

## AVOIDING HARMFUL OVERREACH WHEN PROMOTING HUMAN RIGHTS IN AFRICAN INVESTMENTS\*

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The protection of human rights in African investments is not only a live issue, but one that can only grow in importance as U.S.-African economic relations evolve. At the same time, the over-emphasis of rights may counterproductively scare away legitimate investors and stymie growth. While best practices must be encouraged, a suffocating paternalism must be avoided.

To illustrate why careful balancing is so needed in Africa, it helps to look first at Bangladesh. On April 24, 2013, Rana Plaza, a building housing five garment factories that supplied major U.S. apparel companies,<sup>1</sup> collapsed and killed more than 1,100 people. A panel review found that “Rana Plaza [had] collapsed due to blatant violation of the building code, the use of substandard material and the operation of heavy machinery including generators on the upper floors.”<sup>2</sup> It is also alleged that the owners and operators required workers – who made only \$38 per month, less than a quarter of China’s minimum monthly wage – to go into the factory despite cracks appearing the day before on the building’s outer wall.<sup>3</sup>

The official U.S. reaction to Rana Plaza was far from harsh. Bangladesh’s GSP export benefits were suspended, but the GSP program as a whole expired per its terms shortly thereafter, and

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\* Panel Talk, “Prosecution of Investment-Related Human Rights Violations in Africa” at the University of Pennsylvania Law School’s 2013 Symposium, “International Regulation of Investment in the Rising Powers,” (Nov. 8, 2013).

<sup>1</sup> Gianluca Mezzofiore, *Rana Plaza Disaster: Benetton Admits It “Occasionally” Made Clothing at Bangladesh Factory*, INT’L BUSINESS TIMES (May 1, 2013, 10:19 AM), <http://www.ibtimes.co.uk/articles/463276/20130501/benetton-rana-plaza-bangladesh.htm>.

<sup>2</sup> Syed Zain al-Mahmoud, *Bangladesh Collapse Blamed on Shoddy Materials*, WALL ST. J. (May 24, 2013, 1:28 AM), <http://online.wsj.com/news/articles/SB10001424127887324659404578500830784721920>.

<sup>3</sup> *Id.*

the U.S. and Bangladeshi governments almost immediately set about to come to terms.<sup>4</sup> Meanwhile, at a Senate hearing little more than a month after the collapse, a State Department official blandly observed that “[i]n the past two decades, Bangladesh has made remarkable development progress, in part because of the growth of its ready-made garment sector. Despite the benefits the industry has brought, however, the tragedies at Rana Plaza and Tazreen Fashions [a 2012 fire<sup>5</sup>] have made clear that significant challenges remain.”<sup>6</sup> The official went on to note that Secretary of State Kerry had, in his discussions with his Bangladeshi counterpart, framed the matter as one of protecting Bangladesh’s “brand.”<sup>7</sup>

Had Rana Plaza been located in a suburb outside Accra rather than outside Dhaka, the response would have been quite different. Rather than see it as an isolated and all-too-typical industrial accident in the developing world, the U.S. media would have assailed U.S. complicity in the horrors of an industrializing Africa that had been pristine and innocent.<sup>8</sup> Advocates of the Global

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<sup>4</sup> Mike Godfrey, *US Withdraws GSP Benefits from Bangladesh*, TAX-NEWS.COM (July 3, 2013), [http://www.tax-news.com/news/US-Withdraws\\_GSP\\_Benefits\\_From\\_Bangladesh\\_61276.html](http://www.tax-news.com/news/US-Withdraws_GSP_Benefits_From_Bangladesh_61276.html); Rezaul Karim, *US Wants to Know Measures Taken on GSP Action Plan*, THE FINANCIAL EXPRESS (Oct. 21, 2013), <http://www.thefinancialexpress-bd.com/index.php?ref=MjBfMTBfMjFfMTNfMV8yXzE4NzQwNA==> (reporting on efforts by U.S. and Bangladeshi officials, within months of the collapse, to develop a timetable to restore GSP preferences); *Generalized System of Preferences (GSP)*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp> (last visited Nov. 5, 2013) (noting the GSP system’s expiry on July 31, 2013).

<sup>5</sup> Anis Ahmed & Ruma Paul, *More than 100 Die in Garment Factory Fire, the Deadliest in Bangladesh’s History*, CHRISTIAN SCI. MONITOR (Nov. 25, 2012), <http://www.csmonitor.com/World/Latest-News-Wires/2012/1125/More-than-100-die-in-garment-factory-fire-the-deadliest-in-Bangladesh-s-history> (observing that “[w]orking conditions at Bangladeshi factories are notoriously poor, with little enforcement of safety laws, and overcrowding and locked fire doors are common”).

<sup>6</sup> *Labor Issues in Bangladesh Before the S. Comm. on Foreign Relations*, 113th Cong. 1 (2013) (statement of Robert O. Blake, Assistant Secretary, Bureau of South and Central Asian Affairs, U.S. State Department), available at <http://www.state.gov/p/sca/rls/rmks/2013/210347.htm>.

<sup>7</sup> *Id.* Assistant Secretary of State Blake’s prepared testimony used terms such as “goal,” “urged,” “pressed,” “hope,” “advocacy,” “engaged,” and “organized a conference call,” which convey a gentler tone than that of Assistant Secretary of State Carson when testifying about Nigeria. See source cited *infra* note 10.

<sup>8</sup> A useful example of official U.S. paternalism in respect of “proper” African economic development is the Obama Administration’s Power Africa program,

which is tilted (at least in its featured elements) toward “clean” energy and helping Africa “develop newly-discovered [oil and gas] reserves responsibly.” See Off. of the Press Secretary, *Fact Sheet: Power Africa*, WHITE HOUSE (June 30, 2013), <http://www.whitehouse.gov/the-press-office/2013/06/30/fact-sheet-power-africa>. Such a prescriptive approach, as aesthetically pleasing as it may be to Western policy elites seated in comfortable offices electrified mostly by coal, is not aimed at enabling the large-scale industrial development that pulled the United States, and more recently China, out of agrarian poverty. See Spencer Swartz & Shai Oster, *China Tops U.S. in Energy Use*, WALL ST. J. (June 18, 2010, 12:01 AM), <http://online.wsj.com/news/articles/SB10001424052748703720504575376712353150310> (noting that China’s energy “milestone . . . reflects both China’s decades-long burst of economic growth and its rapidly expanding clout as an industrial giant”). The Western elite preference for clean energy over actual development in Africa is further illustrated by a UNEP report’s consideration of the problem of energy in Sub-Saharan Africa as involving the “need” to shift from carbon-heavy sources to “sustainable options.” UNEP FIN. INITIATIVE, FINANCING RENEWABLE ENERGY IN DEVELOPING COUNTRIES 38 (2012), available at [http://www.unepfi.org/fileadmin/documents/Financing\\_Renewable\\_Energy\\_in\\_Sub-Saharan\\_Africa.pdf](http://www.unepfi.org/fileadmin/documents/Financing_Renewable_Energy_in_Sub-Saharan_Africa.pdf). Such an elevation of Western “clean hands” policy preferences over the rapid if imperfect alleviation of human suffering finds a mirror in Western qualms over the genetic modification of the *Anopheles* mosquito, which carries the malaria-causing *Plasmodium* parasite. The *Anopheles* mosquito thoughtlessly conducts a nearly Rwanda-level genocide every year in Africa, annually slaughtering among its victims around 600,000 children. The lead author of the relevant GM study nevertheless felt bound to observe that

all ethical, social and legal concerns over the use of a genetically-engineered mosquito in a country willing to give it a trial also will have to be satisfied. Meeting these concerns requires significant community engagement and intellectual and emotional ownership of the technology by the end-users and stakeholders. I don’t know how long this could take, but it won’t be fast.

Liat Clark, *Genetically Modified Mosquito Designed to Avoid Malaria Spread*, WIRED.CO.UK (June 13, 2012), <http://www.wired.co.uk/news/archive/2012-06/13/genetically-modified-mosquitoes> (quoting Professor Anthony James from University of California, Irvine). To elevate a mosquito over more than half a million dying children is the nadir of moral preening. A useful thought experiment here is to imagine the reaction in Bethesda or Kensington if malaria started killing prep-schoolers and parents were told by (malaria-free) outsiders that they had to slowly nurture an “intellectual and emotional” consensus about whether to introduce the GM-modified mosquito. It is safe to say the consensus would not only be instantaneous, but accompanied by angry demands for immediate and large-scale implementation. To understand still better just how different Western and African experiences, priorities and timetables often are, compare Tom Frieden, *Number of U.S. Malaria Cases Highest in 40 Years. Have We Forgotten What It Takes to Prevent It?*, HUFFINGTON POST (Oct. 31, 2013, 3:07 PM), [http://www.huffingtonpost.com/tom-frieden-md-mph/number-of-u-s-malaria-cas\\_b\\_4181924.html](http://www.huffingtonpost.com/tom-frieden-md-mph/number-of-u-s-malaria-cas_b_4181924.html) (noting that malaria, which was aggressively wiped out in the United States decades ago – by means now deemed environmentally unacceptable – is contracted through international travel and now kills only five Americans per year) with *Malaria*, WORLD HEALTH ORG., <http://www.who.int/mediacentre/factsheets/fs094/en> (last visited Nov. 6, 2013)

South would have produced articles and conferences bemoaning the ceaseless exploitation of African workers.<sup>9</sup> Congressional hearings would have heard testimony not about safeguarding Africa's "brand," but rather about how harshly U.S. officials had chided their African counterparts.<sup>10</sup> (The fact that even troubled Nigeria has a better "brand" than Bangladesh on important metrics would be blithely ignored.)<sup>11</sup> There would have been calls to

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(noting that an African child dies each minute from malaria, which causes "fever, headache, chills and vomiting" and in severe pediatric cases frequently causes "one or more of the following symptoms: severe anaemia, respiratory distress in relation to metabolic acidosis, or cerebral malaria") and Douglas G. Postels et al., *Pediatric Cerebral Malaria: A Scourge of Africa*, FUTURE NEUROLOGY (Dec. 14, 2012), <http://www.medscape.org/viewarticle/775990> (noting that this severe and usually pediatric form - affecting nearly a million African children each year - causes coma, kills fifteen percent of its victims, and in a further thirty percent can lead to "epilepsy, neurodisabilities and cognitive-behavioral problems").

<sup>9</sup> See, e.g., *Africa: Exploitation and Resistance Conference*, WORLD DEV. MOVEMENT (June 11, 2011), <http://www.wdm.org.uk/africa-conference> (providing recordings from the conference and observing that "Africa is at the sharp end of corporate exploitation"); Richard Drayton, *The Wealth of the West Was Built on Africa's Exploitation*, THE GUARDIAN (Aug. 19, 2005), <http://www.theguardian.com/politics/2005/aug/20/past.hearafrica05> (asserting that the "fragility of contemporary Africa is a direct consequence of two centuries of slaving, followed by another of colonial despotism," and that the "psychology of racism operates even among those who believe in human equality").

<sup>10</sup> See, e.g., Anastasia Lloyd Damjanovic, U.S. Dept. of State, *State's Carson Says U.S. Supports a "Stable, Prosperous" Nigeria*, U.S. AFRICA COMMAND (July 12, 2012), <http://www.africom.mil/Newsroom/Article/9071/states-carson-says-us-supports-a-stable-prosperous> (noting that Asst. Sec. of State Johnnie Carson testified before the House Foreign Affairs Committee that the corruption, abuse and "inability of the [Nigerian] government to address the needs of the people, to grow the economy and to generate jobs" had generated mass hopelessness and assisted the rise of the Boko Haram terrorist movement). The tonal difference between Mr. Carson's testimony and that of Mr. Blake about Bangladesh is striking (see *supra* notes 6-7 and accompanying text), especially considering the fact that Bangladesh has troubles and metrics comparable to, or worse than, those of Nigeria. See *infra* note 11 and accompanying text.

<sup>11</sup> For example, in 2012, Nigeria ranked 139th in Transparency International's rankings for 2012, five spots higher (*i.e.* better) than Bangladesh at 144th. See *Corruption Perceptions Index 2012*, TRANSPARENCY INT'L, <http://cpi.transparency.org/cpi2012/results> (last visited Nov. 5, 2013) (providing the latest online annual report). Nigeria scores higher than Bangladesh in economic freedom, with a rank of 120th to Bangladesh's 132nd. *2013 Index of Economic Freedom: Country Rankings*, HERITAGE FOUND., <http://www.heritage.org/index/ranking> (last visited Nov. 5, 2013). Meanwhile, Bangladesh has, like Nigeria, a long-running ethnic insurgency that has raised serious international human-rights concerns. *Bangladesh: Indigenous Peoples Engulfed in Chittagong Hill Tracts Land Conflict*, AMNESTY INT'L (June 12, 2013), <http://www.amnesty.org/en/news/bangladesh-indigenous-peoples-engulfed->

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impose stringent labor conditions in investment treaty negotiations with African countries, despite the fact that the United States does not impose such conditions on existing partners like Bangladesh.<sup>12</sup> Meanwhile, the “development aid” industry would discuss with its enablers in the federal bureaucracy and congressional committees how “aid” studies and capacity-building programs could promote the adoption and enforcement of better African labor and building codes.<sup>13</sup>

Meanwhile, more general Western reactions to such a dirtily industrializing Africa would hardly be complimentary. There would be articles about the effects of soot on wildebeest, the disruption of picturesque traditional communities, and the ruination of landscapes by highways and suburban housing tracts. In short, the West would mourn the loss of “National Geographic Africa,” the Rousseauian love of which has inspired so many official U.S. efforts to protect Africa from the standard dislocations and tradeoffs of economic development.<sup>14</sup>

The long reach and oppressive atmosphere of Western paternalism in Africa quietly drives off many legitimate U.S. investors. It is one thing to face a militant labor movement, for

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chittagong-hill-tracts-land-conflict-2013-06-12.

<sup>12</sup> Labor provisions already figure prominently in the 2012 version of the U.S. Model Bilateral Investment Treaty (BIT). 2012 U.S. Model BIT, art. 13, available at <http://www.state.gov/documents/organization/188371.pdf>. Meanwhile, the U.S.-Bangladesh BIT does not even mention labor matters. U.S.-Bangladesh BIT, Mar. 12, 1986, S. Treaty Doc. No. 99-23 (entered into force on July 25, 1989), available at [http://tcc.export.gov/Trade\\_Agreements/All\\_Trade\\_Agreements/exp\\_002778.asp](http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_002778.asp). The massive U.S. Model BIT severely burdens African countries that lack resources for such in-depth negotiations. Because there are currently only six U.S. BITs with Sub-Saharan African countries, most of the region will be able to access legally facilitated U.S. investment only after completing procedures far more demanding than those which Bangladesh and other countries faced. See Peter C. Hansen, Heritage Foundation Lecture No. 1219, *Unleashing the U.S. Investor in Africa: A Critique of U.S. Policy Toward the Continent 4* (Feb. 4, 2013), available at <http://www.heritage.org/research/lecture/2013/02/unleashing-the-us-investor-in-africa> (“The U.S. appears to apply a uniquely strict set of standards to sub-Saharan African countries.”).

<sup>13</sup> For an idea of just how pervasive official U.S. “aid” to Africa is, see generally ALEXIS ARIEFF ET AL., CONG. RESEARCH SERV., R41840, U.S. FOREIGN ASSISTANCE TO SUB-SAHARAN AFRICA: THE FY2012 REQUEST (2011), available at <http://www.fas.org/sgp/crs/row/R41840.pdf>.

<sup>14</sup> See, e.g., *supra* note 8 and accompanying text (discussing the Obama Administration’s Power Africa initiative, which reflects Western notions about “clean” energy sourcing that wealthy Western communities would never accept for themselves).

example in South Africa.<sup>15</sup> It is quite another to deal with a Western presumption that simply employing Africans in a Western-style industrial enterprise is exploitative.<sup>16</sup> Since Western commentators tend to view African workers not as tough proletarians like their Bangladeshi counterparts,<sup>17</sup> but instead as helpless Conradian natives,<sup>18</sup> it is far easier for U.S. investors to avoid public-relations headaches and site industrial investments in brownfield Asian locations rather than in Africa. Conscientious U.S. firms thus counterproductively leave a desperate continent to the tender mercies of U.S. and foreign (particularly Chinese) operations more interested in profits than in ethics.<sup>19</sup>

The answer to stifling Western paternalism is not the abandonment of Africa. It is instead to advance Africa's economic interests rather than the whims of Western elites with more certainty than sense. For example, the U.S. Government displays a certain cognitive dissonance when it decries "inexpensive labor" (a key competitive advantage for Africa),<sup>20</sup> as well as declining wages

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<sup>15</sup> For a short survey of South African labor union activity, see Andy Wynne, *South African Labor Goes Into Battle*, SOCIALISTWORKER.ORG (Sept. 10, 2013), <http://socialistworker.org/2013/09/10/south-african-labor-into-battle> ("Since 2005, South African workers have had as much experience with strikes as anywhere in the world.").

<sup>16</sup> This perception is unfortunately bolstered when African States fail to enforce their own labor laws. See UNCTAD & JAPAN BANK FOR INT'L COOP., *BLUE BOOK ON BEST PRACTICE PROMOTION AND FACILITATION (GHANA) (2006)*, available at [http://unctad.org/en/docs/iteipc200613\\_en.pdf](http://unctad.org/en/docs/iteipc200613_en.pdf) (observing that reformed Ghanaian labor "provisions are not enforced because of inadequate knowledge of the provisions of the law"); Alexis Okeowo, *China, Zambia, and a Clash in a Coal Mine*, NEW YORKER (Oct. 10, 2013), <http://www.newyorker.com/online/blogs/currency/2013/10/china-zambia-and-a-clash-in-a-copper-mine.html> (noting Zambian government failures to address labor abuses before a deadly dispute erupted).

<sup>17</sup> See Ahmed & Paul, *supra* note 5 (reporting that after the Tazreen fire, "[m]ore than 300 factories near the capital shut for almost a week earlier this year as workers demanded higher wages and better working conditions"). Unionization is by no means unknown in African industry. See Okeowo, *supra* note 16 (discussing the role of the Mine Workers Union of Zambia in a violent labor dispute between Zambian miners and Chinese owners).

<sup>18</sup> See, e.g., sources cited *supra* note 9.

<sup>19</sup> See Okeowo, *supra* note 16; *Equatorial Guinea Profile*, BBC NEWS AFRICA (June 25, 2013), <http://www.bbc.co.uk/news/world-africa-13317174> (stating that Exxon Mobil was found to have paid large sums to President Obiang's family in one of the world's most abusive and corrupt states).

<sup>20</sup> See, e.g., Karen J. Hanrahan, Dep. Asst. Sec. for Dem., Hum. Rts., & Labor, Inclusive Economic Growth and Respect for Labor Rights in Sub-Saharan Africa, Statement Before the 2013 U.S.-Sub-Saharan Africa Trade and Economic

in the global apparel industry dominated by China and Bangladesh,<sup>21</sup> while at the same time bragging that the Third-Country Fabric Provision of the African Growth and Opportunity Act (AGOA) “is crucial to the continued survival of Africa’s textile and apparel industry. It has not only generated hundreds of thousands of jobs in sub-Saharan Africa, but it has also helped American retailers reduce their costs, diversify their supply chains, and provide greater low-cost apparel options for American consumers.”<sup>22</sup> So which is it to be – expensive labor or reduced costs? When 153,276 businesses compete worldwide to produce apparel,<sup>23</sup> it is silly for the U.S. Government to expect that high margins will exist to pay for high hourly wages.

A sensible alternative to official protests against economic realities is to increase demand for African labor and thereby drive up wages. This can be done by attracting massive U.S. private investment across all sectors. To achieve this, the U.S. Government and others would be wise to advise and assist U.S. investors in respect of local laws, practices, and procedures concerning labor, health, and the environment. When the present vacuums of risk in these areas are reduced to quotidian details, businesses can develop solid plans that lead to success and to the prosperity of African workers. That is how everybody wins.

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Cooperation Forum (Aug. 12, 2013), available at <http://www.humanrights.gov/2013/08/19/inclusive-economic-growth-and-respect-for-labor-rights-in-sub-saharan-africa-agoa-forum/> (asserting that “just creating jobs is not sufficient if they are not decent jobs,” and opining that “while there are welcome signs of increasing industrial employment in many African countries, in most cases, these industries in which these jobs appear [to] embrace low-wage models, capitalizing on inexpensive labor and light regulation. These industries argue that they are contributing to development by providing jobs, but again job creation alone does not automatically lead to inclusive growth.”).

<sup>21</sup> *Id.* See also Ahmed & Paul, *supra* note 5 (“Bangladesh has around 4,500 garment factories and is the world’s biggest exporter of clothing after China, with garments making up 80 percent of its \$24 billion annual exports.”).

<sup>22</sup> AGOA’s *Third-Country Fabric Provision*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-topics/trade-development/preference-programs/african-growth-and-opportunity-act-agoa/tch> (last visited Feb. 21, 2013).

<sup>23</sup> See *Report Snapshot: Global Apparel Manufacturing: Market Research Report*, IBISWORLD.COM, <http://www.ibisworld.com/industry/global/global-apparel-manufacturing.html> (last visited Feb. 21, 2013) (noting that 153,276 businesses compete in the global industry).