁰ Claimant sought \$20. Claimant won and was awarded \$5 million. An award on damages was issued on October 21, 2002 and a final award on costs was issued on December 30, 2002

⁶¹ Claimant initially alleged damages totaling over US\$507 million. Claimant won and was awarded \$461, 566 in damages and interest (under the Softwood Lumber Agreement, Canada agreed to charge a fee on exports of softwood lumber in excess of a certain number of board feet. According to Pope & Talbot, Canada's allocation of the fee-free quota was unfair and inequitable.).

⁶² Claimant sought \$90 million. Claimant won and was awarded \$15.6 million.

BIT encourages investors to engage in predatory action overseas and could bankrupt a nation given the investor-state dispute resolution mechanism. It is estimated that under the North American Free Trade Agreement (NAFTA), governments have paid out about \$69 million in response to corporate challenges to public interest regulations. In addition to the specific provisions discussed above, other troubling provisions include: the provision relating to minimum standard of treatment (too vague and open to different interpretations by ad hoc tribunals), the provision relating to expropriation (“measures equivalent to expropriation or nation” unclear and could be interpreted in ways that hurt host countries), and the provision relating to performance requirement (goes beyond the WTO Agreement on Trade-Related Investment Measures). It is a concern that the Administration hastened to launch BIT negotiations with Mauritius in light of the fact that the 2004 Model BIT is presently under review (infra) and may be changed.

v. Review of 2004 Model BIT Under Obama Administration

In June 2009, the State Department and the USTR asked the Advisory Committee on International Economic Policy (“ACIEP”) to establish a Subcommittee to review the 2004 Model BIT. A Subcommittee, made up of representatives from business, labor, academia, the legal profession and environmental NGOs, was subsequently established. On September 30, the ACIEP presented its report to the State Department.⁶³ Considering that the U.S. model BIT was last updated in 2004, the move to review the model BIT is very significant. Judging by the tone of the ACIEP Report, Africa and the world may see a host of changes to the 2004 Model BIT including: a broadening of the definition of “investment” and “investor,” a broadening and codification of the minimum standard of treatment provision to reflect current US understanding on the subject, an expansion of prohibitions against performance requirements, a strengthening of the transparency obligations of Parties, restriction of the “essential security” exception provision of Article 18.

1. Definition of Investment and Investor:

In its Report, concern was expressed that the definition of “investment” at present may exclude “certain types of nonprofit acquisition abroad.” The report recommends that the Administration “consider confirming (in the BIT or elsewhere) the understanding that the Model BIT does accord BIT protection to [nonprofit] acquisition.” The report also recommends a clarification that the term “investors” covers certain U.S. nonprofit organizations when they make or seek to make investments.

⁶³ *Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty (September 30, 2009).*

2. Broadening of the Minimum Standard of Treatment Provision of Model BIT:

Discussions at the Subcommittee raised concerns about the minimum standard of treatment clause of the 2004 Model BIT which states that “Each Party shall accord to covered investments treatment *in accordance with customary international law*, including *fair and equitable treatment* and *full protection and security*.” The discussions surrounded whether the clause under-protects U.S. investors by referencing public international law and whether there was a need for the U.S. government to codify current understanding of the content of customary international law in this area. Both issues raise concerns for countries in SSA.

Regarding the codification of the current understanding of customary law on the issue, some members of the Subcommittee recommend the codification of the position taken by the State Department in *Glamis Gold Ltd. V. United States*. In this case, the State Department took the position that state practice and *opinio juris* had established the minimum standard of treatment in at least two areas. One area, according to the State Department, is the obligation of a host state to provide internal security and police protection to foreign investors and investment. Another area is the *Neer* Standard—which states that host states are obliged not to “deny justice” by engaging in “notoriously unjust” or egregious” conduct in judicial or administrative proceedings.

Members of the Subcommittee that did not support codification of the current understanding on minimum standard of treatment recommended the elimination of any reference to customary international law from the Model BIT based on the argument that it puts U.S. investors at a significant disadvantage vis-à-vis other foreign competitors. Thus, this group suggests a return to the language used in the 1994 Model BIT which left unqualified the “fair and equitable treatment” and “full protection and security” obligations of host governments.

3. Broadening of Performance Requirement Obligation:

Judging by the Report, the performance requirement provision of the Model BIT may be revised in the future to impose additional requirements on host governments. Some members called for an expansion of the performance requirement “to cover more comprehensively services and technology and intellectual property based performance requirements.”⁶⁴ Others called for the expansion of the requirement to cover services. According to the Report:

“The Subcommittee considered the appropriateness of broadening the prohibition against performance requirements to encompass a? requirement that (a) research, development,

⁶⁴ *Id.*, at 4

testing, innovation, system integration or other activity aimed at generating intellectual property be performed in the territory of a host Party; or (b) that technology developed in the territory of a host Party be required to be used by an investor as a condition for any investment or investment approval.

Even in its present form, the performance requirement clause undermines the ability of host governments to ensure that foreign investment actually promotes and supports sustainable development. Any additional restriction is simply unacceptable and will make it near impossible for countries to meet their national development goals. Incidentally, some members of the Subcommittee recommended the elimination of performance requirements based on the argument that Model BIT should not restrict the ability of developing countries to pursue their national development goals or address climate change.⁶⁵

4. Strengthening of Transparency Requirement:

The transparency requirement in Article 11 and Article 28 of the Model BIT is extensive as is. Under the existing provisions, host governments are obliged to establish contact points to facilitate communication,⁶⁶ publish “in advance” relevant measures that it proposes to adopt,⁶⁷ notify the other party of proposed or actual measures that “might materially affect the operation of [the BIT] or otherwise substantially affect the other Party’s interests under [the BIT],⁶⁸ guarantee due process in proceedings affecting protected investment and investor,⁶⁹ and “establish or maintain judicial, quasi-judicial, or administrative tribunals or procedures for the purposes of prompt review” of administrative actions.⁷⁰ Despite the extensive provisions of the transparency provision, members of the Subcommittee expressed concern “that many of the transparency provisions ... are hedged or qualified”⁷¹ and were of the view that “there is a risk of countries abusing qualifying language when it comes to transparency.” Of particular concern were phrases such as “to the extent possible (Article 11(2)), “whenever possible” (Article 11(4)) and “when time, the nature of proceedings, and the public interest permit” (Article 11(4)).

To make up for the perceived shortcoming, the Report recommends the creation of a new watchdog—a Transparency Council. Although, according to the Report, the Transparency Council, when created, will be charged with advising “the Parties to a BIT on steps that could maximize the transparency of the rule-making process for the benefit of foreign investors, in essence, this body will

⁶⁵ *Id.*

⁶⁶ 2004 Model BIT, Article 11(1).

⁶⁷ *Id.*, Article 11(2).

⁶⁸ *Id.*, Article 11(3).

⁶⁹ *Id.*, Article 11(4).

⁷⁰ *Id.*, Article 11(5).

⁷¹ ACIEP Report, *supra* note 63, at 7.

exist primary to second-guess decisions of developing countries. Even more troubling is the recommendation made by the Subcommittee for the Administration to insert into Article 11, a new clause that states that:

“Each Party shall allow persons of the other Party to participate in the development of standards, technical regulations, and conformity assessment procedures that affect investors and to do so on terms no less favorable than those it accords to its own persons. When non-governmental bodies carry out the foregoing activity, each Party shall recommend that such non-governmental bodies in its territory observe this obligation in developing standards and voluntary conformity assessment procedures.”⁷²

5. Restriction of the Environmental Protection Provision:

The minimal provisions on environmental protection and worker’s rights espoused in the Model BIT are in jeopardy judging by the concerns expressed by some Subcommittee members regarding the operation of these provisions. The environmental provisions appeared for the first time in the 2004 Model BIT but they contain aspirational language. While some members of the Subcommittee supported strengthening the environmental provisions, others vigorously opposed the idea.

In conclusion, although the 2004 Model BIT, more than earlier models, emphasized the need for states to regulate the public interest, it also granted more protection to investors by, for example, introducing procedural rules guaranteeing greater transparency and broadening provisions on expropriation and minimum standard of treatment. From a developing country's perspective, the 2004 Model Bit is biased in favor of investors and did not strike the right balance between investor/investment protection and public interest protection, nor did it purport to strike a balance between the interests of capital exporters and the interest of capital importers. The current review has undoubtedly reinvigorated interesting debates over the development implications of BITs.

The fundamental question is: are BITs designed to advance a singular purpose (investor protection) or are they designed to achieve multiple purposes (e.g. environmental protection)? A member of the Subcommittee, Sean Heather, Executive Director—International Divisions for the U.S. Chamber of Commerce, has argued that “BITs by design have the singular purpose of protecting investment by the private sector from actions by governments that unfairly and adversely impact that investment.” Conversely, he argues that “BITs aren’t designed nor should they be used to achieve other important objectives such as raising labor and environmental standards, which are the ambit of other international institutions and agreements.”

⁷² *Id.*, Article 7.

It remains to be seen whether the current review will bring about positive change in the interest of developing countries. Judging by the division among Subcommittee members it is hard to discern the future. Fundamental differences in the opinions held by members of the Subcommittee should come as a relief to developing countries. However, many members of the Subcommittee argued that a strong BIT was important for U.S. investors, urged a more aggressive BIT negotiation program, suggested that the U.S. BIT program was weak compared to the programs of other industrialized countries, and expressed concerns that anything short of a “strong,” “high quality” BIT will undermine the international competitiveness of U.S. companies. For example, Sean Heather, Executive Director—International Divisions for the U.S. Chamber of Commerce, laments the fact that “[w]ith some 2,676 international investment instruments in force worldwide, the U.S. is only party to 47,”⁷³ and argues that many of the BITs negotiated by other countries “include greater protection for investors of those countries than does [U.S.] Model BIT.” Consequently, he suggests that the Administration, “begin to aggressively pursue and launch BIT negotiations with key trading partners,”⁷⁴ and urges that “changes as a result of [current] review must not further erode investor protections, but must instead strengthen them.”⁷⁵ Particularly as it engages oil producing countries in SSA, the administration will be under considerable pressure to pursue an aggressive BIT agenda. Toni Hennike, Coordinator—International Investment & Arbitration Law Department with Exxon Mobil, argues that strong BITs “are particularly important in the oil & gas sector where investments in the billions of dollars are not uncommon.”⁷⁶ According to him, U.S. investors in overseas oil & gas projects had two main concerns regarding the existing United States BIT program. First, they were concerned that protections in the 2004 Model BIT “are often weaker than those found in the BITs of other countries.” Second, they are also worried that other countries, particularly the European Union, “have signed BITs with many more hydrocarbon producing countries than has the United States. Clearly, were U.S. investors in oversea oil and gas projects to have their way, a wider (in terms of countries reached), much deeper (in terms of scope of BITs) and stronger (in terms of obligations imposed on host governments) BIT program would result.

In Ghana, President Obama stated that “America can do more to promote investment in Africa.” During the presidential campaign, the Democratic National Convention vowed: “We will not negotiate free trade agreements that stop the government from protecting the environment, food safety or the health of its citizens, give greater rights to foreign investors than to U.S. investors, require the privatization of our vital public services, or prevent developing country governments from adopting humanitarian licensing policies to improve access to life-saving medications. We will stand firm against agreements that fail to live up

⁷³ *Id.*, Annex B, at 24.

⁷⁴ *Id.*, at 24.

⁷⁵ *Id.*, at 24.

⁷⁶ *Id.*, at 26.

to these important benchmarks.”⁷⁷ Whether these campaign pledges will be respected remains to be seen.

For its part, countries in SSA must individually and collectively reassess their goals with respect to foreign investment and investment agreements. Long before they are drawn to the negotiating table, they must determine what is acceptable and what is not. These decisions must be informed by the views of ordinary citizens. Even in the U.S., concerns about expansive foreign investor rights abound and cross party lines.⁷⁸ In light of the scramble for energy resources, African leaders must tread carefully and avoid commitments that essentially give away the continent's natural resources and undermine sustainable development. They must also seek to influence decisions in Washington regarding possible amendments to the 2004 Model BIT. On July 29, 2009, the USTR and the Department of State hosted a public meeting concerning the Administration's review of the 2004 Model BIT and also invited written submissions from the public. Significantly, no African embassy or non-governmental organization specifically representing African interest submitted written comments on the 2004 Model BIT.

c. Free Trade Agreements (AGOA)

Although the U.S. Secretary of State hinted during her AGOA remarks that Ambassador Kirk will separately address the issue of product diversification, no concrete initiative has emerged on the subject. However, evidence and reports suggest that reform is very important and overdue.

i. AGOA: Progress and Setbacks

Signed into law in 2009, AGOA is a U.S. trade preference program that is intended to help integrate Africa into the global environment and stimulate economic growth in the continent. Under AGOA, eligible SSA countries enjoy duty-free access to U.S. market for qualifying goods. Although all 48 countries in SSA are potentially eligible to utilize AGOA, only 40 currently qualify; a fewer group of countries are eligible for textile and apparel benefits under AGOA.

⁷⁷ Democratic National Convention Committee, “The 2008 Democratic Party Platform: Renewing America's Progress,” August 25, 2008. Available at <http://www.democrats.org/a/party/platform.html>.

⁷⁸ Expressing his concerns regarding the Central America Free Trade Agreement (CAFTA), Former Rep. Butch Otter (presently the Republican governor of Idaho), stated: “I'd like to draw your attention to the fact that CAFTA contains 1,000 pages of international law establishing, among other things, property rights for foreign investors that may impose restrictions on U.S. land-use policy. Chapter 10 of CAFTA outlines a system under which foreign investors operating in the United States are granted greater property rights than U.S. law provides for our own citizens! Mr. Speaker, that's not encouraging free trade. That's giving away our natural resources and our national sovereignty.” Rep. Clement LeRoy “Butch” Otter (R-Idaho), Floor Statement on CAFTA, July 29, 2005.

Although Africa export has increased under AGOA, they remain negligible and are concentrated in a few industries. In 2008, U.S. imports under the AGOA were \$66.3 billion (representing a 29.8 percent increase over 2007 figures). However, petroleum products “continued to account for the largest portion of AGOA imports with a 92.3 percent share of overall AGOA imports.”⁷⁹ Petroleum products alone accounted for 92.3 percent of overall AGOA imports in 2008. Excluding fuel products, AGOA imports in 2008 stood at \$5.1 billion (increasing by 51.2 percent). However, much of the non-energy product increase “was due to a 224.8 percent increase in imports of AGOA transportation equipment, virtually all from South Africa.”⁸⁰

Trends in the textile and apparel sector are particularly worrying given earlier expectations that, under AGOA, the sector will help to deepen Africa’s industrial base. In 2008, AGOA textiles and apparel imports declined by 10.4 percent.⁸¹ Between 2000 and 2004, U.S. imports of textile and apparel products from SSA increased from \$776 million to about \$1.8 billion. 2004 was the turning point with the removal of quotas under the Multi-Fiber Arrangement (MFA). Between 2004 and 2008, U.S. imports of textile and apparel products from SSA declined by about one-third, falling to \$1.2 billion.⁸² Current figures show that AGOA textile and apparel imports represent a miserly 1.3 percent of total U.S. imports of these products. In comparison, China, Bangladesh and Cambodia account for 35, 3.8, and 2.6 percent, respectively of U.S. imports of the same products.

In addition to supply side constraints, preference erosion, uncertainties regarding the duration of AGOA, complicated and narrow rules of origin, exclusion of certain key products are all factors that presently limit the benefits possible under AGOA. Regarding duration, AGOA is set to expire in 2015, while the third-country fabric provision is set to expire in 2012; this creates uncertainties and discourages long-term investment in relevant sectors. Making AGOA benefits more permanent will enhance predictability and encourage necessary investment.

ii. The U.S. Government Accountability Office Report

In the 2008 Andean Trade preference Extension legislation, Congress called for a report with recommendations for changes to the U.S. preference programs “to provide incentives to increase investment and other measures necessary to improve the competitiveness of beneficiary sub-Saharan African

⁷⁹ U.S.-African Trade Profile, *supra* note 3.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² U.S. Government Accountability Office, U.S.-Africa Trade: Options for Congressional Consideration to Improve Textile and Apparel Sector Competitiveness under the African Growth and Opportunity Act, August 2009 (hereinafter “GAO AGOA Report.”).

countries in the production of yarns, fabrics, and other textile and apparel inputs....”⁸³ The August 2009 report of the Government Accountability Office (GAO), which focused exclusively on the textile and apparel sector, found that: although the AGOA preference scheme reduces the competitive edge of low-cost Asian producers, “duty-free access alone may not overcome the advantages Asian producers enjoy due to long-standing, established trade channels.” The Report identified four obstacles to effective utilization of AGOA preference: (a) “Africa’s lack of resources to significantly improve its trade infrastructure,” (b) “underdeveloped production facilities” which “increase the cost of production while reducing quality and variety,” (c) “SSA’s challenging business climate, primary corruption and political instability,” which discourage new and increased investment in the region, and (d) uncertainty about AGOA’s duration and preference erosion which together further limit the attractiveness of beneficiary countries for foreign and domestic investors.⁸⁴ Four issue areas identified in the Report where possible changes to AGOA could be made to include (1) “extending the duration of AGOA provisions and making AGOA permanent,” (2) “expanding AGOA LDC benefits to all beneficiaries and duty-free eligibility for other textile products,” (3) “creating non-punitive and voluntary incentives,” and (4) “preserving existing benefits under AGOA and modifying other preference programs and trade agreements.”

iii. The Obama Administration and AGOA

Member of the Obama Administration attended the 8th AGOA Forum – the first under the Administration. In her remarks at the AGOA Forum, the Secretary of State stated that in his op-ed piece – a piece that was placed in newspapers across Africa – Ambassador Ron Kirk “laid out some of the potential opportunities to work with in order to maximize the promise of AGOA.” However, a close reading of the said op-ed piece does not reveal any new initiative or suggest that positive changes were in the horizon. While noting that the AGOA Forum was “an opportune time to discuss new strategies that can build on AGOA’s achievements and set a new path for U.S.-Africa trade and investment,” and stating that he was “committed to finding new solutions to the challenges facing African exporters and new ways to realize the potential of AGOA,” Ambassador Kirk did not directly address any of the specific concerns countries in SSA have regarding AGOA. The Ambassador offered “key considerations” that he thought should be taken into account regarding AGOA’s future: (i) trade diversification and expansion, (ii) improving AGOA utilization, (iii) expanded trade in both directions, and (iv) regional economic integration, and (iv) prioritizing aid for trade.

Regarding trade expansion and diversification, the Ambassador emphasized the need for Africans to improve the business environment in their countries and nurture entrepreneurial. With respect to Doha Round negotiations,

⁸³ Pub.L. 110-436, sec. 3(c)(2).

⁸⁴ GAO AGOA Report, *supra* note 82, at 11.

the Ambassador was very ambivalent and simply noted that “[a]n ambitious and balanced outcome of the World Trade Organization’s Doha Round negotiations *could* also help Africa to reap more benefits from the global trading system.” On AGOA, the Ambassador soundly rejected calls for the U.S. to expand the number of products covered. According to him, “[t]he answer is not expanding the list of AGOA products - almost everything is already covered - *but in increasing the utilization of AGOA.*”⁸⁵ Although almost every product is covered under AGOA, it is what is not covered that is significant; products such as cocoa, tobacco, peanuts, and other product deemed “import-sensitive” are not covered. The Ambassador also did not address uncertainties surrounding AGOA’s future – will the program be extended beyond 2015? On the issue of the need for trade in both directions, the Ambassador emphasized Africa’s responsibility in this regard and called on Africans to “intensify efforts to address trade barriers affecting U.S. exporters in their countries.” On Aid for Trade, needed to support trade capacity building in Africa, the Ambassador noted that the Obama Administration “is committed to supporting trade capacity building assistance” quickly adding that “African countries must also do their part by making trade a priority in their development programs and ensuring that funds are wisely targeted.”

Thus, after the Administration’s first AGOA Forum and in the light of the Ambassador’s widely publicized op-ed, it is difficult to ascertain how the Administration will proceed on AGOA and other trade issues of concern to Africa. The Ambassador did not address majors concern of African producers such as AGOA’s complicated and narrow rules of origin requirements or the preference erosion that will result if the U.S. extended AGOA-type benefits to other poor countries outside Africa. The idea of shared responsibility – stressed in speeches by President Obama, the Secretary of State, and Ambassador Kirk – is an important and very legitimate principle that African must embrace. Addressing supply-side constraints to effective utilization of AGOA is first and foremost the responsibility of governments in SSA. Nevertheless, the principle of shared responsibility requires better clarity on the Administration’s commitment to the continent and calls for specific initiatives that can address specific obstacles to African trade and improve Africa’s trade competitiveness. AGOA is underutilized in part because many value-added manufactured goods do not enjoy AGOA benefits. Thus, specialized products such as luggage that contain synthetic fabric do not enjoy duty-free treatment.⁸⁶ On Aid for trade, there are a host of possibilities that the Administration can consider including: new, sustained and targeted funding for trade capacity building that go beyond funding regional hubs.

VI. President Obama’s Global Hunger and Food Security Initiative (“Initiative”)

a. L’Aquila Food Security Initiative and The Global Hunger and Food Security Initiative

⁸⁵ *Emphasis added.*

⁸⁶ GAO AGOA Report, *supra* note 82, at 15.

In July 2009, at the L'Aquila G8 Summit, donors pledged to raise \$20 billion over the next three years for food and agricultural aid to the world's most impoverished countries. On July 10, G8 Partners adopted the L'Aquila Joint Statement on Global Food Security and created a new initiative – L'Aquila Food Security Initiative.⁸⁷ Pursuant to the Joint Statement, G8 Partners made several commitments:

- **Commitment 1** - Partnership with vulnerable countries based on five core principles: comprehensive approach, country-led plans, strategic coordination, leveraging the benefits of multilateral institutions and sustained and accountable commitment.⁸⁸
- **Commitment 2** – Increased investment in agriculture development.⁸⁹
- **Commitment 3**: Reduce trade distortion and address new barriers to trade and investment.⁹⁰
- **Commitment 4** – Strength global and regional for food security.⁹¹
- **Commitment 5** – Implementation of the Global partnership for Agriculture and Food Security⁹².
- **Commitment 6** – Support for country and regional agricultural strategies.⁹³
- **Commitment 7** – New resources in support of CAADP⁹⁴

⁸⁷ In the Joint Statement, G8 Partners expressed deep concern “about global food security, the impact of the global financial and economic crisis and last year’s spike in food prices on the countries least able to respond to increased hunger and poverty” and noted that the combined effect of longstanding underinvestment in agriculture and food security, price trends and the economic crisis have led to increased hunger and poverty in developing countries, plunging more than a further 100 million people into extreme poverty and jeopardising the progress achieved so far in meeting the Millennium Development Goals.”

⁸⁸ “We will partner with vulnerable countries and regions to help them develop and implement their own food security strategies, and together substantially increase sustained commitments of financial and technical assistance to invest in those strategies. “

⁸⁹ “We are committed to increase investments in short, medium and long term agriculture development that directly benefits the poorest and makes best use of international institutions.”

⁹⁰ “We are therefore committed to reduce trade distortions and refrain from raising new barriers to trade and investment and from implementing WTO-inconsistent measures to stimulate exports.”

Id.,

⁹¹ “we support the fundamental reform processes underway in the FAO, the Committee on World Food Security, the Consultative Group on International Agricultural Research and the global agricultural research system through the Global Forum on Agricultural Research.” *Id.*, para 9.

⁹² “We pledge to advance by the end of 2009 – consistent with our other actions aimed at an improved global governance for food security – the implementation of the Global Partnership for Agriculture and Food Security.” *Id.*, para. 10..

⁹³ “We support the implementation of country and regional agricultural strategies and plans through country-led coordination processes, consistent with the Accra Agenda for Action and leveraging on the Comprehensive Framework for Action of the UN High Level Task Force and on existing donor coordination mechanisms.” *Id.*, para. 10.

⁹⁴ “In Africa, NEPAD’s Comprehensive Africa Agriculture Development Program (CAADP) is an effective vehicle for ensuring that resources are targeted to a country’s plans and priorities.... We commit to provide resources – whether financial, in-kind or technical assistance – in support of CAADP and other similar regional and national plans in Africa”

- **Commitment 8** – Mobilization of \$20 billion over three years.⁹⁵

The U.S. pledged to contribute at least \$3.5 billion over the next three years to this worldwide effort. In a July 9 press release, the White House noted the fact that “the global economic and financial crisis threatens the livelihoods of many of the world’s poorest people,”⁹⁶ the fact that “[w]hile commodity prices are lower, food prices remain 40% higher than historical levels,”⁹⁷ and the fact that “the contraction of global economic activity has reduced exports and incomes among farmers in developing countries.”⁹⁸ Even more important, the White House observed that “[a]lthough 75% of the world’s poor live in rural areas and 60% of those suffering from hunger are rural small-scale farming families, only 4% of official development assistance goes to agriculture.”⁹⁹ The Obama Administration promises that the Initiative represents not just a commitment of resources, “but also a commitment to reform the way the international community approaches food security.”¹⁰⁰ On September 28, the State Department released the Global Hunger and Food Security Initiative: Consultation Document (“Consultation Document”).¹⁰¹ The Consultation Document endorses the five principles established at L’Aquila.

i. A Comprehensive Approach: According to the Consultation Document, a comprehensive approach will advance three key objectives: “[i]ncrease sustainable market-led growth across the entire food production and market chain;” “[p]revent and treat under-nutrition;” and “Increase the impact of humanitarian food assistance and social safety-nets.” Seven key areas of potential investment are identified: (1) Improve Productivity; (2) Expand Market and Trade; (3) Spur Regional Integration; (4) Harness Global Innovation and Research; (5) Women and Those Who Are Very Poor; (6) Reduce Under-Nutrition; and (7) Increase the Impact of Humanitarian Assistance. With respect to the goal of improving productivity, examples of the types of investment the U.S. will make include: increase access to inputs, expand access to knowledge, increase access to financial services and improve natural resource management. Regarding the goal of expanding market and trade, a key concern of SSA, the Consultation Document notes rightly that “Improvements in productivity will not translate into higher farm incomes and reduced hunger unless surplus harvest

⁹⁵ “We will aim at substantially increasing aid to agriculture and food security including through multiyear resource commitments. In this respect, we welcome the commitments made by countries represented at L’Aquila towards a goal of mobilizing \$20 billion over three years through this coordinated, comprehensive strategy focused on sustainable agriculture development, while keeping a strong commitment to ensure adequate emergency food aid assistance.” *Id.*, para. 12.

⁹⁶ The White House (Office of the Press Secretary), *Food Security: Investing in Agricultural Development to Reduce Hunger and Poverty*, July 10, 2009.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Bureau of Public Affairs, Department of State, *The Global Hunger and Food Security Initiative: Consultation Document*, September 28, 2009.

and products can be sold in local, regional, and international markets.”¹⁰² Examples of potential investments the U.S. will make include: expanding market information, improving post-harvest market infrastructure and creating an enabling policy environment for agribusiness growth. With respect to women and the very poor, the U.S. effort will “focus on linking these groups to new opportunities throughout agriculture and market value chains,” “work to identify and address the policy constraints which prevent greater participation in these value chains,” “[a]dapt or target interventions ... to the needs of women and the very poor;” “[p]rioritize labor-saving technologies;” and “[e]ngage in dialogue at all levels ... to raise awareness of the value of women and the very poor to foster greater agricultural growth.”¹⁰³

ii. **Country-Led Plans:** Discussions about the optimal way to develop and implement country-led plans are still underway. It is not exactly clear what the final modality will be. The U.S. promises to “work with partner countries to develop sound investment plans that are grounded in a comprehensive framework, include a needs-based assessment, and have a realistic estimate of the impact of [U.S.] investments.”¹⁰⁴ At this stage, it is not clear what political calculations, if any, will go into the country-selection decisions. The Consultation Document suggests that decisions will be based on objective factors. The U.S. will invest in country plans that: (1) “Ensure[s] the participation of key groups, including farmers and civil society organizations, and prioritize small holder farmers, especially women;” (2) “Use[s] the best available data to prioritize those geographic regions with the greatest need and opportunity for agricultural development;” (3) “Prescribe[s] strategies for creating policy and regulatory environments that accelerate agriculture-led growth;” (4) “Include government commitments that allocate a significant portion of the national budget to agriculture and food security and to policy reform that promotes private sector investment;” (4) “Provide[s] protection of natural resources and support for environmentally sustainable growth;” and “Contain targets, benchmarks, and a system for publicly tracking progress towards clearly established goals.”

iii. **Improving Strategic Coordination:** At the country-level, the U.S. promises to “invest in strengthening the capacity of countries to convene stakeholders and ensure that all stakeholders are able to participate in the planning process from the start,” and also to “coordinate joint action and financing to support country-led plans.” At the global level, U.S. commits to support the newly establish Global Partnership for Agriculture and Food Security (GPAFS) – a new facility that donors hope will convene stakeholders to global stakeholders to participate in dialogue, tracks stakeholder commitments and programs, and disseminates information about current global needs. The Consultative Document also hints at changes in the way things are done in the

¹⁰² *Id.*, at 5.

¹⁰³ *Id.*, at 8.

¹⁰⁴ *Id.*, at 10.

U.S. A “whole-of-government strategy” as well as a new position, that of a U.S. Global Food Security Coordinator, is envisaged. The consultation Document states that “[k]ey government agencies will be involved in all aspects of the planning and implementation of this strategy, both in Washington and in the field,” and that the U.S. initiative “will be monitored and evaluated using indicators, targets, and benchmarks.”

iv. Leveraging the Benefits of Multilateral Mechanisms: The U.S. promises multilateral rather than unilateral approach to development. The Consultation Document notes that multilateral institutions “can efficiently deliver global resources for food security, complement bilateral activities, and strengthen in-country donor coordination processes,” and suggests that in advancing the Initiative, the U.S. will work closely with institutions such as the World Bank, regional development banks, the International Fund for Agriculture and Development (IFAD), the UN Food and Agricultural Organization (FAO), and the World Food Program (FAO). The Consultative Document is silent on the issue of possible reform of the Bretton Woods institutions.

v. Sustained Commitment and Public Accountability:

According to the Consultative Document, donors and partner countries must set benchmarks and targets and be held publicly accountable to these targets. This principle of accountability calls for robust tools to monitor and track pledged commitments and the humility to learn from investments and make corrections as they go.

The Consultation Document maps out a very ambitious agenda for the Obama Administration. It is not clear how much of what is promised will remain as in-puts are received from U.S. stakeholders and the global community. The State Department notes that the document “is a work in progress and will continue to be expanded and refined over the coming weeks and months.” The State Department has invited input from the U.S. and global community; this is clearly an opportunity for Africans and African Diaspora Community to participate in discussions at an early stage. Underlying the emerging and growing global food crisis are fundamental structural changes in agriculture that are exacerbated by factors such as rising energy costs, climate change, droughts, etc. The threats to the food supply system can only be countered by fundamental changes in agricultural production and foreign assistance. The Global Hunger and Food Security Initiative promises such a change; whether it can deliver on the promise is a different question

b. The Initiatives: A Turning Point or an Old Wine in a New Wine Skin?

Commitment to invest on agriculture, food security and rural development is not new. For example, in April 2008, the UN Secretary General Ban Ki-moon

established the High Level Task force (HLTF) on the Global Food Security Crisis. The FAO High Level Conference on World Food Security was convened in June 2008 in Rome also to address food security. G8 leaders also addressed the food crisis during their meeting in Hokkaido Toyako in July 2008, during the High Level Meeting on Food Security for All in Madrid in January 2009. The various meetings in 2008 resulted in:

- the development of a Comprehensive Framework for Action (CFA) by the HLTF,¹⁰⁵
- the Global Partnership for Agriculture for Agriculture and Food Security,
- a Declaration on World Food Security (2008), adopted following the FAO conference,¹⁰⁶
- the Toyako Leaders Statement on Global Food Security (2008),¹⁰⁷ and
- the creation of a G8 Expert Group on Global Food Security.

In short, in many respects, neither the Obama's Initiative nor the L'Aquila Initiative is new. Even before President Obama assumed office, G8 leaders had made numerous commitments on food security that are yet to be realized. The question today is - will G8 Partners in general and the Obama Administration in particular be able to translate lofty principles into action? There are many thorny issues to be resolved:

- **Committed Funding:** Will the Obama Administration be able to translate lofty principles into action? Will the U.S. Congress appropriate funding for the Initiative? With issues like health care reform, the wars in Afghanistan and Iran, Iran and North Korea nuclear threats on the table, there is no indication that the Initiative is a priority for the U.S. Congress. A three-day World Summit on Food Security¹⁰⁸ ended on November 18 with yet another declaration from world leaders pledging renewed commitment to eradicate hunger but failing to commit to precise promises of funding. The declaration lacks target figure, timeframe, or binding commitment on key issues. The near total absence of rich country leaders from the summit was remarkable. Of the G8 leaders, only Italian Premier Silvio Berlusconi, who chaired the opening session, attended. The U.N.'s

¹⁰⁵ The CFA represents the consensus view on how to respond to respond to the global food crisis and invest in Agriculture.

¹⁰⁶ Pursuant to the Declaration, the international community committed to establish short, medium and long term actions to eliminate hunger and secure food for all.

¹⁰⁷ Under the Toyako Leaders Statement on Global Food Security, G8 members committed to undertake all possible measures to ensure global food security. It is estimated that since January 2008, G8 members have committed about US\$10 billion to support the commitments they made.

¹⁰⁸ World Summit on Food Security, Rome, November 16-18, 2009.

appeal to World leaders to commit themselves to \$44 billion annually in agricultural development aid was soundly rejected.¹⁰⁹ In his appeal for sustained funding, Jacques Diouf, the Director General of the Food and Agriculture Organization, grimly observed that:

"Eliminating hunger from the face of Earth requires US\$44 billion of official development assistance per year to be invested in infrastructure, technology and modern inputs. It is a small amount if we consider the \$365 billion of agriculture producer support in OECD countries in 2007, and if we consider the \$1,340 billion of military expenditures by the world in the same year."

While pleased that the World Summit centered on an important problem, Ecuador's agriculture minister Dr. Ramon Espinel regretted that "what has been declared is not enough, even though some contributions are in the right direction, such as the 20 billion from the L'Aquila summit."

- **Tied Food Aid/U.S Farm Interest:** In his speech in Ghana, President Obama observed that too little foreign assistance was reaching those who need it because of tied food aid: "One of the concerns that I have with our aid policy generally is that Western consultants and administrative costs have been gobbling huge percentages of our aid overall." But, can the Obama's Administration make good on the promise to end tied food aid given anticipated opposition from U.S. farmers and the U.S. transportation mechanism? The Consultation Document makes no mention of the U.S. food aid program and the problem it presently poses for poor farmers around the world nor does it suggest that any change is imminent. Although the U.S. devoted \$2.3 billion to food aid in 2008 and \$2.7 billion has been set aside for the 2009 fiscal year, "nearly 100 percent of American support is in the form of home-grown crops, *not money*."

The largest food aid program in the U.S., the Food for Peace, requires that a minimum of 75 percent of all food aid must be in the form of American-grown crops purchased from U.S. growers and processed through U.S. companies. Not surprising, "[the real winners in a U.S. food aid program are American agricultural companies."¹¹⁰ At the recently concluded World Summit on Food Security, Ecuador's agriculture minister voiced the collective fear of developing countries regarding food aid and empty declarations. According to him, "We think this is not enough because it may stay just a declaration. If we follow the path of what has happened before, this (money) may come as food aid, which is not what our

¹⁰⁹ Associated Press, U.N. World Food Summit Ends With 'Crumbs' in Hunger fight, <http://www.google.com/hostednews/ap/article/ALeqM5jeEimi-fD79vUG9uVWzcG7e-A9oAD9C1UT6G0>

¹¹⁰ Not surprising, in April 2008, Cargill reported an 86 percent jump in profits and realized \$1 billion in quarterly profits. Monsanto also reported a \$1.4 billion increase in quarterly profits – a 45 percent increase in profit.

countries need.”¹¹¹ A recent Government Accountability (GAO) Report concluded that the federal law requiring most international food aid to come from U.S. farmers could be “hobbling efforts to feed the world's hungry.” 40 percent of World Food Program’s budget comes from the United States, and about 90 percent of that is in-kind only. Experts believe that a shift to cash aid in Washington would have dramatic effects on WFP operation and effectiveness.

Experts agree that food aid costs and delivery time can be reduced through local and regional procurement (LRP). However, there appears to be little support in Washington for complete transition to an LRP model. According to the Washington Independent, arguments for cash offers in place of in-kind food aid “is one that hasn’t gotten very far on Capitol Hill.” President George W. Bush’s proposal, made each year during the second half of his tenure in the White House, that up to 25 percent of the Food for Peace funding (about \$2 billion a year) go to support LRP went nowhere in Congress.¹¹² According to the Washington Independent, “Many lawmakers have suggested that moving Food for Peace toward a cash-aid system would erode congressional support for the program altogether, threatening its very existence.”¹¹³ Quite apart from the farming and transportation interests, some in Washington have raised questions about the effectiveness and sustainability of LRP. In his testimony before the House Foreign Affairs subpanel on Africa and global health, Thomas Melito, director of GAO’s international affairs and trade team, cautioned that there is as yet no clear indication that any boost from a shift to LRP would be sustainable. Bud Philbrook, deputy under secretary of Farm and Foreign Agricultural Services of the Department of Agriculture thinks that “market intelligence is crucial,” and calls for caution in approaching LRP concept given the dearth of data.

- **Stakeholder involvement:** Are the people whose lives are most threatened by the food crisis and who are likely to be most affected by the Initiative – e.g. women and small farmers – involved in the discussion? According to the Consultation Document, the U.S. strategy “is being developed through a consultative process within the U.S. government *and with the global community and other stakeholders*, including foundations, universities, non-governmental organizations, and the private sector.” Thus far, it is not clear how the voices of Africa women are being heard. It is not clear what mechanisms have been or will be established to ensure that the voices of the real stakeholders are heard.

- **Transparency in Aid Delivery:** It is not yet clear what, if any, mechanism will be established to monitor whether pledges made by the U.S. and other donors are actually respected. There is presently a pending legislation,

¹¹¹ Paul Virgo, Hunger Summit Passes Toothless Declaration, <http://www.ipsnews.net/news.asp?idnews=49283>

¹¹² *Id.*

¹¹³ Mike Lillis, *Food Aid Program Helps U.S. Farms, Hobbles Anti-Hunger Efforts*, The Washington Independent, 6/5/09, <http://washingtonindependent.com/45713/food-aid-program-helps-us-farms-hobbles-anti-hunger-efforts>

Foreign Assistance Revitalization and Accountability Act of 2009 that, if passed, would create an independent Council on Research and Evaluation of Foreign Assistance (CORE) to evaluate the impact of all U.S. foreign aid programs.

c. New Legislative Initiatives

Since President Obama assumed office, two pieces of legislation have been introduced in Congress that can have considerable impact on U.S. foreign policy. The Global Food Security Act of 2009 (S.384) was introduced on February 5, 2009, and the Foreign Assistance Revitalization and Accountability Act of 2009 (S.1524) was introduced on July 28, 2009. Neither bill has been voted on by the full senate, however.

1. The Global Food Security Act of 2009 (S.384)

S. 384 was placed on the Senate Legislative Calendar on May 13, 2009. The stated purpose of S. 384 is bill “to authorize appropriations for fiscal years 2010 through 2014 to provide assistance to foreign countries to promote food security, to stimulate rural economies, and to improve emergency response to food crises, to amend the Foreign Assistance Act of 1961, and for other purposes.” In general, the bill calls for a comprehensive food security strategy.

One aspect of the bill defines the policy objective the bill and addresses the planning and coordination of any program that is created. This bill, if approved, will: (1) create a Special Coordinator for Global Food Security (Sec. 102); (2) instructs the President to establish a comprehensive food security strategy that is based on a whole-of-government approach, encourages multi-stakeholder involvement, incorporates approaches directed at reaching women living in poverty, includes “specific and measurable goals, benchmarks and time frames, and a plan of action, encourages public-private alliances, and that “provides annual monitoring and evaluation.” The bill also calls for an annual report to Congress from the President/Special Coordinator and an additional report from the Government Accountability Office containing a review of the report by the President and recommendations that the Controller General “believes are important to improve a global food security strategy.” In addition, the bill calls for a detailed program review no later than 4 year after the enactment of the Act.

Another aspect of the bill focuses on bilateral programs of the U.S. Section 201 amends Section 103(a)(1) of the Foreign Assistance Act of 1961 to allow the President address agriculture, rural development, and nutrition. More important, it authorizes appropriation to the President to provide foreign assistance, in addition to funds otherwise available for such purposes, in the following amount: \$750 million in FY2010, \$1 billion for fiscal year 2011; \$1.5

billion for fiscal year 2012; \$2 billion for fiscal year 2013; and \$2.5 billion for fiscal year 2014.

The bill also creates a new program that can have a positive impact on Africa - Higher Education Collaboration for Technology, Agriculture, Research, and Extension (HECTARE). The goal is the development of higher education capacity in the field of agriculture. The purpose of Title III of the Bill is to “authorize United States assistance that promotes food security, agriculture productivity, rural development, poverty and malnutrition alleviation, and environmental sustainability by engaging the expertise of United States institutions of higher education in collaboration with public and private institutions in developing countries.” It calls for “multi-year assistance plans” that is “consistent with national development strategies,” include partnerships with U.S. and other institutions of higher learning, and identify appropriate channels for the dissemination of farming technologies to the field.

Many aspects of this bill are commendable, for example, the funding for emergency relief, agricultural development and nutrition programs, and higher education programs in developing countries that emphasize agriculture and the support for university partnerships in furtherance of developing countries’ agricultural. The bill clearly has potential to strengthen national agricultural research systems in developing countries. Regarding emergency food aid, the bill *authorizes* to be appropriated to the President from time to time “such sums as may be necessary” to meet “unexpected urgent food assistance needs” in a country. The bill authorizes the president “whenever [he] determines it to be important to the national interest,” to “furnish on such terms and conditions as he may determine appropriate assistance ... for the purpose of meeting unexpected urgent food assistance needs, notwithstanding any provision of law which restricts assistance to foreign countries.”¹¹⁴ Addressing the problem of tied food aid, the bill expressly provides that assistance may include “the local and regional purchase and distribution of food.”

Critics take issue with the bills endorsement of research on biotechnology, particularly genetically modified technology. Section 202 calls for “research on biotechnological advances appropriate to local ecological conditions, including genetically modified technology.” The bill does not specify how much of the funding for agricultural development (about \$5.7 billion) would actually go to genetically modified crops. Shattuck and Holt-Gimenz warn that: “Just as food aid expands markets for U.S. grain even as it destroys markets and farm livelihoods abroad, the agricultural development aid in the [bill] will open markets in Africa and elsewhere to the U.S. biotechnology industry. This is likely to result in a windfall for northern seed and chemical companies, but will increase risk and dependency among small farmers across the developing world.” There are also concerns that the bill essentially prescribes a top-down, technology driven approach to agricultural development and that this is at odds with the bottom-up,

¹¹⁴ The Global Food Security Act of 2009, Section 401.

locally controlled, agroecological approach that many experts increasingly recommend.¹¹⁵ Supachai Panitchpakdi, Secretary-General of UNCTAD and Achim Steiner, Executive Director of UNEP, “organic agriculture can be more conducive to food security in Africa than most conventional production systems, and... it is more likely to be sustainable in the long term.”¹¹⁶ Shattuck and Holt-Gimenz conclude that funding for agricultural research under the bill “is essentially a subsidy to corporate research and development goals, and is not targeted towards the most effective, appropriate, or cost-efficient technologies.” Will this bill be a tool for opening foreign markets to biotechnology? Considering that GM crops are currently legal in only three African countries, African countries may be forced into a difficult position having to choose between accepting GM crops and losing essential aid.

2. The Foreign Assistance Revitalization and Accountability Act of 2009 (S. 1524)

On July 28, six U.S. senators introduced the Foreign Assistance Revitalization and Accountability Act of 2009 (S.1524).¹¹⁷ The bill aims to redefine the U.S. foreign assistance architecture and to strengthen the capacity of the USAID and related agencies to “to establish effective development policies and implement innovative and effective foreign assistance programs with maximum impact.” It creates a new Bureau for Policy and Strategic Planning (Bureau) within the USAID and a new Office for Learning, Evaluation, and Analysis in Development within the Bureau. It authorizes the appropriation to the USAID “\$5,000,000 for fiscal year 2010 and such sums as may be necessary for fiscal year 2011. The bill also creates a new Council on Research and Evaluation of Foreign Assistance (CORE) to be located in the executive branch. The primary purpose of CORE is to evaluate the impact of U.S. foreign assistance programs and to establish an integrated research and development program.

S. 1524, if approved, will bring about the first major amendment to the U.S. Foreign assistance Act of 1961. The bill:

- Enjoys bi-partisan support;¹¹⁸
- Prioritizes development planning, transparency, accountability, coordination, monitoring and evaluation;

¹¹⁵ Jules Pretty, Rachel Hine and Sophia Twarog. 2008. *Organic Agriculture and Food Security in Africa*. Edited by UNEP-UNCTAD Capacity-building Task Force on Trade. New York and Geneva: United Nations Conference on Trade and Development/ United Nations Environment Programme.

¹¹⁶ *Id.*

¹¹⁷ Rep. Howard Berman (DCalif.) and Rep. Mark Kirk (R-III.) authored the bill.

¹¹⁸ The bill was introduced by: Senate Foreign Relations Committee Chairman John Kerry (D-MA) and Ranking Member, Dick Lugar (R-IN), Senator Robert Menendez (D-NJ), Senator Bob Corker (R-TN), Senator JamesRisch (R-ID) and Senator Ben Cardin (D-MD).

- Can begin the process of revamping, reforming, and restructuring U.S. foreign assistance to enable it meet the diverse economic, ecological and geopolitical challenges of the twenty-first century;¹¹⁹
- Introduces coherence and coordination in U.S. foreign assistance program
- Creates a new foreign assistance architecture

Overall, as U.S. Senator James Risch observed, “This legislation will position the State Department to make better programming and funding decisions by establishing more rigorous transparency mechanisms and authorizing an independent counsel to examine all of [U.S.] foreign aid programs.” S. 1524 has particular implications for women in general and African women in particular. By emphasizing monitoring and evaluation of development programs, the bill will ensure that necessary analysis – including gender analysis – are utilized in ways that highlight women’s experiences and draws attention to more targeted programs. Second, by strengthening the USAID and requiring the USAID Administrator to develop and implement a comprehensive workforce and human development strategy for USAID, the bill might encourage the hiring of more experts of gender and more regional experts. Third, by prioritizing policy planning and strengthening the policy and strategic planning capacity of the USAID, the bill will ensure that more targeted, informed, and long-term planning and the development of programs that draw on the real experiences of women in developing countries and reward programs that invest in women’s lives which research has shown leads to direct payoffs for reducing poverty, improving child welfare and growing economies.

VII. Conclusion

President Obama is right in his assertion that Africa’s twenty-first century, “will be shaped by what happens not just in Rome or Moscow or Washington, but by what happens in Accra as well.” Although Africa is undeniably “a fundamental part of our interconnected world,” for a host of reasons, including historical reasons, Africa is presently a minor player on the world’s stage. The problems facing Africa that President Obama highlighted in his Ghana speech – tribalism, patronage, nepotism, wars, corruption – are all real and cannot be ignored or wished away. While the 20th century was the era of struggles for liberation from political domination, the twenty-first century is a time for a different liberation struggle – liberation from economic oppression. Unfortunately, this time, the enemy is both within and without. Building on the principle of shared responsibility, it is apparent that Internally, Africa has its problems to solve.

¹¹⁹ S. 1524, Section 3(6)(noting that “The current law governing foreign assistance is outdated, cumbersome, and lacks relevance for modern challenges, articulating at least 140 broad priorities for United States development efforts, with at least 400 specific directives on how to implement those broad priorities. Moreover, it allows the budget process to drive priorities, rather than setting clear priorities that drive resource decisions.”

According to the recently released, Corruption Perception Index 2009, sub-Saharan Africa remains especially hit by corruption.¹²⁰ Although countries like Botswana, Mauritius and Cape Verde improved their standing, overall much of Sub-Saharan Africa remains at the bottom of the list. It is no “lecture,” therefore, to be reminded, as the Secretary of State did in October, that no economic development in Africa can happen “without responsible African leadership, without good government and transparency and accountability, without acceptable of the rule of law, without environmental stewardship and the effective management of resources, without respect for human rights, without an end to corruption as a cancer that eats away at the entrepreneurial spirits and hopes of millions of people.” It is also no “lecture” for the Administration to emphasize mutual responsibility because the Administration’s initiatives are driven by and depend on U.S. tax payer’s money.

The time has come for countries in SSA to articulate their goals and strategies regarding trade and investment and to present coherent agenda and specific demands on the Obama Administration. This process should necessarily involve all the stakeholders in the continent and the broader society. The on-going review of the 2004 Model BIT in the United States should serve as a lesson for countries in SSA regarding the need for involvement of the private sector, civil society groups, and the general public in crafting trade, investment and development laws and policies. The ACIEP exists as a non-government adviser to the US government on matters of international economic policy. Members of the Subcommittee represented a cross-section of the society including the legal profession, business, labor, and even non-governmental organizations. For example, the Subcommittee was co-chaired by Alan Larson, a Senior International Policy Advisor to the law firm Covington and Burling LLP, and Thea Mei Lee, Policy Director for the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO). In approaching its duty, the Subcommittee sought input from interested groups and individuals through a public hearing and also invited written statements from the public. Reflecting the need for coherence in trade and investment policy, the BIT review also included consultation with a broad range of government agencies including the Justice Department, the Department of Labor, the Environment Protection Agency, and the Department of Interior. The time has come for serious discussions about the future direction of trade and investment in Africa.

The principle of mutual responsibility and mutual respect also requires that the Administration says what it means and means what it says. Africans are tired of vague promises and expect more specific commitment from the Administration on crucial issues. In the short term and against the backdrop of the global financial crisis, countries in SSA need policies and programs that can help them reduce their vulnerability to the external shocks that the financial crisis induced and strengthen their resilience to future crisis. In the long-term, targeted policies

¹²⁰ Jennifer Glasse, *Annual Report Finds Sub-Saharan Africa Especially Hit by Corruption*, 17 November 2009, <http://www.voanews.com/english/2009-11-17-voa14.cfm>

and programs that promote economic growth and sustainable development are needed.

With respect to the financial crisis, the Administration can help by proposing and implementing specific measures including:

- Mitigating measures directed at expanding trade and expanding trade finance,
- Measures that augment risk reduction strategies, such as those aimed at promoting export diversification and promoting regional trade, currently underway in the continent,
- Measures specifically eliminating non-tariff barriers to African product in U.S. markets, and
- Proposals that aim at reforming the international financial architecture,

The Administration must also make important decisions regarding possible reform of the U.S. BIT program. BITs should be mutually benefitting. BITs can and should protect investors but not at the expense of vital public interests or at the expense of the long-term financial stability of host countries. BITs provide a necessary rule of law framework for international investments, but they can also advance environmental policy goals and contribute to the establishment of rule of law in developing countries. Although BITs historically served the singular purpose of protecting foreign investment and investors, changing international law norms and principles, particularly in the areas of environmental protection, human rights and sustainable development, necessitate a re-conceptualization of the multiple purposes BITs can and should serve in the twenty-first century. Besides investor protection, BITs can be used to address climate change (by encouraging the transfer of relevant technology), raise labor and environmental standards, and promote transparent and accountable investment. The Administration must ignore calls for a more aggressive BIT program and any pressure to reinvigorate the U.S. BIT program in its present form. Particularly in the light of the recent financial crisis, the Administration should conclude twenty-first century BITs that:

- Substantially exclude the financial services sector,
- Expand the Model 2004 BIT provision that provide exception for government action by providing governments sufficient flexibility to respond to financial crisis as they arise,
- Include substantive obligations on labor, environment, and subsidies,
- Include a balance of payment exception,
- Condition the investor-state dispute settlement mechanism on the prior exhaustion of domestic remedies, and
- Expand, rather than narrow, the use of the “essential security interest exceptions” in the 2004 Model BIT.

With respect to AGOA, there are many concrete steps that the Administration can take, in line with recommendations made in the GAO report, to provide greater certainty to investors, address underutilization concerns, avoid preference erosion, These include:

- Extending the duration of third-country fabric provision for LDCs beyond 2012 and extending the duration of AGOA beyond 2015,
- Refraining from extending AGOA-like trade preferences to LDCs outside SSA,
- commit to increasing investment particularly in value addition of African primary products, and
- Modifying rules of origin provisions under other U.S. trade agreements to allow duty-free access for products that use AGOA textile and apparel inputs.

There are many issues presently competing for the attention of the Administration which is a problem for SSA countries. Amongst other issues begging for attention, the Administration has two wars to fight, a health care reform battle underway, and a domestic financial crisis to address. Even on the global economic front, Africa does not necessary rank high in the foreign policy agenda of the Administration; the 2008/2009 Top 10 Global Economic Challenges Facing America's 44th President, published by Brookings Global Economy and Development, underscores this fact. The good news is that Africa appears on the list of the 10 top critical global economic issues facing the Administration; the bad news is that Africa ranks very low on this list. On the list in order of priority are: (1) restoring financial stability; (2) setting the right green agenda; (3) exercising smart power; (4) reimagining global trade; (5) navigating China's rise; (6) Deciphering "Russia, Inc."; (7) engaging an Emerging India; (8) revitalizing ties to Latin America; (9) supporting Africa's growth turnaround; and (10) pursuing a positive agenda for the middle East.¹²¹

The African diaspora community has a role to play in seeing that Africa is squarely on the Administration' foreign policy agenda.; their tax dollars contributes to the U.S. economy, while remittances to their home countries help sustain whole villages, promote grassroots development, and sustain economies in Africa. As tax-payers in the United States, Africans resident in the United States can contribute to on-going and future debates regarding Obama's Africa policy. Their voice should be heard on issues such as foreign assistance reform, review of the U.S. BIT program, and the Global Food and Security Initiative.

¹²¹ Brookings Global Economy and Development, *Top 10 Global Economic Challenges Facing America's 44th President* (2008).

African diaspora groups also have a role to play in underscoring, in countries in SSA, the mutual responsibility principle which President Obama has made one of the cornerstones of his African policy agenda. They can push African leaders on issues relating to good governance, transparency and accountability. In this respect, it is unfortunate that the voice of African diaspora groups was not heard in debates surrounding reform of the U.S. BIT program. Although the USTR and the Department of State provided an opportunity for written comments to be submitted concerning the Administration's review of the Model BIT, it does not appear that any group specifically representing African interest submitted a written comment. On July 31, 2009, the USTR and the State Department also hosted a public meeting concerning the Administration's review of the U.S. model Bilateral Investment Treaty (BIT).

Africa is marginal in U.S. foreign aid, and, for now, there is no objective indication that situations will change under the Obama Administration. No new initiative or policy direction has unfolded on important issues such as AGOA reform, Aid for Trade, Doha Round negotiations, U.S. subsidies, etc. However, the new initiatives that the Obama Administration has announced, together with the new legislations that has been introduced to the Senate, if successful, can bring about a fundamental change in the U.S. foreign aid programs in ways that will benefit Africa. As Senator Menendez rightly observed, the Foreign Assistance Revitalization and Accountability Act of 2009 "is one of the most significant pieces of foreign assistance legislation that has passed out of the Senate Foreign Relations Committee in decades."¹²² At the very least, the bills might reinvigorate debate regarding U.S. national interest. S.1524 states that "The alleviation of poverty and hunger is in the national interest of the United States."¹²³

U.S. clearly faces critical foreign policy and development priorities worldwide. Under the Obama Administration there is now a rare opportunity to rethink U.S. approach to bilateral investment treaties and fundamentally restructure the foreign assistance architecture of the country. Whether the initiatives of the Obama Administration will take off and whether the legislative initiatives of the present Congress will pass is the question. Whether the initiatives and legislative will be successful, is a more fundamental question.

¹²² U.S. Senate Committee on Foreign Relations, Senate Foreign Relations Committee Approves Foreign Assistance Revitalization and Accountability Act of 2009, Press Release, Nov. 17, 2009.

¹²³ S. 1524, Section 3(4) ("It improves United States security by mitigating the underlying causes of violence and extremism, addresses threats like climate change and pandemic disease, expands economic opportunities for producers and consumers in the United States, demonstrates United States leadership to the world, and represents the values, humanitarianism, and generosity of the American people.").