


2014

Scott Lively and Free Trade: United States Free Trade Agreements as a Mechanism for Advancing Human Rights Abroad

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Nicholas K. Fedde *Scott Lively and Free Trade: United States Free Trade Agreements as a Mechanism for Advancing Human Rights Abroad*, 12 Loy. U. Chi. Int'l L. Rev. 93 (2014).

Available at: <http://lawcommons.luc.edu/lucilr/vol12/iss1/6>

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SCOTT LIVELY AND FREE TRADE: UNITED STATES
FREE TRADE AGREEMENTS AS A MECHANISM FOR
ADVANCING HUMAN RIGHTS ABROAD

Nicholas K. Fedde*

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I. Introduction

Uganda’s anti-homosexuality bill recently resurfaced in international news,¹ as has the case against Scott Lively, who is credited with influencing the bill’s creation.² In December of 2013, the Ugandan parliament passed the legislation, which was first introduced in 2009.³ The bill, signed by President Museveni in

* J.D., Loyola University of Chicago School of Law, May 2014. Thanks to Whitney Hutchinson and Professor James Gathii for their suggestions regarding this article, and to Marcela Fedde for her love, patience, and support.

¹ See, e.g., Musaaazi Namiti, *Uganda Anti-Gay Bill Close to Becoming Law*, ALJAZEERA (Jan. 6, 2014, 8:59 AM), <http://www.aljazeera.com/indepth/features/2014/01/uganda-anti-gay-bill-close-bc-coming-law-20141681452366858.html>; Faith Karimi, *Ugandan Parliament Passes Anti-Gay Bill that Includes Life in Prison*, CNN (Dec. 23, 2013, 2:11 PM), <http://www.cnn.com/2013/12/21/world/africa/uganda-anti-gay-bill/>.

² See, e.g., Meredith Bennett-Smith, *Scott Lively, American Pastor, Takes Credit For Inspiring Russian Anti-Gay Laws*, THE HUFFINGTON POST (Sep. 22, 2013, 6:34 PM), http://www.huffingtonpost.com/2013/09/19/scott-lively-russian-anti-gay-laws_n_3952053.html; Dahlia Lithwick, *Hate Preach: An American Brags that He’s the Father of the Ugandan Anti-Gay Movement. Can He Be Prosecuted in the U.S.?*, SLATE (Aug. 21, 2013, 6:05 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/08/scott_lively_can_he_be_punished_in_the_u_s_for_speech_against_gay_ugandans.html.

³ Karimi, *supra* note 1.

February,⁴ makes certain homosexual acts punishable by life in prison, and adds a broader spectrum of activities to the existing list of gay crimes, including prison time for those supporting homosexuals.⁵ Its passage has elicited condemnation from much of the international community, and has already resulted in the withdrawal of some foreign aid.⁶

The anti-homosexuality bill is but one manifestation of the persecution faced by members of the lesbian, gay, bisexual, and transgender (LGBT) community in Uganda. The past few years have seen a surge in violence against homosexuals in Uganda, where lynching and murder of gay activists and citizens have become commonplace.⁷ And while Scott Lively, even by his own account, contributed to the development of Uganda's anti-homosexuality bill, the United States-based evangelical leader has also been blamed for the rise in violence and oppression toward gay Ugandans. With the help of a United States-based legal advocacy organization, LGBT activists within Uganda reacted by suing Lively in United States federal court for aiding and abetting this persecution, under the Alien Tort Statute (ATS).⁸ Although the case survived dismissal after the seventy-nine-page opinion was handed down in August 2013,⁹ its novel basis under the ATS casts some doubt on the lawsuit's chance for overcoming summary judgment.¹⁰

The Lively suit's final disposition may, indeed, prove the shortcomings of the ATS as a mechanism for bringing American instigators to justice for their role in persecuting unpopular political minorities abroad. At any rate, the ATS's reliance on American actors severely limits its viability when the instigators are free from this jurisdictional nexus. Acknowledging these limitations begs the question of which alternative legal mechanism might be best suited to combat such persecution, so that political minorities abroad are afforded protection consistent with the values of the United States.

⁴ Al Jazeera and the Associated Press, *Uganda's President Signs Anti-Gay Bill*, ALJAZEERA AM, (Feb. 24, 2014, 12:21 PM), <http://america.aljazeera.com/articles/2014/2/24/uganda-s-presidentsignsanti-gaybill.html>.

⁵ Karimi, *supra* note 1.

⁶ See *id.*; see also Namiti, *supra* note 1 (discussing business leader and billionaire Richard Branson's call for companies and tourists to boycott Uganda).

⁷ See, e.g., Jeffrey Gettleman, *Ugandan Who Spoke Up for Gays is Beaten to Death*, N.Y. TIMES (Jan. 27, 2011), <http://www.nytimes.com/2011/01/28/world/africa/28uganda.html> (discussing the 2011 murder of David Kato, the most outspoken advocate for gay rights in Uganda, after a Ugandan newspaper ran an anti-gay segment urging readers to hang him); Codrin Arsene, *Uganda: Hang Gay List Goes Public*, AFRICAN POLITICS PORTAL (Oct. 21, 2010), <http://www.african-politics.com/uganda-hang-gay-list-goes-public/> (discussing a Ugandan newspaper's publication of the country's "top homos," which contained photos, names, and addresses of gay men and resulted in the some of the listed men being attacked and harassed); Jonathan Cunningham, *Pride and Prejudice: Life under Uganda's 'Kill the Gays' Bill*, SEATTLE GLOBALIST (Jun. 27, 2014), <http://www.scattleglobalist.com/2014/06/27/uganda-anti-homosexuality-bill-pride/27155> (discussing an incident in January 2014 where two gay Ugandan men were fleeing from a lynch mob when they were arrested for engaging in "acts against the order of nature").

⁸ 28 U.S.C. § 1350.

⁹ *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 309 (D. Mass. Aug 14, 2013) (Memorandum And Order Regarding Defendant's Motions to Dismiss).

¹⁰ *Id.* at 321-323 (discussing the plaintiff's obstacles in *Sexual Minorities Uganda v. Lively*).

This Comment attempts to answer that question by leveraging the topic of this Law Review's 2014 symposium as one possible solution.¹¹ Specifically, this Comment explores the extent to which human rights provisions within United States free trade agreements (FTAs) might serve as an effective legal mechanism to protect political minorities abroad from persecution. It does so primarily by using the alleged actions perpetrated by Scott Lively against the Ugandan LGBT community as an example. Congress has posited that "leadership by the United States in international trade fosters open markets, democracy, and *peace* throughout the world."¹² The United States Trade Representative (USTR) is currently leading efforts to forge a new trade partnership with the East African Community (EAC).¹³ Moreover, the African Growth and Opportunity Act (AGOA) is set to expire in September 2015, unless renewed.¹⁴ With Uganda directly benefiting from both of these trade initiatives, exploring this solution could not be timelier.

Part II of this Comment provides background on the plight of the LGBT community within Uganda, Scott Lively's role in cultivating their plight, and the pending lawsuit against him under the ATS. Part II also provides background on United States FTAs and preferential trade agreements (PTAs) generally, including the incorporation of human rights provisions within these agreements. Part III discusses the challenges of using the ATS as a basis for dispensing justice in the case against Scott Lively, as gleaned from the court's opinion denying Lively's motion to dismiss, and then further discusses existing trade agreements between the United States and Uganda. Part IV analyzes the strengths and challenges of relying on United States FTAs as a vehicle for securing human rights with trade partner nations generally, and specifically with Uganda. Finally, Part V considers the efficacy of the Court of Justice of the East African Community (EACJ) in order to propose that the court could be used to enforce FTAs between Uganda and the United States as a solution to overcome shortcomings in Uganda's rule of law.

II. Background

Before discussing the shortcoming of the ATS as a basis for the suit against Scott Lively, it is important to understand the allegations against him and his contribution to the plight of the LGBT community in Uganda. And before exploring United States FTAs as an alternative vehicle for adjudicating the transgressions of likes of Scott Lively, it is imperative to first understand the usage of FTAs generally and how they might incorporate human rights provisions. Thus, this Part endeavors to supply an understanding of both prerequisites.

¹¹ In 2014 the Loyola University Chicago International Law Review hosted a symposium entitled "Assessing the New Generation of Human Rights Provisions in U.S. Free Trade Agreements."

¹² Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C. § 3801 (emphasis added).

¹³ *Uganda*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/countries-regions/africa/cast-africa/uganda> (last visited Nov. 21, 2013). The EAC is a regional intergovernmental organization. *Id.*

¹⁴ Williams Mullen, Evelyn M. Suarez and Singleton B. McAllister, *Debate Concerning Renewal of African Growth and Opportunity Act has Begun*, LEXOLOGY (Dec. 17, 2013), <http://www.lexology.com/library/detail.aspx?g=F450a65f-de82-494d-9086-e365fecbb935>. See, *infra* Part III.B for a description of the AGOA.

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A. Gay Persecution in Uganda and the Case against Scott Lively

Persecution against homosexuality is prominent in Africa. Thirty-six African nations have laws against same-sex conduct, forcing some citizens to seek asylum elsewhere.¹⁵ Amnesty International has said that anti-gay attacks have reached dangerous levels in sub-Saharan Africa, while African leaders preach that homosexuality is un-African and the “toxic message” is spread that LGBT people are criminals.¹⁶ Uganda is no exception, as it is experiencing a time of unparalleled animus and violence towards its LGBT citizens.¹⁷

Against a backdrop of existing anti-sodomy laws in Uganda, the situation for members of the LGBT community has been made worse, in no small part, due to the efforts of Scott Lively. Lively is an evangelical minister, attorney, author, and self-proclaimed expert on “the gay movement.”¹⁸ Based in the United States, he has taken his agenda abroad, consulting with the Ugandan and Russian governments in an attempt to persuade them to pass anti-gay legislation.¹⁹ In 2009, he played an instrumental role at an anti-gay conference in Uganda, which soon thereafter led to the drafting of a bill proposed to its Parliament.²⁰ This Anti-Homosexuality Bill of 2009, if adopted, would have made a variety of conduct punishable by death, including homosexual sex with a minor, homosexual conduct by a serial offender, homosexual sex while HIV-positive, homosexual sex with one’s children, using anything to overpower another to have homosexual sex, and homosexual sex with a disabled person.²¹ The proposed bill made attempting any of these acts punishable by life in prison.²² Further, it imposed prison for an authority figure’s failure to report a homosexual activity to the police within 24 hours and criminalized conduct promoting homosexuality.²³

On March 14, 2012,²⁴ Sexual Minorities Uganda (SMUG), an LGBT rights activist group, responded to Lively’s efforts by filing a civil action against him in

¹⁵ Rob Williams, *Fear of Imprisonment for Being Gay in African Countries is Grounds for Asylum, EU Court Rules*, THE INDEPENDENT (Nov. 7, 2013), available at <http://www.independent.co.uk/news/world/africa/fear-of-imprisonment-for-being-gay-in-african-countries-is-grounds-for-asylum-eu-court-rules-8927557.html> (discussing how the European Union’s highest court ruled that the fear of prison for homosexuality in African is grounds for asylum in the European Union).

¹⁶ *Id.*

¹⁷ Waymon Hudson, *American Evangelical Lou Engle Promotes ‘Kill the Gays’ Bill at Sunday’s Rally in Uganda*, THE HUFFINGTON POST (May 4, 2010, 6:31 PM), http://www.huffingtonpost.com/waymon-hudson/american-evangelical-lou_b_560819.html.

¹⁸ *Sexual Minorities Uganda*, *supra* note 9, at 1-2.

¹⁹ Lithwick, *supra* note 2.

²⁰ *Id.*

²¹ Lucy Heenan Ewins, Note, “Gross Violation”: *Why Uganda’s Anti-Homosexuality Act Threatens Its Trade Benefits with the United States*, 34 B.C. INT’L COMP. L. REV. 147, 148, 150-52 (2011).

²² *Id.*

²³ *Id.*

²⁴ *LGBTI Uganda Fights Back!*, CENTER FOR CONST. RIGHTS, <http://ccrjustice.org/lgbtuganda/> (last visited Nov. 20, 2013).

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the United States District Court for the District of Massachusetts.²⁵ Invoking federal jurisdiction under the ATS, the complaint alleged that Lively, a US citizen residing in Massachusetts, attempted and succeeded in fomenting an atmosphere of repression against lesbian, gay, bisexual, transgender, and intersex (LGBTI) people in Uganda.²⁶ The complaint sought monetary damages, injunctive relief, and declaratory judgment holding that Lively's actions violate the law of nations.²⁷

B. United States FTAs and Human Rights Provisions

In light of strong efforts to increase international trade and decrease tariff barriers to American goods, the birth of the twenty-first century has brought a new era of FTAs.²⁸ These FTAs exist between the United States and individual countries throughout the world, as well as between the United States and collective geographic regions.²⁹ Currently, there are only two such regional FTAs: the North America Free Trade Agreement (NAFTA) and the Central America Free Trade Agreement (DR-CAFTA).³⁰ However, negotiations are currently underway between the United States and eight other nations to implement the Trans-Pacific Partnership (TPP).³¹

In addition to FTAs, the United States also employs unilateral trade preference programs. These programs are granted by one country to another without requiring the latter's consent.³² The United States establishes unilateral trade programs primarily with developing countries, as a means to promote their economic development.³³ These programs share much in common with FTAs.³⁴ For example, both include labor standards, as well as a review process to evaluate whether the grantee country is meeting those standards.³⁵ In addition, both unilateral programs and FTAs occasionally link tariff exemptions to adherence to labor rights.³⁶

²⁵ *Sexual Minorities Uganda*, *supra* note 9, at 1. The plaintiff, Sexual Minorities Uganda, is an organization that advocates for "for the fair and equal treatment of lesbian, gay, bisexual, transgender, and intersex (LGBTI) people" in Uganda, and is located in that country. *Id.*

²⁶ *Id.* at 2.

²⁷ *Id.*

²⁸ Lyndsay D. Speece, *Beyond Borders: CAFTA's Role in Shaping Labor Standards in Free Trade Agreements*, 37 *SETON HALL L. REV.* 1101, 1102 (2007).

²⁹ *Id.*

³⁰ Deirdre Salsich, *International Workers' Rights Enforced Through Free Trade Agreements: DR-CAFTA and the DOL's Case Against Guatemala*, 25 *N.Y. INT'L. L. REV.* 19, 31 (2012).

³¹ *Id.*

³² Paula Church Albertson, *The Evolution of Labor Provisions in U.S. Free Trade Agreements: Lessons Learned and Remaining Questions Examining the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR)*, 21 *STAN. L. & POL'Y REV.* 493, 497-98 (2010).

³³ *Id.*

³⁴ *Id.* at 498.

³⁵ *Id.*

³⁶ *Id.*

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Unilateral preferential schemes, when combined with bilateral and regional trade agreements such as FTAs form a category of agreements coined “preferential trade agreements” (PTAs).³⁷ Globally, PTAs often regulate spheres of social governance, which increasingly include human rights standards.³⁸ Some PTAs include “hard” standards—provisions that condition market benefits upon compliance with specific human rights principles, and delegate authority for interpreting law.³⁹ Others include “soft” standards—provisions that vaguely tie market access to human rights principles and appeal to voluntary cooperation rather than making compliance mandatory.⁴⁰

III. Discussion

A. Shortcomings of the ATS as a Vehicle for Protecting Political Minorities Abroad

In June of 2012, Lively filed a motion to dismiss SMUG’s complaint against him.⁴¹ In a 104-page brief in support of his motion, Lively set out several key arguments for dismissal.⁴² First, he argued that persecution based on sexual orientation and gender identity does not violate international norms with the clarity and historical lineage necessary for jurisdiction under the ATS.⁴³ Second, the court, according to Lively, lacks jurisdiction under the ATS for actions outside of the United States, per *Kiobel v. Royal Dutch Petroleum*.⁴⁴ Third, he contended that SMUG lacked standing to file the complaint on its own behalf or on behalf of Uganda’s LGBTI community.⁴⁵ Fourth and finally, Lively argued that he was

³⁷ Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT’L ORG. 593, 594, 594 n.5 (2005).

³⁸ *Id.*

³⁹ *Id.* at 594, 594 n.8. The Euro-Mediterranean Association Agreements are an example of a PTA with “hard” standards. *Id.* at 594.

⁴⁰ *Id.* at 594, 594 n.8. One example of a PTA with “soft” standards is the West African Economic Monetary Union. *Id.* at 594.

⁴¹ *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 309 (D. Mass. Aug 14, 2013), Defendant Scott Lively’s Motion to Dismiss Plaintiff’s Complaint, 1 (D. Mass. June 22, 2012). SMUG subsequently amended its Complaint and Lively filed a Motion to Dismiss Plaintiff’s First Amended Complaint. See *Sexual Minorities Uganda v. Lively*, C.A. No. 3:12-cv-30051-KPN, Defendant Scott Lively’s Motion to Dismiss Plaintiff’s First Amended Complaint (D. Mass. Aug. 9, 2012).

⁴² *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 309 (D. Mass. Aug 14, 2013), Memorandum of Law in Support of Defendant Scott Lively’s Motion to Dismiss Plaintiff’s First Amended Complaint, 104 (D. Mass. Aug. 10, 2012).

⁴³ *Sexual Minorities Uganda*, *supra* note 9, at 2-3.

⁴⁴ *Id.* at 3 (referring to the recent United States Supreme Court decision in *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013)). For an analysis of the *Kiobel* decision, see Meir Feder, *Commentary: Why the Court Unanimously Jettisoned Thirty Years of Lower Court Precedent (and what that Can Tell Us about How to Read Kiobel)*, SCOTUSBLOG (Apr. 19, 2013, 11:30 AM), <http://www.scotusblog.com/2013/04/commentary-why-the-court-unanimously-jettisoned-thirty-years-of-lower-court-precedent-and-what-that-can-tell-us-about-how-to-read-kiobel>.

⁴⁵ *Sexual Minorities Uganda*, *supra* note 9, at 3.

exercising protected speech under the First Amendment; therefore, SMUG could not use the court to restrict his expression.⁴⁶

In a lengthy court opinion handed down in August 2013, Judge Ponsor rejected all of Lively's arguments and denied the motion.⁴⁷ Responding to Lively's jurisdictional challenge based on extraterritorial actions, the court ruled that the restrictions established in *Kiobel* did not apply to this case because a substantial portion of the alleged conduct took place in the United States.⁴⁸ Ponsor reasoned that Lively, through his United States headquarters, allegedly "maintained what amounts to a kind of Homophobia Central."⁴⁹

The court's holding regarding international norms was less definitive. As to Lively's argument that persecution based on sexual orientation and gender identity does not violate international norms, Ponsor recognized that it was a "closer question" whether the alleged crime constitutes "one of the relatively modest set of actions alleging violations of the law of nations for which the ATS furnishes jurisdiction," per *Sosa v. Alvarez-Machain*.⁵⁰ Rather than deciding the issue in the Motion to Dismiss, the court elected to postpone ruling on the "*Sosa* issue" until a "fully developed record" was accumulated following discovery.⁵¹ Clearly, this reasoning of the court on an admittedly close issue opens the possibility that the complaint could be defeated on summary judgment, after sufficient discovery occurs.

Similarly, the court's holding on the protected speech defense, again, opens the door to the complaint's future defeat. In rejecting Lively's affirmative defense as a basis for dismissal, Ponsor opined that the argument was "premature."⁵² The court reasoned that the complaint alleged sufficient facts to support the claim that Lively's behavior crossed over the protective boundary provided by the First Amendment.⁵³ Specifically, the opinion points to allegations that Lively's speech advocated imminent criminal conduct in the form of crimes against humanity, and managed actual crimes such as repressing free expression through intimidation, and committing assaults and false arrests.⁵⁴ Ponsor indicated, however, "discovery may, or may not, reveal that the argument is correct, and this issue will almost certainly be front and center at the summary judgment stage of this case."⁵⁵

⁴⁶ *Id.* Additionally, Lively's brief argued that the two state law claims alleged in the complaint lacked adequate legal foundation. *Id.*

⁴⁷ *Id.* at 1, 3.

⁴⁸ *Id.* at 4-5.

⁴⁹ *Id.* (internal quotation marks omitted).

⁵⁰ *Id.* at 4 (internal quotation marks omitted) (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004)). The ATS states in its entirety, "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C.A. § 1350 (West 2013) (emphasis added).

⁵¹ *Id.*

⁵² *Sexual Minorities Uganda*, *supra* note 9, at 5-6.

⁵³ *Id.*

⁵⁴ *Id.* at 62.

⁵⁵ *Id.* at 57.

Thus, the court opinion in *Sexual Minorities Uganda*, while denying the defendant's motion to dismiss, suggested that the case may be defeated at summary judgment after sufficient discovery, either under the First Amendment defense or on the *Sosa* issue. These issues could be interpreted as significant hurdles to the success of the lawsuit. Legal analysts have recognized that the complaint brings a novel legal argument under the ATS,⁵⁶ further lending doubt that the ATS is an adequate basis for addressing persecution of political minorities abroad. That the specific type of persecution must violate international law or a US treaty,⁵⁷ and the conduct must originate within the United States,⁵⁸ are both significant legal limitations.

Legal hurdles aside, public policy arguments also question the ATS as a solution. To begin, our federal courts may be ill-equipped to handle international human rights cases. It has been observed that "quantitatively, international human rights law is not a major, or even a minor, component of the business of federal courts: it is a minuscule part of what [they] do."⁵⁹ Moreover, international human rights issues may be better addressed by foreign policy through the prerogative of the political branches of government.⁶⁰ The United States Supreme Court has cautioned against the risk of overstepping its role under the ATS and has chosen to tread lightly.⁶¹ These concerns, when coupled with the legal limitations of the ATS, provide ample justification for seeking an alternative vehicle for protecting political minorities from persecution abroad.

B. Existing PTAs between the United States and Uganda

Before analyzing whether a United States PTA could serve as an effective mechanism to protect political minorities, such as the LGBT community in Uganda, it is necessary to understand the *status quo* related to trade between the United States and Uganda. This section examines the existing trade relationship between the two countries.

⁵⁶ See, e.g., Lithwick, *supra* note 2.

⁵⁷ 28 U.S.C.A. § 1350 (West 2013).

⁵⁸ See *Kiobel*, 133 S. Ct. at 1664, 1669 ("The question here is . . . whether a claim [under the ATS] may reach conduct occurring in the territory of a foreign sovereign. . . . We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption. . . . And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.").

⁵⁹ Hon. John M. Walker, Jr., *Domestic Adjudication of International Human Rights Violations Under the Alien Tort Statute*, 41 St. Louis U. L.J. 539, 539 (1997) (discussing the ATS and *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995)).

⁶⁰ See *id.* ("[S]ome believe the courts have no business dealing with such matters which, they argue, fall squarely within the realm of foreign policy and are best left to the political branches to manage.").

⁶¹ See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659, 1664 (2013) (discussing "the danger of unwarranted judicial interference in the conduct of foreign policy", and "the need for judicial caution" in considering which claims [can] be brought under the ATS" and "whether a cause of action under the ATS reaches conduct within the territory of another sovereign", so that the court does not "imping[e] on the discretion of the Legislative and Executive Branches in managing foreign affairs").

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The United States is not a major trading partner with Uganda, but it has established multiple trading programs that extend to it. Only 1.4% of Uganda's exports reach the United States, which are worth approximately \$35 million annually.⁶² The existing trade relations are fostered in part by the AGOA,⁶³ which is described by American officials as the "cornerstone" of United States trade policy with Africa.⁶⁴ Signed into law by President Bill Clinton in 2000,⁶⁵ the AGOA is a unilateral trade preference program in which the United States grants trade preferences to eligible countries in sub-Saharan Africa, allowing virtually all of their goods to enter the United States duty-free.⁶⁶ Eligibility is determined each year by the President of United States and is based on meeting a set of criteria that include progress toward establishing the rule of law, protecting internationally recognized worker rights, combatting corruption, and establishing a market-based economy.⁶⁷ Uganda has maintained eligibility under the AGOA; however, the Act will expire in 2015 unless renewed.⁶⁸

In addition to the AGOA, trade between the United States and Uganda is also fostered by two overlapping trade and investment framework agreements (TIFAs)—agreements that provide "strategic frameworks and principles for dialogue on trade and investment issues" between the United States and other TIFA parties.⁶⁹ The first, signed in 2001, is geographically more extensive, as it is between the United States and the Common Market for Eastern and Southern Africa (COMESA).⁷⁰ The second TIFA is between the United States and the EAC, signed in 2008.⁷¹ Further, the USTR is currently leading efforts to forge a

⁶² UGANDA BUREAU OF STATISTICS, 2012 STATISTICAL ABSTRACT 231, 233 (2012), available at <http://www.ubos.org/onlinefiles/uploads/ubos/pdf%20documents/2012StatisticalAbstract.pdf> (based on figures for the year 2011).

⁶³ UGANDA, *supra* note 13. The AGOA is codified as 19 U.S.C. §§ 2466a, 2466b, 3701-3706, 3721-3724, 3731-3741 (2000); See Mullen et al., *supra* note 14

⁶⁴ See Mullen et al., *supra* note 14.

⁶⁵ *Id.*

⁶⁶ *African Growth and Opportunity Act (AGOA)*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-topics/trade-development/preference-programs/african-growth-and-opportunity-act-agoa> (last visited Nov. 21, 2013). See background *supra* Part II.B for an explanation of unilateral trade preference programs generally.

⁶⁷ *Id.* Duty-free treatment provided to beneficiary sub-Saharan African countries under the AGOA remains in effect through September 30, 2015. 19 U.S.C.A. § 2466b (West 2013).

⁶⁸ See Mullen et al., *supra* note 14.

⁶⁹ *Trade & Investment Framework Agreements*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/trade-investment-framework-agreements> (last visited Nov. 21, 2013) (discussing TIFAs generally, and providing hyperlinks to all existing TIFAs).

⁷⁰ See UGANDA *supra* note 13 (reciting the existing trade agreements between the United States and Uganda).

⁷¹ *Id.*

new trade and investment partnership with the EAC.⁷² Uganda is a member of both regional organizations.⁷³

In July of 2013, President Obama launched a new initiative coined “Trade Africa.”⁷⁴ The program seeks to increase trade within Africa, and expand economic ties and trade between Africa and the United States.⁷⁵ Initially, Trade Africa’s focus will be limited to member states of the EAC, including Uganda.⁷⁶ Its goals include doubling intra-regional trade in the EAC, and increasing exports from the EAC to the United States under the AGOA by forty percent.⁷⁷ The strategy involves facilitating trade by moving goods across EAC member borders cheaper and faster, through means such as “moderniz[ing] customs, mov[ing] to single more efficient border crossings, reduc[ing] bottlenecks, [and] reduc[ing] the roadblocks that stymie the flow of goods to market.”⁷⁸

In sum, trade between the United States and Uganda is governed by the AGOA, the United States–COMESA TIFA, and the United States–EAC TIFA. Additionally, United States–Uganda trade will likely be further stimulated by the President’s Trade Africa initiative, as well as a new trade and investment partnership between the United States and the EAC, which is in the works.

IV. Analysis

Having discussed the landscape of existing PTAs between the United States and Uganda, this Part of the Comment will first analyze the extent to which any of these agreements provide for human rights so as to serve as a basis for protecting political minorities such as Uganda’s LGBTI community.⁷⁹ Next, it will explore the challenges of utilizing United States PTAs as a basis for providing such protection.⁸⁰

⁷² *Id.* See also Ron Kirk et al., *Joint Statement on the United States-East African Community Trade and Investment Partnership*, OFF. U.S. TRADE REPRESENTATIVE (June 15, 2012), <http://www.ustr.gov/about-us/press-office/press-releases/2012/june/joint-statement-US-East-African-Community-Trade-Investment-Partnership> (press release announcing the pursuit of the partnership, discussing its purpose, objectives, strategy, and the specific items that the countries have agreed to explore together); *The United States and East African Community Announce Progress under Trade and Investment Partnership*, OFF. U.S. TRADE REPRESENTATIVE (Oct. 19, 2012), <http://www.ustr.gov/about-us/press-office/press-releases/2012/october/us-eac-announce-progress> (press release announcing progress and next steps regarding the partnership).

⁷³ See UGANDA, *supra* note 13.

⁷⁴ Office of the Press Secretary, *Fact Sheet: Trade Africa*, THE WHITE HOUSE (July 1, 2013), <http://www.whitehouse.gov/the-press-office/2013/07/01/fact-sheet-trade-africa>; Merle David Kellerhals Jr., *Obama Launches Major African Trade Initiative*, U.S. EMBASSY: IIP DIGITAL (July 1, 2013), <http://iip.digital.usembassy.gov/st/english/article/2013/07/20130701277944.html#axzz2qPxmeXFL>; Olga Khazan, *3 Reasons Why Obama Wants to Expand Trade With Africa*, THE ATLANTIC (July 2, 2013, 5:23 PM), <http://www.theatlantic.com/international/archive/2013/07/3-reasons-why-obama-wants-to-expand-trade-with-africa/277493>.

⁷⁵ See Office of the Press Secretary, *supra* note 74.

⁷⁶ *Id.*

⁷⁷ See Kellerhals Jr., *supra* note 74.

⁷⁸ *Id.*

⁷⁹ See analysis *infra* Part IV.A.

⁸⁰ See analysis *infra* Part IV.B.

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A. Extent of Human Rights Provisions within Existing United States–Uganda PTAs

Perhaps the most obvious place to start is to examine the language of the AGOA, as it appears to be the most developed of the PTAs extended by the United States to Uganda. The Congressional findings that preface the AGOA focus primarily on the economic conditions and economic goals for establishing the Act.⁸¹ While the findings do point to some political goals, namely encouraging continued progress in broadening participation in the political process⁸² and enhancing political ties between the United States and sub-Saharan Africa,⁸³ none of the findings speak of human rights or social issues.⁸⁴

Similarly, the AGOA's Statement of Policy is also primarily focused on economic issues.⁸⁵ It does, however, point to some non-economic objectives such as focusing on countries committed to the rule of law⁸⁶ and combating bribery of public officials.⁸⁷ Moreover, the Statement of Policy references two goals that could be interpreted as relating to human rights. First, it states that "Congress supports . . . strengthening and expanding the private sector in sub-Saharan Africa, especially enterprises *owned by women*."⁸⁸ More relevant to this Comment, it also states that "Congress supports . . . facilitating the developing of . . . *political freedom*" in the region.⁸⁹

The section of the AGOA establishing country eligibility requirements provides the most fertile basis for addressing human rights.⁹⁰ Among the laundry list of criteria are the requirements that the country "has established, or is making continual progress toward establishing . . . the right to equal protection under the law,"⁹¹ as well as "protection of internationally recognized worker rights."⁹² Ad-

⁸¹ See, e.g., 19 U.S.C.A. § 3701(1) (West 2013) ("[I]t is in the mutual interest of the United States and the countries of sub-Saharan Africa to promote stable and sustainable economic growth and development in sub-Saharan Africa"; 19 U.S.C.A. § 3701(5)-(6) ("[C]ertain countries in sub-Saharan Africa have increased their economic growth rates", however, "despite those gains the per capita income . . . averages approximately \$500 annually.").

⁸² 19 U.S.C.A. §§ 3701 (West 2013).

⁸³ 19 U.S.C.A. § 3701 (West 2013).

⁸⁴ See 19 U.S.C.A. § 3701 (West 2013).

⁸⁵ See, e.g., 19 U.S.C.A. § 3702(1) (West 2013) (supporting "encouraging increased trade and investment between the United States and sub-Saharan Africa"); 19 U.S.C.A. § 3702(2) (supporting "reducing . . . obstacles to sub-Saharan African and United States trade"); § 3702(4) (supporting "negotiating reciprocal and mutually beneficial trade agreements"); 19 U.S.C.A. § 3702(5) (supporting "focusing on countries committed to . . . economic reform, and the eradication of poverty").

⁸⁶ 19 U.S.C.A. § 3702 (West 2013).

⁸⁷ *Id.*

⁸⁸ 19 U.S.C.A. § 3702(6) (West 2013) (emphasis added).

⁸⁹ 19 U.S.C.A. § 3702(7) (West 2013) (emphasis added).

⁹⁰ See 19 U.S.C.A. § 3703 (West 2013).

⁹¹ 19 U.S.C.A. § 3703 (West 2013).

⁹² 19 U.S.C.A. § 3703(a)(1)(F) (West 2013). This provision provides a non-exhaustive list of such worker rights: right of association, right to organize and bargain collectively, a prohibition on compulsory labor, a minimum employment age, and acceptable working conditions with respect to minimum wage, hours of work, and occupational safety and health. *Id.*

ditionally, a country is ineligible if it “engage[s] in gross violations of internationally recognized human rights.”⁹³

In contrast to the AGOA, the TIFAs between the United States and Uganda (as a member of the signing regional organizations) provide no language raising the issue of human rights.⁹⁴ This is not surprising; as framework agreements, the United States–COMESA and United States–EAC agreements are fairly bare-bones,⁹⁵ focused primarily on establishing guiding principles⁹⁶ and a mechanism for devising future programs.⁹⁷ Of the two agreements, the TIFA with the EAC comes closest to including a human rights-related provision. It provides that “[t]he Council shall . . . identify relevant issues, such as . . . worker rights . . . that may be appropriate for negotiation in an appropriate forum.”⁹⁸

Of the existing PTAs between the United States and Uganda, it appears that AGOA eligibility requirements provide the most direct reference to human rights and, likewise, provide the most substantial basis for protecting political minorities, such as Uganda’s LGBT community, from persecution. For example, the requirement that countries demonstrate progress toward achieving equal protection under the law in order to maintain trade preferences could operate to reduce homosexual persecution. This result, however, would likely require that Uganda acknowledge such persecution to be an equal protection issue. The AGOA’s explicit reference to ineligibility based on gross violations of internationally recognized human rights might, at first glance, appear as another basis for reducing persecuting. However, at least for the LGBT community, they must overcome the same hurdle they face under the ATS; it is a close question whether persecution on the basis of sexual orientation violates the law of nations.

⁹³ *Id.*

⁹⁴ See Trade and Investment Agreement Between the United States of America and the East African Community, U.S.-E.A.C., July 16, 2008, T.I.A.S. No. 08-716.1, available at http://www.ustr.gov/sites/default/files/uploads/agreements/tifa/asset_upload_file413_15020.pdf [hereinafter *U.S.–EAC TIFA*]; Agreement Between the Government of the United States of America and the Common Market for Eastern and Southern Africa Concerning the Development of Trade and Investment Relations, U.S.-C.O.M.E.S.A., Oct. 29, 2001, OFF. U.S. TRADE REPRESENTATIVE, available at http://www.ustr.gov/sites/default/files/uploads/agreements/tifa/asset_upload_file367_7725.pdf [hereinafter *U.S.–COMESA TIFA*]. A review of both agreements indicates the absence of any language referring to human rights or similar concepts.

⁹⁵ The United States–COMESA TIFA is comprised of one and a half pages of recitals, followed by two pages of terms. See *U.S.–COMESA TIFA*, *supra* note 94. The United States–EAC TIFA is similarly brief, containing approximately one page each of recitals and terms. See *U.S.–EAC TIFA*, *supra* note 94.

⁹⁶ See *U.S.–COMESA TIFA*, *supra* note 94, at art. 2 (“The Parties affirm their desire to establish cooperation between the member states of COMESA and the United States of America to: (a) develop and expand trade in products and services; (b) promote the adoption of appropriate measures to encourage and facilitate trade in goods and services; and (c) secure favorable conditions for long-term investment, development and diversification of trade.”); *U.S.–EAC TIFA*, *supra* note 94, at art. 1 (“The Parties affirm their desire to promote an attractive investment climate and to expand and diversity trade in products and services between the East African Community and the United States.”).

⁹⁷ Almost half of the Articles to the United States–EAC TIFA concern establishing the United States–EAC Council on Trade and Investment, setting frequency of Council meetings, and setting forth the Council’s duties and procedures. See *U.S.–EAC TIFA*, *supra* note 94, at art. 2-4. The United States–COMESA TIFA similarly dedicates a significant portion of its text to defining Council operations. See *U.S.–COMESA TIFA*, *supra* note 94, at art. 3-6.

⁹⁸ See *U.S.–EAC TIFA*, *supra* note 94, at art. 3.

B. Challenges of Utilizing United States PTAs to Protect Political Minorities

Having analyzed whether existing PTAs between the United States and Uganda provide a basis for protection of political minorities, the next question is whether PTAs are an effective vehicle for enforcing such protection. This section analyzes obstacles to success. First, it addresses issues generally, then it analyzes additional issues specific to Uganda.

1. General Challenges

In one sense trade agreements have been the cause of, rather than a vehicle for remedying, human rights violations. For example, it is theorized that free trade has fostered competition among underdeveloped nations to attract foreign corporations by relaxing labor and environmental laws.⁹⁹ This “race to the bottom” has been blamed as a major cause of “abhorrent human rights violations” among the working conditions in factories.¹⁰⁰ Care must be taken, however, to differentiate between human rights violations among working conditions, on the one hand, and human rights violations in the form of persecuting political minorities, on the other. It is doubtful the race to the bottom that occurs to increase profit margins would have a negative effect on the latter category of human rights. Nonetheless, it would be important to scrutinize any proposed PTA from a pragmatic standpoint, so to minimize any unintended consequences for human rights.

Where United States PTAs have included special emphasis on improving labor rights, some commentators doubt their success. If they are right, human rights provisions could suffer a similar fate. For example, in the opinion of Human Rights Watch,¹⁰¹ the signatories of NAFTA’s side agreement on labor conditions (the NAALC) have worked together to minimize the effectiveness of the agreement, as they are incentivized to ignore abuses so that they may mutually reap economic gains.¹⁰²

2. Challenges Specific to Uganda

A United States PTA with Uganda, in any form, could fail to yield the desired human rights benefits for the simple reason that the stakes are not very high. With only 1.4% of its exports going to the United States,¹⁰³ Uganda might not heavily rely on the United States as a driver of its GDP. With such little reliance, Uganda might choose to opt out of a human rights-focused PTA with the United

⁹⁹ Travis Robert-Ritter, Note, *Achilles’ Heel: How the ATS and NAFTA Have Combined to Create Substantial Tort Liability for US Corporations Operating in Mexico*, 42 U. MIAMI INTER-AM. L. REV. 443, 444 (2011).

¹⁰⁰ *Id.*

¹⁰¹ Human Rights Watch is an international non-governmental organization (NGO) that investigates and publicizes human rights violations and advocates human rights worldwide. About Us, HUMAN RIGHTS WATCH, <http://www.hrw.org/about> (last visited Oct. 19, 2014).

¹⁰² See Travis Robert-Ritter *supra* note 99 at 450-51; *NAFTA Labor Accord Ineffective: Future Trade Pacts Must Avoid Pitfalls*, HUMAN RIGHTS WATCH (Apr. 16, 2001), <http://www.hrw.org/en/news/2001/04/15/nafta-labor-accord-ineffective>.

¹⁰³ See UGANDA BUREAU OF STATISTICS, *supra* note 62.

States. On the other hand, Uganda might wish to comply with PTA conditions if it sees trade with the United States as an under exploited opportunity that could be tapped to dramatically improve Uganda's economic condition.

More challenging is Uganda's struggle with maintaining the rule of law. The organization Human Rights Watch has expressed "serious concerns about Uganda's respect for the rule of law," citing as examples threats to freedom of assembly, association, and expression, along with impunity for torture and extra-judicial killings by security forces.¹⁰⁴ It has been observed that all persons and authorities are not bound by and equal under the law in Uganda.¹⁰⁵ Instead, the executive branch flouts provisions of Uganda's constitution that do not suit its convenience, the freedom of speech is exercised at the whim of the police and political activists are subject to "preventative arrest."¹⁰⁶ Furthermore, court orders are subject to police interpretation and the Attorney General.¹⁰⁷ The government's reluctance to enforce human rights guarantees casts doubt on Uganda's ability to uphold PTA provisions meant to address political persecution.¹⁰⁸

V. Proposal

This section offers up some mechanics that could help bring positive results to a United States PTA-based solution to LGBT persecution in Uganda, considering the current state of PTAs between the two countries¹⁰⁹ and the challenges of a PTA-based solution¹¹⁰ as discussed in the previous sections.

The most effective PTA-based solution would be one structured as a bilateral trade agreement between the United States and the EAC, which incorporates human rights provisions setting forth hard standards to be interpreted and enforced by the EAC's judicial organ, the EACJ.¹¹¹ This solution is superior for several reasons. A bilateral (or multilateral) agreement is preferable to a unilateral trade preference program because, like a treaty, it has the capacity to legally compel conduct.¹¹² Unilateral programs, in contrast, do not bind the beneficiary.

¹⁰⁴ *World Report 2013: Uganda*, HUMAN RIGHTS WATCH, <http://www.hrw.org/world-report/2013/country-chapters/uganda> (last visited Jan. 15, 2014).

¹⁰⁵ David F.K Mpanga, *Is it Rule of Law or Rule by Law in Uganda's Politics?*, DAILY MONITOR (Dec. 7, 2013), <http://www.monitor.co.ug/OpEd/Commentary/Is-it-rule-of-law-or-rule-by-law-in-Uganda-s-politics-/1689364/2102166/-/riqciuz/-/index.html>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ James Gathii, *Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy* 6 (Loyola University Chicago School of Law, Research Paper No. 2012-019, 2012), available at <http://ssrn.com/abstract=2178756>.

¹⁰⁹ See discussion *supra* Part III.B; see also analysis *supra* Part IV.A.

¹¹⁰ See analysis *supra* Part IV.B.

¹¹¹ See Gathii, *supra* note 108, at 6 (explaining the function of the EACJ). The EAC is a customs union and common market for the region, consisting of five members: Uganda, Kenya, Tanzania, Rwanda, and Burundi. *Id.*

¹¹² See Mikhail Klimenko, Garey Ramey, and Joel Watson, *Recurrent Trade Agreements and the Value of External Enforcement*, 74 J. INT'L ECON. 475, 478 (2008) (discussing the increased role of international legal systems to resolve conflicts arising within the context of multilateral and bilateral trade agreements, including reliance on the World Trade Organization's judicial mechanism of dispute

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If the benefitting party violates conditions of the program, it simply loses eligibility.

Human rights provisions setting hard standards are preferable to those setting soft standards.¹¹³ “In the area of human rights, hard laws are essential: change in repressive behavior almost always requires legally binding obligations that are enforceable.”¹¹⁴ When PTAs implement hard standards for human rights, they are likely to coerce repressors to change their behavior within a shorter timeline, as opposed to waiting for them to change their deeply held preferences toward human rights.¹¹⁵

The experience of the COMESA treaty is instructive in this regard.¹¹⁶ Article 6 of the treaty calls for the “recognition, promotion and protection of human and people’s rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights; accountability, economic justice and popular participation in development; [and] the recognition and observance of the rule of law.”¹¹⁷ This human rights provision sets soft standards because the treaty contains no active mechanism to sanction member countries that do not adhere to the principles.¹¹⁸ Due to the treaty’s toothless position on human rights violations, acts of terror within member states such as Zimbabwe have not been formally observed by COMESA.¹¹⁹

Given the choice between entering into a PTA with Uganda directly or with one of the regional organizations to which it belongs, the best option is for the United States to craft the agreement with the EAC. The United States has already expressed interest in establishing a new partnership with the EAC,¹²⁰ so there is already momentum to be leveraged. Moreover, the EACJ has a proven track record of adjudicating human rights violations and does not share Uganda’s deficient rule of law.¹²¹ While it is, strictly speaking, a regional trade court, the EACJ has decided significant human rights cases, including the 2007 *Katabazi*

resolution); Alan O. Sykes, *Public vs. Private Enforcement of International Economic Law: Of Standing and Remedy* 1-2 (The University of Chicago Law School, Working Paper No. 235, 2005), available at <http://ssrn.com/abstract=671801> (discussing trade agreements whose members create adjudicative bodies to hear complaints alleging breach of obligations, providing both public and private means of enforcement).

¹¹³ See background *supra* Part II.B (explaining the difference between hard and soft standards in trade agreements).

¹¹⁴ See Hafner-Burton, *supra* note 37 at 594-95.

¹¹⁵ Hafner-Burton, *supra* note 37, at 595.

¹¹⁶ Treaty Establishing the Common Market for Eastern and Southern Africa, Nov. 5, 1993, 33 I.L.M. 1067 [hereinafter *COMESA Treaty*]. Note that the treaty referred to here is between the African nations that comprise COMESA, not to be confused with the United States–COMESA TIFA discussed in Parts III.B and IV.A of this Comment.

¹¹⁷ *Id.*, at art. 6(e)-(g).

¹¹⁸ See Hafner-Burton, *supra* note 37 at 606.

¹¹⁹ *Id.*

¹²⁰ See discussion *supra* Part III.B (the USTR is currently leading efforts to forge a new trade and investment partnership with the EAC).

¹²¹ See Gathii, *supra* note 108, at 3. (“[T]he EACJ has developed a strong reputation within multiple networks of civil society, professional and other groups at the national and regional levels as a defender of human rights, the rule of law and good governance.”).

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case where fourteen people were placed under military arrest for unlawful possession of firearms and terrorism after the High Court of Uganda had granted them bail.¹²² Although the EACJ's constitutive treaty does not specifically grant jurisdiction to hear human rights cases, the court has broadly construed its power to decide such cases in order to fill the vacuum created by reluctant member states,¹²³ and the EAC Treaty explicitly provides that the court could have human rights jurisdiction if its member states conclude a protocol to operationalize the extended jurisdiction.¹²⁴

Alternatively, the United States could choose to influence Uganda's human rights climate by revoking Uganda's status as a beneficiary of the AGOA while promising to reinstate its privileges upon a measurable improvement in the persecution of political minorities including the LGBT community. This approach however provides only a temporary solution rather than establishing a sustainable mechanism for continual enforcement. Furthermore, it is a drastic measure, with the people of Uganda suffering lost trade with the United States until its government brings human rights guarantees into compliance. This solution, therefore, is best viewed as a "plan B."

VI. Conclusion

Given the attenuation of relying on the ATS to protect political minorities from persecution abroad, as gleaned from the case against Scott Lively, it is ripe to consider alternative vehicles. United States PTAs might be one such vehicle. For Uganda, and its LGBT community in particular, the most effective PTA-based solution would be one crafted as a bilateral agreement between the United States and the EAC, which incorporates specific human rights backed by hard standards to be enforced by the EACJ. As for other countries and other persecuted minorities, this Comment's proposal may point to possible solutions, to the extent that they share commonalities with the plight of Uganda.

¹²² *Id.* at 6, 12-14.

¹²³ *Id.* at 6-7.

¹²⁴ *Id.* at 7 n.3.