

THE IMF AND AGOA: A COMPARATIVE ANALYSIS OF CONDITIONALITY

INTRODUCTION

The International Monetary Fund (IMF or the Fund) and the Africa Growth and Opportunity Act (AGOA) are fundamentally dissimilar regimes with different purposes and goals. The mission of the IMF is to monitor and stabilize the global economic currency system.¹ It is a member-based organization of nation-states that provides loans to countries in financial difficulties. AGOA, on the other hand, is a unilateral trade preference regime offered by the U.S. government to benefit countries in sub-Saharan Africa. Its purpose is to provide increased trade opportunities as an incentive for countries to undertake political and economic reforms.²

A common feature of the IMF and AGOA is, however, that both institutions impose conditions on their beneficiaries. “Conditionality” in relations between developed and developing countries, specifically with regard to financial assistance and trade benefits, has long been a highly controversial topic. Condemnation of IMF conditionality has become something of an ethos among critics of the Fund.³ Along those lines, there have also been numerous complaints regarding the conditionality engrained in AGOA.⁴

1. *See generally* Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, art. I, 60 Stat. 1401, 2 U.N.T.S. 39, 40 (as amended by the Second Amendment to the Articles of Agreement of the International Monetary Fund, Apr. 30, 1976, art. I, 29 U.S.T. 2203, 2205, 15 I.L.M. 546, 547 (1976)) [hereinafter IMF Articles]. The text of the Second Amendment reprints the IMF Articles with all changes incorporated into the body of the full text. *But see* Third Amendment of the Articles of Agreement Regarding the Suspension of Voting Rights, June 28, 1990, 31 I.L.M. 1307 (1992) (amending Article XII, § 3(i), and Article XXVI, § 2, and adding Schedule L and paragraph 5 of Schedule D). Hereinafter, citations to the IMF Articles will be to the printed sources for either the Second or Third Amendments as necessary. The current full text is also available from the IMF website at <http://www.imf.org/external/pubs/ft/aa/index.htm> and <http://www.imf.org/external/pubs/ft/aa/aa.pdf> (last visited Mar. 28, 2004).

2. *See* discussion *infra* in Part II.

3. *See, e.g.,* Vivien Collingwood, *Assistance with Fewer Strings Attached*, in ETHICS & INT'L AFF., No. 1, at 55 (Carnegie Couns. Ethics & Int'l Aff. 2003) (critiquing IMF conditionality); Martin Feldstein, *Refocusing the IMF*, FOREIGN AFF., Mar./Apr. 1998, at 20 (“The IMF’s recent emphasis on imposing major structural and institutional reforms as opposed to focusing

This note analyzes the manner in which conditions are applied in the IMF and AGOA regimes. While the substance of the conditions is naturally dissimilar, we explicitly accept the premise that conditions have the potential to be an important tool in effecting positive change by influencing recipient country policies. Thus, affirming the theoretical legitimacy of conditionality, the paper undertakes an analysis of how the IMF and AGOA use the conditions at their disposal, and whether such use is consistent with their missions and purposes.

I. DECONSTRUCTING ARGENTINA'S FAILURE

If success has a thousand fathers, then Argentina has lately been an orphan. Merely six years ago, Argentina was the darling of the IMF,⁵ and the country's leaders bragged of the macroeconomic "miracle" that had transpired following the "lost decade" of the 1980s.⁶ Since its default in December of 2001, the struggling nation has seen massive capital flight, followed by an inevitable influx of critics.⁷

on balance-of-payments adjustments will have adverse consequences in both the short term and the more distant future.").

4. See, e.g., Jesse Jackson, Jr., *Hope for Africa*, NATION, Mar. 15, 1999, at 6 (arguing that AGOA "impose[s] on Africa the worst aspects of the International Monetary Fund's structural adjustment programs, major elements of NAFTA and the World Trade Organization, and left-over provisions of the Multilateral Agreement on Investment, while proffering illusive, short-lived trade 'benefits'"); see also Chakravarthi Raghavan, *Africa: NGOs start campaign against U.S. AGOA*, THIRD WORLD NETWORK ONLINE, (Oct. 4, 2000) (reporting on African civil society groups' claims that AGOA "provides illusory benefits to African countries who in exchange are to provide real concessions to the United States and its firms"), at www.twinside.org.sg/title/agoa.htm (last visited Mar. 19, 2004).

5. See MICHAEL MUSSA, ARGENTINA & THE FUND: FROM TRIUMPH TO TRAGEDY 1-2 (2002); see also Bretton Woods Committee, *Spotlight on Latin America*, in CRITICAL ISSUES FORUM, Dec. 2002, at 5 (comments of Joseph Stiglitz, referring to Argentina as the "A-plus student of the IMF"), at <http://www.brettonwoods.org/Critical%20Issues%20Latin%20America.pdf> (last visited Mar. 19, 2004).

6. See Domingo F. Cavallo & Joaquin A. Cottani, *Argentina's Convertibility Plan and the IMF*, AM. ECON. REV., May 1997, at 17.

7. See, e.g., Bretton Woods Committee, *supra* note 5, at 6-7 (comments of Adam Lerrick, blaming Argentina's malaise on populist social sentiment, strong labor unions, and big spending). See also *id.* at 8 (comments of Morris Goldstein: "Argentina got into trouble because it didn't exercise sufficient fiscal discipline . . . because it allowed its external debt to become too large, because it stuck too long with a currency regime that permitted its real exchange rate to become uncompetitive, and because it refused for too long to restructure its debt . . ."); Mary Anastasia O'Grady, *A Shocking Proposal: Let Brazil Find its Own Way*, WALL ST. J., Oct. 11, 2002, at A13 ("[R]igid [Argentine] labor laws and protectionism were destroying productivity and high taxes were choking off incentives to invest and produce."); James Petras, *The Case of Argentina*, SOCIAL POLICY, Summer 2002, at 6-7 ("The principle cause for decline and collapse

Given its history of providing significant financial and political support for Argentina's economic policies during the 1990s, the IMF has unsurprisingly found itself to be the object of much of the criticism. Left-wing commentators assail the IMF for focusing on neo-liberal economics while ignoring the increasingly stratified distribution of wealth between rich and poor.⁸ Predictably, conservatives take the opposite approach, blaming the IMF for allowing Argentina's leaders to delay the implementation of "sound money, low tax rates and freer trade policy."⁹ Critics on both sides of the political spectrum have called for the IMF to "shut down."¹⁰

Of course, the collapse of an entire economy is unlikely to stem from a single factor, meaning that all of the above commentators are at least partially correct. But much of the literature emerging over the past two years has overemphasized Argentina's fiscal, monetary, and exchange policy instead of addressing the fundamental problems that have led Argentina from one financial crisis to another for decades. In particular, we believe that Argentina will never achieve long-term growth and financial stability until it effectively reduces its rampant and infamous corruption. Furthermore, we assert that IMF conditionality can be used as an effective tool in aiding Argentina in its struggle to clean up its government.

A. Why Should Corruption Be Important to the IMF?

It may seem odd to call for greater use of conditionality at the IMF, given the flood of criticism that IMF conditions, especially those that touch on "structural" considerations, have already received.¹¹

is located in neo-liberal structures of power and policies which facilitated pillage of the economy, massive corruption, and rising foreign debt . . .").

8. See, e.g., Petras, *The Case of Argentina*, *supra* note 7, at 6–7; *A Stubborn Curse: Inequality in Latin America*, *ECONOMIST*, Nov. 8, 2003, at 37 ("Historians, political scientists and left-wingers have long highlighted inequality as an important obstacle to development in Latin America.").

9. Mary Anastasia O'Grady, *Take Argentina Off Life Support*, *WALL ST. J.*, Aug. 15, 2003, at A9.

10. See, e.g., O'Grady, *A Shocking Proposal*, *supra* note 7, at A13 ("[The] International Monetary Fund should get out of the bailout business and find a new line of work, or better yet, shut down. . . . What was once supposed to be insurance for developing countries that opened their capital markets and suffered 'external shocks' beyond their control has turned into a slush fund for populist big government."); Petras, *supra* note 7, at 7 ("The immediate cause of the collapse of Argentine capitalism was the role of foreign owned banks and [industrial financial institutions], led by the International Monetary fund (IMF), in emptying the Argentine financial system.").

11. See, e.g., *supra* note 3 and accompanying text. *But see* INTERNATIONAL MONETARY FUND (IMF), *GUIDANCE ON THE DESIGN & IMPLEMENTATION OF IMF CONDITIONALITY*:

Some bemoan the fact that IMF conditions unduly infringe on the borrower-nation's sovereignty, and urge the Fund to avoid conditionality wherever possible.¹² Others would abandon conditionality for the simple reason that it is ineffective in imposing any financial discipline.¹³ On the other hand, some argue that the IMF's biggest mistake has not been its use of conditions, but its unwillingness to insist that the conditions be strictly followed.¹⁴

Without endorsing any specific conditions, we find that conditionality is particularly appropriate when a borrower's primary problem is not a short-term liquidity crisis, but a deep-rooted flaw in the fundamentals of its economy.¹⁵ It can be argued that the IMF is not designed to treat such structural societal illnesses.¹⁶ But as long as the Fund chooses to remain at Argentina's bedside, it would be foolish for it to perform cosmetic surgery on macroeconomic indicators while ignoring the underlying cancer of corruption.

Corruption should be important to the IMF because it wastes the resources of borrower countries, thereby endangering their fiscal position and decreasing their ability to repay their external debts. The

PRELIMINARY CONSIDERATIONS 2 (2002) ("conditionality is indispensable to ensure that IMF financing goes hand in hand with appropriate policy action by the country receiving that financing"), at <http://www.imf.org/External/np/pdr/cond/2002/eng/guid/053102.pdf> (last visited Mar. 19, 2004); Masood Ahmed et al., *Refocusing IMF Conditionality*, FIN. & DEV., Dec. 2001, at 40, 43 (indicating that imposing structural conditionality may be necessary where a country's economic difficulties are caused by more than just fiscal and monetary imbalances).

12. Feldstein, *supra* note 3, at 27. Feldstein is somewhat supported by the IMF Articles, which preclude the Fund from basing decisions on a borrower country's political or social choices. See IMF Articles, art. IV, § 3(b), *supra* note 1, 29 U.S.T. at 2209, 15 I.L.M. at 549 ("[Principles for the guidance of exchange rate policies] shall respect the domestic social and political policies of members . . ."); see also IMF Articles, sched. C(4), 29 U.S.T. at 2263, 15 I.L.M. at 580 ("The Fund shall not object [to a proposed par value for a member's currency] because of the domestic social or political policies of the member proposing the par value.").

13. See Bretton Woods Committee, *supra* note 5, at 7 (Lerrick states that "[o]fficial conditionality has failed: of Argentina's 19 accords with the IMF, the country did not respect 15.").

14. MUSSA, *supra* note 5, at 17 (lamenting the IMF's failure "to press the Argentine authorities as hard as it could have and should have to maintain a more prudent fiscal policy").

15. Thus, Feldstein's critique of conditionality, which focused mostly on the IMF's handling of a short-term liquidity crisis in South Korea, is inapplicable to Argentina, where decades of economic dreams deferred cannot possibly be attributed to a short-term liquidity problem. See Feldstein, *supra* note 3, at 25–27; see also Steven L. Schwarcz, *Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach*, 85 CORNELL L. REV. 956, 995–96, 1009–10 (2000) (distinguishing sovereign debt crises that arise from shortages of liquidity from crises that have more fundamental root causes); cf. John H. Chun, "Post-Modern" Sovereign Debt Crisis: Did Mexico Need an International Bankruptcy Forum?, 64 FORDHAM L. REV. 2647, 2659 (1996) (arguing that the Mexican financial crisis of 1994–1995 was caused by liquidity rather than structural problems).

16. See Feldstein, *supra* note 3, at 20, 30.

IMF is required to conserve its resources responsibly,¹⁷ and therefore can only extend funding to countries that are reasonably likely to service their loans. When a substantial portion of revenue is wasted on graft, it becomes more difficult for a government to fulfill all of its domestic obligations while simultaneously keeping the deficit under control. In addition, when corruption is uncontrolled, government officials will steal money that had been destined for development, thus hampering a country's growth and reducing the future revenue available to service its loans.¹⁸

The second justification for IMF involvement in the fight against corruption stems from the Fund's duty to monitor its borrowers' monetary policy.¹⁹ Corruption is relevant to monetary policy because central banks are unlikely to retain autonomy and independence from the political influence of corrupt regimes. A politicized central bank will be pressured to lower interest rates in anticipation of elections,

17. Cf. IMF Articles, art. V, § 3(a), *supra* note 1, 29 U.S.T. at 2211, 15 I.L.M. at 550 ("The Fund will... establish adequate safeguards for the temporary use of [its] general resources...").

18. See John Githongo, *Corruption as a Problem in the Developing World: Effects on the Economy and Morale*, Address at the Seminar on Corruption and Development Co-operation held by the Government of Finland (May 2000) ("Corruption is now accepted as a major international scourge that undermines economic, political and social development.") (transcript available at <http://www.transparency.org/speeches/githongo.html> (last visited March 19, 2004)); Inter-American Convention Against Corruption, Mar. 29, 1996, pmbl., S. TREATY DOC. NO. 105-39, at 1-2, 35 I.L.M. 724, 727 ("The member states of the Organization of American States, [are] convinced that corruption... strikes at... the comprehensive development of peoples..."), available at <http://www.oas.org/juridico/english/Treaties/b-58.html> (last visited Mar. 19, 2004); cf. Pedro-Pablo Kuczynski, *Setting the Stage*, in AFTER THE WASHINGTON CONSENSUS: RESTARTING GROWTH AND REFORM IN LATIN AMERICA 21, 29 (Pedro-Pablo Kuczynski & John Williamson eds., 2003) (noting that development requires substantial public spending in "productive investment expenditure especially on education and basic infrastructure"); Pedro-Pablo Kuczynski, *Reforming the State*, in *id.* 33, 34 (noting that in Latin America "[c]rucial sectors—such as the administration of education, health care, and public infrastructure—suffer from political interference, lack of a career path for civil servants, and pay that is substantially lower than in comparable private-sector positions" often resulting in a "confrontational attitude toward the private sector—and sometimes corruption and ineptitude").

Mussa implies that Argentina's crisis was caused by a congenital tendency of the government to "spend significantly more than it could raise in taxes." MUSSA, *supra* note 5, at 10. But chronic deficits are a hallmark of practically every democracy, since politicians hate to choose between raising taxes and cutting popular spending programs. See *The Red and the Black*, ECONOMIST, May 26, 2001, at 76. Of course, not every democracy suffers from Argentina's repeated financial crises. Perhaps a more accurate explanation for Argentina's dilemma is that corruption has persistently stunted Argentina's growth, thereby inhibiting the country's ability to maintain long-term deficits comparable to most democracies.

19. See IMF, GUIDELINES ON CONDITIONALITY 3 (2002) (describing monetary policy as a "core area of responsibility" for the IMF), at <http://www.imf.org/External/np/pdr/cond/2002/eng/guid/092302.pdf> (last visited Mar. 19, 2004).

thereby subjecting the economy to overheating and reducing currency stability. Furthermore, central bankers beholden to political considerations will be tempted to monetize the fiscal deficit, a solution that inevitably leads to hyperinflation and financial disaster.²⁰

Some countries, including Argentina, seek to maintain the independence of central banks by enacting laws that forbid the dismissal of the Central Bank's governor without cause.²¹ But when corruption pervades an entire government, the authorities of the Central Bank will often be influenced by either outright bribes or more subtle political manipulation. Even if the Central Bank somehow maintains its integrity, the political leaders who disagree with its policies can easily find "cause" to effect the governor's removal.

This is exactly what happened to Pedro Pou, the widely respected former governor of Argentina's Central Bank. When Pou refused to adopt the policy recommendations of Argentina's economy minister, the government conveniently discovered a link between Pou and certain money-laundering operations and dismissed him.²² The scandal compromised investors' already shaky confidence in Argentina's monetary system.²³ It thus demonstrated that corruption is not just a "political consideration," but also a key determinant of a country's monetary stability, and therefore a legitimate concern for the IMF. The illicit flow of government funds to the well-connected is often considered the "underlying cause of Argentina's financial catastrophe."²⁴ But despite an overwhelming consensus of corruption's impact on development, the IMF has afforded little more than lip service to the problem.²⁵

20. See MUSSA, *supra* note 5, at 20 (noting that printing money to finance deficit spending had historically caused rapid inflation in Argentina).

21. See *id.* at 39.

22. See *id.* Pou may have been guilty, or he may have been the innocent victim of a regime that was willing and able to go to any lengths to get its way. In either case, Pou's dismissal exemplifies how corruption undermines the independence of central banks. Ironically, the economy minister was himself arrested on corruption charges about a year later. Enter the *Scapegoat*, *ECONOMIST*, Apr. 13, 2002, at 35.

23. MUSSA, *supra* note 5, at 39.

24. Matt Moffett, *Local Battle: One Tough Mayor Shows Argentina How to Clean House*, *WALL ST. J.*, July 1, 2003, at A1; Celeste Boeri, Note, *How to Solve Argentina's Debt Crisis: Will the IMF's Plan Work?*, 4 *CHI. J. INT'L. L.* 245, 250 (2003) ("Argentina is so rife with political corruption that it can hardly implement its own reforms."); see also *supra* notes 21–23 and accompanying text.

25. See *infra* notes 26–28 and accompanying text; see also IMF, *EXPERIMENTAL REPORT ON TRANSPARENCY PRACTICES: ARGENTINA* Box 1 (1999) (noting that the IMF "has not undertaken an assessment of the quality of the data disseminated" by Argentine authorities), at <http://www.imf.org/external/np/rosca/arg/> (last visited Mar. 28, 2004) [hereinafter

For example, in a postmortem analysis of what went wrong, the former director of the Department of Research at the IMF writes extensively about Argentina's macroeconomic conditions but hardly mentions corruption.²⁶ In other words, when the chief researcher for Argentina's largest lender evaluates the reasons for his former client's collapse, he focuses on the country's congenital habit of spending beyond its means, but completely ignores where the money ended up.²⁷ Such negligence would be unthinkable for a private lender,²⁸ and should not be tolerated in an organization charged with promoting "development of the productive resources of all members."²⁹

Of course, it is one thing for the IMF to make the fight against corruption a priority, and quite another for it to be effective at reducing it. Indeed, we know of no silver bullet for this longstanding and pervasive problem.³⁰ Nonetheless, we argue that the IMF could effec-

EXPERIMENTAL REPORT]; cf. IMF, STRUCTURAL CONDITIONALITY IN FUND-SUPPORTED PROGRAMS 42 (2001) ("[C]hanges in the legal and institutional framework . . . accounted for less than 10 percent of the structural conditions in transition economies in the second half of the 1990s."). Fortunately, the IMF has recently begun to take corruption more seriously. Last December the Fund refused to bail out the Dominican Republic after it became clear that the government was not committed to addressing the "cronyism, corruption, lax regulation and secrecy" that precipitated a recent banking crisis. *Dominican Republic in Crisis*, N.Y. TIMES, Dec. 29, 2003, at A16 (editorial); see also generally IMF, *How Does the IMF Encourage Greater Fiscal Transparency?* (Apr. 2003), at www.imf.org/external/np/exr/facts/fiscal.htm (last visited Feb. 25, 2004); IMF, GUIDELINES ON CONDITIONALITY, *supra* note 19, at 2 ("In helping members to devise economic and financial programs, the Fund will pay due regard to . . . their administrative capacity to implement reforms."). For more, see generally the EXPERIMENTAL REPORT, *supra*.

26. See MUSSA, *supra* note 5, at 9–16; see also Flemming Larsen, Argentina and the IMF: the need for perspective, Address at the International Cooperation and Solidarity in Latin America Week, Pôle Universitaire Européen de Toulouse (Nov. 18, 2003) (mentioning "weak governance" but declining to give the IMF a role in anything other than macroeconomic policy) (transcript available at <http://www.imf.org/external/np/speeches/2003/111803.htm> (last visited Mar. 19, 2004)).

27. Mussa's failure to address corruption is especially glaring in light of the arrest of Domingo Cavallo on corruption charges. See *Enter the Scapegoat*, *supra* note 22, at 55. Cavallo was the renowned architect of Argentina's Convertibility Plan and was one of the key figures involved in negotiations with the IMF. MUSSA, *supra* note 5, at 37.

28. To illustrate by way of example, imagine two companies, X and Y, neither of whom have any assets or liabilities. Thus, both companies have equivalent fiscal situations. Suppose that both companies approach a bank, B, requesting equivalent loans to finance a new factory, and that B can only supply one loan. Further suppose that X is likely to succeed in the project while Y (due to corrupt corporate governance) is likely to have the funds embezzled or otherwise wasted. With all other things being equal, B's resources would be more wisely spent on a loan to X. But if B focuses only on X and Y's fiscal positions without investigating how they spend their money, then B will sometimes loan to Y.

29. IMF Articles art. I(ii), *supra* note 1, 29 U.S.T. at 2205, 15 I.L.M. at 547.

30. See Peter Eigen, *Preface* to JEREMY POPE, *TRANSPARENCY INTERNATIONAL SOURCE BOOK 2000: CONFRONTING CORRUPTION: THE ELEMENTS OF A NATIONAL INTEGRITY*

tively reduce corruption in certain circumstances by adopting the proposals described below.

B. How Can the IMF Use Conditionality to Reduce Corruption?

The most direct manner in which the IMF could control the finances of its borrowers is by conditioning loan approval on reducing corruption. However, such an overarching policy would be far more easily articulated than carried out in practice, as the IMF has neither the resources nor the mandate to police every dollar of government spending.³¹

Nonetheless, the IMF could at least monitor what John Githongo describes as “looting, . . . the kind of scams whose figures are so huge that when they are successfully concluded they have macroeconomic implications fairly quickly.”³² If the IMF declared that such theft would be factored into its decision-making process, corrupt leaders might become more hesitant to steal.³³

The IMF could also use conditionality to control corruption in an indirect, although perhaps more effective, manner. Namely, it should condition loan guarantees on the borrower’s disclosure of budgetary information. The IMF Articles of Agreement require member countries to furnish information on macroeconomic indicators and exchange reserves, but do not demand the publication of government

SYSTEM, at xv (2000) (lamenting that “corruption will . . . always be with us”), <http://www.transparency.org/sourcebook/index.html> (last visited Mar. 28, 2004).

31. Cf. Feldstein *supra* note 3, at 27 (arguing that even the more limited conditions in use today unduly infringe on borrowers’ sovereignty).

32. See Githongo, *supra* note 18. Other aid organizations such as the World Bank and the Inter-American Development Bank may be better suited to police smaller-scale corruption in the projects they fund. See Eduardo Wills Herrera & Nubia Urueña Cortés, *South America*, in TRANSPARENCY INT’L., GLOBAL CORRUPTION REPORT 2003, at 103, 104 (Robin Hodess ed., 2002), <http://www.globalcorruptionreport.org/gcr2003.htm> (last visited Mar. 28, 2004). On the other hand, the World Bank has had trouble policing corruption in practice. See, e.g., *infra* note 112.

33. Although we call for the IMF to condition loans on making progress in the fight against corruption, we do not suggest that it give an ultimatum to all borrower countries to clean up or face an immediate end to all IMF financing. Instead, corruption should be taken into account among other factors when reviewing a borrower’s IMF program. A failure to reduce corruption need not by itself cut off a country’s access to Fund resources, but would be one of several conditions that, if unmet in sufficient numbers, would ultimately doom a country’s program. See IMF, CONDITIONALITY IN FUND-SUPPORTED PROGRAMS—POLICY ISSUES 17 (2001) (discussing the “critical mass” of failed structural benchmarks that could cut off a country from IMF funding), <http://www.imf.org/external/np/pdr/cond/2001/eng/policy/index.htm> (last visited Mar. 26, 2004). Such an approach could admittedly be applied in an unpredictable fashion, but it has the advantage of giving the IMF sufficient flexibility to use conditionality in a way that best suits each borrower’s unique situation.

budgets.³⁴ In fact, Article VIII specifically forbids the IMF from compelling members “to furnish information in such detail that the affairs of individuals or corporations are disclosed.”³⁵ Such self-imposed secrecy does nothing to advance the purposes of the IMF,³⁶ and serves only to protect well-connected actors who have something to hide about their incomes.³⁷

By demanding disclosure of borrower country spending, the IMF would help reduce corruption by providing citizens of borrower countries a greater opportunity to scrutinize how their tax money is being spent.³⁸ Furthermore, if Article VIII were amended, the IMF could demand that politicians and other high-ranking officials in borrower countries disclose their personal financial information. Such a move could substantially increase the accountability and credibility of governments in the developing world.³⁹ And unlike other structural conditions, which depend on the borrower government keeping its promises after coming to an agreement with the IMF, disclosure requirements could be enforced before any money is disbursed, thus ensuring a greater level of compliance than is typical for most IMF programs.

34. See IMF Articles, art. VIII, § 5, *supra* note 1, 29 U.S.T. at 2224–26, 15 I.L.M. at 558; see also *id.*, art. IV, § 3(b), 29 U.S.T. at 2209, 15 I.L.M. at 549. In Argentina, the IMF acknowledges that “coverage of general government transactions . . . is limited, and published information on extrabudgetary funds, tax expenditures, and contingent liabilities is partial or unavailable.” EXPERIMENTAL REPORT, *supra* note 25, para. 11.

35. IMF Articles art. VIII, § 5(b), *supra* note 1, 29 U.S.T. at 2225, 15 I.L.M. at 558.

36. See *id.* art. I, 29 U.S.T. at 2205, 15 I.L.M. at 547 (outlining the purposes of the IMF).

37. Cf. Eigen, *supra* note 30, at xv (“The belief that increased transparency can achieve not only more meaningful levels of accountability, but can do so in a highly cost-effective fashion, is now expressed universally.”); ROBERT MARTIN & ESTELLE FELDMAN, ACCESS TO INFORMATION IN DEVELOPING COUNTRIES 14–19 (1998) (Transparency International working paper) (advocating access to governmental information generally), available at http://www.transparency.org/working_papers/martin-feldman/2-why.html (last visited Mar. 26, 2004).

38. Thus, by demanding financial openness, the IMF will be able to utilize the democratic infrastructures of recipient countries to ensure that conditions which directly require good governance are actually followed. In other words, financial disclosure can ensure that good governance requirements are not reduced to mere surplusage. See *supra* note 25 (illustrating the IMF’s failure, notwithstanding its rhetoric, to encourage good governance in lender countries) and AGOA analysis *infra* (concluding that AGOA’s good governance requirement has not been taken seriously).

39. See POPE, *supra* note 30, at 235; *A Fight Against Corruption*, N.Y. TIMES, Dec. 15, 2003, at A28 (“If public servants must declare their wealth . . . and can be fired if caught lying, they are deterred from buying a Mercedes or a beach house.”). Such conditions would be analogous to disclosure requirements of certain U.S. federal and state election laws. See, e.g., GA. CODE ANN. § 21-5-50 (2003).

In recent months the IMF has taken steps in the direction of full disclosure, and it should be applauded for its efforts. On October 10, 2003, the IMF announced that many country documents would be presumed publishable unless the country in question objected.⁴⁰ More importantly, the Managing Director will recommend that the Board decline approval of new programs for countries with exceptional access to IMF resources that do not consent to the publication of material.⁴¹ These moves will not only improve the efficacy of Fund-supported programs, but they will also boost the credibility of the IMF as an institution.

Of course, using disclosure and corruption as conditions for IMF programs is an imperfect solution, subject to numerous criticisms. For example, some might consider corruption to be too vague a benchmark to measure in an objective fashion.⁴² In fact, corruption has already been measured in a number of ways, such as through Transparency International's Corruption Perceptions Index and as part of the qualifying criteria for the U.S. government's Millennium Challenge Account.⁴³ These indices may not be perfect gauges, but the same could be said about many of the macroeconomic indicators traditionally used by the IMF.⁴⁴ Furthermore, although imperfect statistics may not be appropriate tools for judges to use in deciding questions of law, they are well-suited to constitute factors in the IMF's "critical mass" decision-making process.⁴⁵

Another potential criticism of the use of conditions to fight corruption is that, like all types of structural conditionality, they "substitute [the IMF's] technical judgments for the outcomes of the nation's political process."⁴⁶ However, even those who generally oppose struc-

40. *IMF Takes Another Step to Increase Its Openness*, 32 IMF SURV. 297-98 (2003).

41. *Id.* at 298. The new policy applies specifically to "Use of Fund Resources" and "Post Program Monitoring" reports. *Id.* This suggests a new-found IMF focus on monitoring spending of funds. *See supra* notes 20-23 and accompanying text.

42. This criticism would not apply to disclosure requirements, as the financial information that must be disclosed could easily be delineated in advance.

43. *See* Press Release, Transparency Int'l, Nine out of Ten Developing Countries Urgently Need Practical Support to Fight Corruption, Highlights New Index 2-3 (Oct. 7, 2003), http://www.transparency.org/pressreleases_archive/2003/2003.10.07.cpi.en.html (last visited Mar. 26, 2004); Lael Brainard, *The Millennium Challenge Account & Foreign Assistance*, BROOKINGS REV., Spring 2003, at 42.

44. *See, e.g.*, IRVIN B. TUCKER, MACROECONOMICS FOR TODAY 126-28 (2000) (questioning the value of GDP as a measurement of a nation's income).

45. *See supra* note 33.

46. *See* Feldstein, *supra* note 3, at 27.

tural conditionality⁴⁷ might accept our proposals because, for the following reasons, they do not suffer from the same deficiencies as other structural conditions.

First, many IMF structural conditions are assailed for being influenced by some kind of ideological bias.⁴⁸ In contrast, conditions relating to corruption are ideologically neutral. They do not tell a government how much money it should spend, or what its spending priorities should be. Their only aim is to ensure that public spending be applied for the public good and not for some official's personal gain.

In addition, IMF conditions have often pitted the Fund against its borrowers' populations—the very people whom the IMF purports to help.⁴⁹ Yet IMF action against corruption would probably elicit far more popular support, since corruption is a scourge that is overwhelmingly condemned the world over.⁵⁰ Moreover, disclosure requirements are unlikely to engender popular opposition, because they do not require popular sacrifice.⁵¹

Some conditions have been criticized for depriving a borrower country of “ownership” of its economic agenda, thereby dooming any Fund program to failure. In other words, IMF programs that do not have the support of the borrower government are unlikely to be fully implemented no matter what carrots or sticks the Fund offers to secure compliance.⁵² But conditions that decrease corruption will only

47. See *supra* note 11 and accompanying text.

48. The accusations have come from both the Left and the Right. See *supra* notes 7–9 and accompanying text for a selection of IMF critiques from all sides of the political spectrum. Though the authors are often directly at odds with each other on substance, they all tend to accuse the IMF of being biased towards either the Left or the Right. Conditions that are vulnerable to charges of ideological bias include IMF-influenced privatizations, tax increases, deregulation of industry and of capital controls, and austerity measures.

49. See, e.g., Eliseo Gardel, *No llores por FMI Argentina* [Don't cry for the IMF, Argentina], at <http://www.nodo50.org/patrialibre/sifuturo/argentina.html> (last visited Dec. 18, 2003); Richard H. Robbins, *Anti-IMF/World Bank Protests in the Global South 1976-2001 (a partial list)*, at <http://faculty.plattsburgh.edu/richard.robbs/legacy/Anti-IMF%20Protests%201976-2001.htm> (last visited Dec. 18, 2003).

50. Eigen, *supra* note 30, at xix (noting “the degree of public outrage that has accompanied the fall” of corrupt leaders and dismissing the notion that “corruption is a matter of ‘culture’”). The IMF can also improve the popularity of corruption-related conditions by involving elements of local civil society, such as Poder Ciudadano in Argentina. See generally Poder Ciudadano website (select link to “Relaciones Internacionales”), at <http://www.poderciudadano.org.ar> (last visited Dec. 18, 2003).

51. Of course, they may end up requiring (long overdue) sacrifices from corrupt leaders.

52. See Allan Drazen, *Conditionality & Ownership in IMF Lending: A Political Economy Approach*, 49 IMF STAFF PAPERS 36, 40 (2002).

improve a country's ownership of its program, because a government with less corruption is naturally more responsive to the public rather than to the unknown and unpredictable demands of those who purchase influence.

Finally, the requirement that governments disclose their expenditures may be seen as too intrusive on a sovereign's prerogative to keep state secrets. In light of the horrifying recent histories of some of the recipients of IMF aid, one might question the wisdom of allowing any kind of secrecy in such governments.⁵³ Nevertheless, as long as the United States and other developed countries continue to harbor state secrets, it would be difficult to require absolute openness from the developing world. Here, the IMF could compromise between state sovereignty and the need for governmental transparency by allowing recipient countries to designate a small percentage of their expenditures as classified. At the same time, a borrower country's right to limited secrecy would not compromise the duty of government officials to report all sources of personal income. Thus, corrupt leaders would have little room to hide illicit payoffs under the guise of national security.

II. INTRODUCTION TO AGOA

The African Growth and Opportunity Act (AGOA),⁵⁴ passed by the U.S. Congress as part of the Trade and Development Act of 2000,⁵⁵ has been heralded as providing sub-Saharan African states with unprecedented benefits and opportunities.⁵⁶ AGOA offers re-

53. For example, in Argentina an estimated 10,000 people were killed by clandestine military squads during the nation's "dirty war" of the 1970s and 1980s. Hector Tobar, *Revolution Was One of Their 3 Rs*, L.A. TIMES, Dec. 6, 2003, at A1.

54. African Growth and Opportunity Act, 19 U.S.C. §§ 3701-3747 (2000) [hereinafter AGOA].

55. Trade and Development Act of 2000, Pub. L. No. 106-200, 114 Stat. 251 (2000) (codified throughout 19 U.S.C. (2000)) [hereinafter Trade and Development Act].

56. See *The African Growth and Opportunity Act: Hearing Before the Senate Committee on Foreign Relations*, S. HRG. NO. 108-187, at 8 (2003) (prepared statement of Florizelle B. Liser, Assistant U.S. Trade Representative for Africa) ("AGOA is . . . stimulating economic growth, helping sub-Saharan Africa integrate into the global economy, increasing opportunities for U.S. exports and businesses, supporting African reforms, and encouraging a solid U.S.-Africa trade partnership."), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_senate_hearings&docid=f:90449.pdf (last visited Apr. 2, 2004) [hereinafter *AGOA Foreign Relations Hearing*]; see also 2003 COMPREHENSIVE REPORT ON U.S. TRADE AND INVESTMENT POLICY TOWARD SUB-SAHARAN AFRICA AND IMPLEMENTATION OF THE AFRICAN GROWTH AND OPPORTUNITY ACT, THIRD OF EIGHT ANNUAL REPORTS, H.R. DOC. NO. 108-74, at 4, 7 (2003), available at <http://www.ustr.gov/reports/2003agoa.pdf> (last visited Apr. 1, 2004) ("U.S. imports under AGOA were valued at \$9 billion in 2002, a 10 percent increase from 2001.")

forming sub-Saharan African countries duty-free access to the U.S. market, covering 1,800 items in addition to the 4,600 products contained under the General System of Preferences (GSP) offered to other developing countries.⁵⁷

The president is required to certify AGOA-candidate countries annually.⁵⁸ The determinative eligibility criteria demand that a country “has established, or is making continual progress toward establishing,” *inter alia*,

- (A) a market-based economy that protects private property rights; . . .
- (B) the rule of law, political pluralism, and the right to due process, a fair trial, and equal protection under the law; . . .
- (C) the elimination of barriers to United States trade and investment[, including national treatment of foreign investors and the protection of intellectual property rights;]
- (D) economic policies to reduce poverty, increase the availability of health care and educational opportunities; . . .
- (E) a system to combat corruption and bribery[; and] . . .
- (F) protection of internationally recognized worker rights, including the right of association, [and] the right to organize and bargain collectively.⁵⁹

Additionally, AGOA’s conditions stipulate that the president is authorized to designate a country eligible only if it “does not engage in activities that undermine United States national security or foreign policy interests;” and “does not engage in gross violations of internationally recognized human rights or provide support for acts of international terrorism and cooperates in international efforts to eliminate human rights violations and terrorist activities.”⁶⁰

This long list of eligibility criteria identifies many of the most pervasive problems of the region, where the vestiges of colonialism and subsequent misadministration still manifest themselves in “continuing conflict in some countries and regions, weak institutions and leadership, disunity among racial, linguistic, religious, and tribal

[hereinafter 2003 COMPREHENSIVE REPORT]. About seventy-five percent of the imports are petroleum products. *Id.* at 18.

57. See William Cline, *Trading Up: Strengthening AGOA's Development Potential*, CTR. FOR GLOBAL DEV. BRIEF, June 2003, at 3, at <http://www.cgdev.org/docs/cgdbrief6.pdf> (last visited Apr. 2, 2004).

58. AGOA § 106.

59. *Id.* § 104.

60. *Id.* § 104(2)–(3).

groups, corruption, and poor governance.”⁶¹ Consequently, while many sub-Saharan African countries have made enormous progress toward more open and democratic political systems, the region still lags behind the rest of the world in virtually every category of development.⁶² Thus, in light of the numerous conditions, it might come as a surprise that thirty-eight of forty-eight sub-Saharan African countries were certified under AGOA in 2003.⁶³ Only seven countries were deemed ineligible in 2003, and three countries did not apply for participation in the program.⁶⁴ As of January 2004, two countries were removed from the list (Central African Republic and Eritrea), while Angola was added by presidential proclamation.⁶⁵

A. The Apparel Provision

A widely criticized element of AGOA is in fact not a formal condition, but rather a provision related to the export of apparel products to the United States. Unlimited duty-free exports of textiles and apparels are allowed only if they are produced with American raw materials.⁶⁶ Currently, due to market conditions, many apparel producers in sub-Saharan Africa receive their yarns from outside the

61. BUREAU FOR DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, SUPPORTING HUMAN RIGHTS AND DEMOCRACY: THE U.S. RECORD 2002–2003, at 11, *available at* <http://www.state.gov/g/drl/rls/shrd> (last visited Apr. 2, 2004).

62. *See, e.g.*, UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT INDEX REVEALS DEVELOPMENT CRISIS, *in* HUMAN DEVELOPMENT REPORT 2003, at 4E1 (2003) (“Almost all of the ‘low human development countries’ at the bottom of the Index are in sub-Saharan Africa: 30 out of a total of 34.”), http://www.undp.org/hdr2003/pdf/presskit/HDR03_PR4E.pdf (last visited June 30, 2004); *see also* FREEDOM HOUSE, FREEDOM IN THE WORLD 2003: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES 11 (2003) (reporting that only 11 African countries can be considered “free”) [hereinafter FREEDOM HOUSE 2003].

63. 2003 COMPREHENSIVE REPORT, *supra* note 56, at 1.

64. *See generally Results of the AGOA Country Review for 2003 Eligibility*, at http://www.agoa.gov/2003_eligibility_results.pdf (last visited Apr. 2, 2004).

65. *See* Proclamation 7748, 69 Fed. Reg. 227, 228 (Jan. 2, 2004).

66. AGOA § 112. Apparel made from fabrics originating in other AGOA countries may also be exported duty-free to the United States, but must not exceed a cap set by the U.S. government, which was recently raised to 3 percent of all U.S. imports and will rise to 7 percent by 2008 under AGOA II. *See* Cline, *supra* note 57, at 4. A temporary apparel exception for least developed countries, allowing imports into the U.S. regardless of the origin of the yarn, will expire in September 2004. Cline, *supra* note 57, at 3; *see also* AADITYA MATTOO ET AL., THE AFRICA GROWTH AND OPPORTUNITY ACT AND ITS RULES OF ORIGIN: GENEROSITY UNDERMINED? 7–8 (World Bank Policy Research, Working Paper No. 2908, 2002), http://econ.worldbank.org/files/20742_wps2908.pdf (last visited Apr. 2, 2004).

continent, often from Asia.⁶⁷ As a result, “the rules of origin requirements in the apparel sector . . . will significantly reduce exports below [sub-Saharan Africa’s] full potential.”⁶⁸

The rule-of-origin provisions are, however, not the only problem pertaining to apparel products. In order to export duty-free apparel into the United States, sub-Saharan African countries must obtain a “visa” issued by the United States Trade Representative (USTR).⁶⁹ This visa requires countries to modernize domestic laws and institute highly technical administrative and enforcement procedures to prevent the unlawful transshipment of articles and the use of counterfeit documents and products.⁷⁰ Due to the weak technical capacity of most sub-Saharan African countries, only nineteen of the thirty-eight AGOA countries have obtained this visa certification.⁷¹

B. Importance of Foreign Investment

Additionally, the president has the authority to suspend duty-free apparel imports if they “cause serious damage, or threat thereof” to the domestic U.S. industry.⁷² While the provision has not yet been invoked, it is indicative of a fundamental structural flaw of the regime.⁷³ This imbalance of power, allowing the president to revoke

67. Currently, due to market conditions, many apparel producers in sub-Saharan Africa receive their yarns from outside the continent, often in Asia. See, e.g., Helmo Preuss, *SA Has Not Used AGOA to Best Advantage* (Sept. 9, 2003), at <http://business.iafrica.com/features/269064.htm> (“Clothing manufacturers cannot source all the fabric they need from South African textile producers. That means they cannot expand their exports to the US due to the stringent rules of origin.”) (last visited June 30, 2004).

68. MATTOO ET AL., *supra* note 66, at 17. Without the apparel exports rule, the volume of African exports into the United States would be five times higher. *Id.*

69. Trade and Development Act § 113(1)(A).

70. *Id.*; see also *AGOA Foreign Relations Hearing*, *supra* note 56, at 28 (prepared statement of Stephen Hayes, President, Corporate Council on Africa) (“[M]any of Africa’s small businesses are confronted with a myriad of confusing and complicated standards imposed upon them by their own governments as they seek to comply with AGOA visa provisions. It would be useful for the U.S. government to work more closely with national customs agencies in Africa to find ways to explain better and/or simplify the AGOA certification requirements for African small and medium businesses.”).

71. See 2003 COMPREHENSIVE REPORT, *supra* note 56, at 9. As a result of the visa requirement, only 38 percent of apparel from AGOA countries was exported to the U.S. duty-free in 2001. Cline, *supra* note 57, at 3.

72. AGOA § 112 (b)(3)(C)(ii).

73. The World Trade Organization, via the so-called Enabling Clause, permits developed countries to offer unilateral non-reciprocal preferential treatment to products originating from developing countries under the General System of Preferences (GSP). Arrangements such as AGOA go beyond the traditional GSP, in that they attach specific conditions as a prerequisite for developing countries receiving the GSP benefits. As AGOA is effectively a GSP+ system, it

benefits unilaterally, injects uncertainty into potential investors' plans to become active in sub-Saharan Africa.⁷⁴ AGOA is scheduled to expire in 2008, and thus any long-term investor will likely hesitate to expend a large amount of capital in a country that may not see preferential market access at the end of the decade.⁷⁵ In fact, the lack of foreign direct investment under AGOA has been identified as a major disappointment.⁷⁶ A World Bank study expresses the view that increases in foreign investment are central to the economic growth of sub-Saharan Africa.⁷⁷ The authors found that open market access alone without accompanying foreign investment will result in a mere 0.4% increase in non-oil exports and hardly any change in the welfare of sub-Saharan African countries.⁷⁸

In light of this data, it comes as no surprise that AGOA aims to facilitate foreign investment in the region.⁷⁹ The U.S. government has numerous tools at its disposal to induce investment, many of which are underutilized at best.⁸⁰ Yet even the best efforts to urge corporations to invest abroad can only be negligible compared to the importance of an attractive climate on the ground. No rational investor will throw his money down the metaphorical bottomless pit. In the words of U.S. Secretary of State Colin Powell, "[c]apital is a coward. It flees

does not include reciprocal obligations on its members. Unlike a bilateral or multilateral free-trade agreement, which imposes mutual rights and duties on its parties, the unilateral nature of AGOA lets both the developing countries of sub-Saharan Africa and the "benefactor," the United States, off the hook. The performance conditionality inherent in such GSP+ programs has recently been struck down by a WTO Panel in a case brought by India against the European Communities (EC). The EC has appealed the Panel decision, which could potentially mark the end of conditionality in programs such as AGOA or the EU's Cotonou Agreement.

74. Cf. Cline, *supra* note 57, at 4 (arguing AGOA be reformed to grant qualifying African nations assured eligibility for five years, allowing for presidential revocation only in "extreme circumstances, such as when a government has been deposed by force").

75. Several members of Congress have urged an extension of AGOA benefits, and President Bush has indicated his support to extend AGOA beyond 2008. See, e.g., Jim Fisher-Thompson, *U.S. Lawmaker Calls for an AGOA III at Mauritius Forum*, U.S. DEP'T OF ST. INT'L INFO. PROGRAMS, Jan. 17, 2003, at <http://www.usinfo.state.gov/regional/af/trade/a3011701.htm> (last visited Feb. 22, 2004).

76. See *AGOIA Foreign Relations Hearing*, *supra* note 56, at 26-27 (prepared statement of Stephen Hayes).

77. See generally ELENA IANCHOVICHINA ET AL., UNRESTRICTED MARKET ACCESS FOR SUB-SAHARAN AFRICA: HOW MUCH IS IT WORTH AND WHO PAYS? (World Bank Development Research Group Paper 2001), at <http://www.eldis.org/static/doc9124.htm> (last visited May 24, 2004).

78. See *id.* at 2. The study bemoans the "neglect of investment" in the region. *Id.* at 22.

79. *AGOIA Foreign Relations Hearing*, *supra* note 56, at 26 (prepared statement of Stephen Hayes) ("[T]he act is intended to serve as an investment tool for U.S. companies seeking African partners.")

80. *Id.* at 10.

war. It flees disease. It won't go near corruption.”⁸¹ Unstable governments, pervasive nepotism, lack of judicial independence, human rights abuses, non-transparent political and economic processes, unsatisfactory intellectual property protection, and the ever-present threat of violent upheaval and conflict present seemingly insurmountable obstacles to increased investment.⁸² Therefore, conditions aimed at improving those realities are necessary and entirely consistent with AGOA's purpose of promoting political and economic reform and development.

C. 2003 AGOA Country Report Analysis

Most sub-Saharan countries have performed neither brilliantly nor awfully *vis-à-vis* AGOA eligibility and must therefore be analyzed with great scrutiny. The records of a few states, though, are so obvious that they speak for themselves. Two examples on opposite sides of the spectrum are Botswana and Liberia. Botswana, despite being the country with the highest HIV/AIDS infection rate in the world, boasts a great record on transparent, democratic governance and offers not only universal health care and anti-retroviral therapy to all of its AIDS patients, but also receives strong marks on respect for human rights and labor rights.⁸³ Economically, it maintains a highly stable market economy and financial policy, for which it received a Standard & Poor's "A" credit rating.⁸⁴ It is arguably the least corrupt country in Africa and has correctly been rewarded with AGOA eligibility, including textile and apparel benefits.⁸⁵

Liberia is on the other end of the spectrum. A repressive, war-mongering political leadership has enriched itself and brought death and misery to its own citizens and its neighbors, fueling conflicts in Sierra Leone and Cote d'Ivoire. Human rights are seemingly non-existent, a formal economic system has collapsed, and despite President Taylor's departure, the country remains far from securing a sustainable peace.⁸⁶

81. Zachary Goldfarb, *Powell Urges Ending African Corruption*, WASH. TIMES, June 28, 2003, at A7.

82. See *AGOA Foreign Relations Hearing*, *supra* note 56, at 29 (prepared statement of Stephen Hayes) ("The nations of Africa themselves clearly have a major responsibility in creating the economic and political climate necessary for business investment.").

83. See 2003 COMPREHENSIVE REPORT, *supra* note 56, at 71–72.

84. *Id.* at 71.

85. *Id.* (noting that five Botswanan firms are exporting textiles under AGOA).

86. See generally David White, *U.S. Pullout from Liberia Raises Security Concerns*, FIN. TIMES (London), Oct 1, 2003, at 10 ("[The] country remains divided into three, controlled by

Evaluating AGOA eligibility for Botswana or Liberia is easy. In most other cases, though, the picture is less clear. Four examples—Burkina Faso, Cameroon, Chad, and Eritrea—serve as an illustration of the reprehensibly cynical manner in which the U.S. government applies AGOA's criteria to countries that have received less media attention.

Burkina Faso failed to obtain AGOA eligibility in 2003.⁸⁷ Yet, the U.S. government's official evaluation is full of praise for recent political developments in this West African state. It applauds the country's market reforms and good governance, which includes democratic elections and a severe reduction of corruption and poverty.⁸⁸ In fact, Burkina Faso has been the recipient of IMF loans as part of its poverty reduction strategy and has graduated from "Highly Indebted Poor Country" status.⁸⁹ Additionally, the report deems Burkina Faso "helpful on terrorism."⁹⁰ The widely acclaimed evaluation by Freedom House, a non-governmental organization that rates countries' respect for political and civil liberties, also applauds recent developments in Burkina Faso.⁹¹ Freedom House reports that "gains have been made in life expectancy, literacy, and school attendance."⁹² Furthermore, "Burkina Faso has a vibrant free press, and freedom of speech is protected by the constitution and generally respected in practice."⁹³ Religious freedom and labor union rights receive protection, as observed by the many human rights groups that operate freely in the country.⁹⁴ It would thus appear that Burkina Faso meets the stated conditions of AGOA. However, because of its alleged involvement in the rebel insurgency in neighboring Cote d'Ivoire and arms shipments to Liberia, the U.S. government declined to certify its eligibility for AGOA in 2003.⁹⁵

former government militias and two rebel movements. Aid and human rights organisations report continued harassment and abuse of civilians in all three sectors, including widespread rape and extortion by armed bands.").

87. 2003 COMPREHENSIVE REPORT, *supra* note 56, at 72.

88. *Id.*

89. *See id.*

90. *Id.*

91. FREEDOM HOUSE 2003, *supra* note 62, at 114 (labeling Burkina Faso "partly free" and giving the country an "upward trend arrow due to the holding of legislative elections that were more free and fair than in previous years").

92. *Id.*

93. *Id.* at 115.

94. *See id.*

95. 2003 COMPREHENSIVE REPORT, *supra* note 56, at 72.

It is illuminating to compare Burkina Faso to countries admitted into the AGOA club. For example, Cameroon continues to face internal political challenges.⁹⁶ The government rules an undemocratic, de facto one-party state and frequently obstructs political meetings and harasses journalists.⁹⁷ Freedom House agrees, noting that “elections in 2002 . . . were no more free and fair than previous polls.”⁹⁸ The judiciary is “ineffective and subject to political influence and corruption.”⁹⁹ The government has failed to stop forced and child labor, and “has ignored agreements after entering into them with unions,” thereby precluding any formal collective bargaining from taking place since 1996.¹⁰⁰ Most dramatically, “[t]he U.S. Secretary of State has expressed concerns to the government about the arrest, arbitrary detention, harsh treatment and torture of opposition politicians, human rights activists, and other citizens. There are credible reports that security forces committed extra-judicial killings.”¹⁰¹

Despite this condemning indictment of Cameroon’s political and human rights policies, the country is eligible for AGOA, including textiles and apparel benefits.¹⁰² To explain this outcome, one must look to economics. In 2002, Cameroon exported duty-free products worth \$116 million to the United States—overwhelmingly oil.¹⁰³ The country receives high marks on its treatment of international investors.¹⁰⁴ It has engaged in extensive privatization of formerly state-owned production, including the sale of its power utility to a U.S. corporation.¹⁰⁵ Most importantly, it is host to the United States’ “largest investment in sub-Saharan Africa,” the Chad-Cameroon pipeline project.¹⁰⁶ Thus, the plausible explanation for Cameroon’s

96. FREEDOM HOUSE 2003, *supra* note 62, at 127. The report ranks Cameroon in its 2003 country report as “not free.” *Id.*

97. See 2003 COMPREHENSIVE REPORT, *supra* note 56, at 74–75.

98. FREEDOM HOUSE 2003, *supra* note 62, at 127.

99. 2003 COMPREHENSIVE REPORT, *supra* note 56, at 75 (“The judiciary is regarded as ineffective and subject to political influence and corruption.”).

100. *Id.* at 75.

101. *Id.*; see also FREEDOM HOUSE 2003, *supra* note 62, at 128 (reporting that Amnesty International called for investigations into dozens of extra-judicial executions).

102. 2003 COMPREHENSIVE REPORT, *supra* note 56, at 74.

103. *Id.*

104. *Id.* However, the USTR also notes that, “[f]oreign investors have sometimes found it difficult to obtain enforcement of their legal rights.” *Id.* at 74.

105. *Id.* Additionally, it has granted a cobalt mining concession to a U.S. firm. *Id.*

106. Emmanuel Tumanjong, First Crude Shipped in West Africa Project, ASSOCIATED PRESS, Oct. 5, 2003, at http://www.worldbank.org/afr/ccproj/news/press_coverage_1003.pdf (last visited May 5, 2004). Although the project is carried out under the auspices of the World Bank,

admission lies in the narrow-minded attempt by the U.S. government to secure a continually welcoming investment climate for U.S. corporate entities, as part of its strategy to become less dependent on Middle Eastern oil.

Chad could be called Cameroon's twin brother, for the abuses committed by its government are equally serious.¹⁰⁷ Chad's progress toward political pluralism and the rule of law are deemed "disappointing," with its presidential elections of 1996 and 2001 marked by irregularities and fraud.¹⁰⁸ Anticorruption laws are not enforced, and the judiciary is the victim of frequent executive interference.¹⁰⁹ Chad's human rights record is appalling. There is widespread evidence of arbitrary and prolonged detention, extra-judicial killings, torture, beatings and rape committed by government agents.¹¹⁰ While unions ostensibly have the right to organize, they are subject to government interference, and participation in strikes is punishable by imprisonment with forced labor.¹¹¹ Despite the country's slow progress on privatization, it was nevertheless approved for AGOA. Again, the most likely explanation is the prestigious Chad-Cameroon oil pipeline project and the Bush administration's attempt to protect the U.S. corporate interests involved.¹¹²

Eritrea is another compelling example. Applying the explicit AGOA criteria, this small East African nation by the Red Sea falls short on the political, economic, and human rights fronts.¹¹³ In 2002,

two U.S. oil corporations are major stakeholders, namely ExxonMobile with 40 percent and ChevronTexaco with 25 percent. *Id.*

107. Elizabeth Becker, *World Bank Inaugurates Oil Pipeline in Africa*, N.Y. TIMES, Oct 3, 2003, at W1. Becker also notes, "Chad and Cameroon are failing on environmental, social and poverty alleviation grounds." *Id.* at W7.

108. 2003 COMPREHENSIVE REPORT, *supra* note 56, at 78. *See also* FREEDOM HOUSE 2003, *supra* note 62, at 135 (characterizing Chad as "not free").

109. 2003 COMPREHENSIVE REPORT, *supra* note 56, at 78.

110. *Id.* Freedom House agrees. It admonishes that "[s]ecurity forces routinely ignore constitutional protections regarding search, seizure, and detention. Overcrowding, disease, and malnutrition make prison conditions life threatening, and many inmates spend years in prison without charges." FREEDOM HOUSE 2003, *supra* note 62, at 137.

111. 2003 COMPREHENSIVE REPORT, *supra* note 56, at 78.

112. The Chad government's priorities are evidenced by its initial use of the money it received for the pipeline project. "Embarrassed World Bank officials have already admitted that the notoriously corrupt Chad government has spent the first [10 million pounds] of grant money it received from the consortium on arms for its security forces rather than on the educational and development projects for which the money was intended." Paul Brown, *Chad Oil Pipeline Condemned for Harming the Poor*, GUARDIAN (London), Sept. 27, 2002, at 15.

113. *See, e.g.*, Dan Connell, *Redeeming the Failed Promise of Eritrea*, BOSTON GLOBE, Nov. 10, 2003, at A17 ("[W]ith the Asmara government refusing to implement the Constitution, postponing national elections, arresting critics, shutting down the independent press, and banning

the government "continued its repressive policy of allowing neither opposition nor independent organizations in the political or civil sphere."¹¹⁴ The U.S. government bemoans the dictatorship's tendency to shut down the independent press and arrest journalists and political dissidents, who are often held in prison without any charges or prospects for trial.¹¹⁵ While Eritrea has the formal structures of a market economy and has started to lower tariff barriers, it currently provides no intellectual property protection and has been instituting economic reforms very slowly.¹¹⁶ Eritrea's "poor human rights record worsened in 2002,"¹¹⁷ as the "government has maintained a hostile attitude towards civil society and has refused international assistance designed to support the development of pluralism in society."¹¹⁸ The accumulation of these realities has brought Eritrea the dubious distinction of being featured in a special report to the United Nations Commission on Human Rights, as one of the "World's Most Repressive Regimes."¹¹⁹

Unlike Chad or Cameroon, Eritrea conducts almost no trade with the United States.¹²⁰ So why might the Bush administration be interested in awarding Eritrea the status of AGOA membership? As part of the global war on terrorism, Eritrea suddenly has achieved great strategic importance as the United States is expanding its military presence in the Horn of Africa. It has hosted several visits by U.S. Secretary of Defense Donald Rumsfeld and the U.S. military

rival parties, the country's trajectory follows a familiar path toward highly coercive one-man rule.").

114. FREEDOM HOUSE 2003, *supra* note 62, at 198. Eritrea received a "not free" rating. In its international relations, "Eritrea's aggressive foreign policy has contributed significantly to regional instability." *Id.* at 199.

115. *See, e.g.*, Frank Smyth, *U.S.'s New Friend Could Pose Problems*, ST. LOUIS POST-DISPATCH, Dec. 15, 2002, at B5 ("Until recently, U.S. military ties with Eritrea were restricted because of the crackdown on civil liberties. In October, the State Department raised human rights concerns on the anniversary of the jailing of two of its Eritrean employees The Eritrean government is not known to have filed charges against any prisoner Meanwhile, the government's allegations that they were part of a foreign-backed plot remain unsubstantiated.").

116. *See* 2003 COMPREHENSIVE REPORT, *supra* note 56, at 84.

117. *Id.*; *see also* Rory Carroll, *Eritrean Children Locked Up For Having Bibles, Says Amnesty*, GUARDIAN (London), Sept. 20, 2003, at 20.

118. FREEDOM HOUSE 2003, *supra* note 62, 199.

119. *See generally* FREEDOM HOUSE, THE WORLD'S MOST REPRESSIVE REGIMES 2003, 27-30 (2003), at <http://www.freedomhouse.org/research/mrr2003.pdf> (last visited May 24, 2004).

120. *See* 2003 COMPREHENSIVE REPORT, *supra* note 56, at 83. ("[E]xports in 2002 were negligible. No new U.S. investment was reported.").

commander for the Middle East, General Tommy Franks.¹²¹ Eritrea's government was part of the "coalition of the willing" in the Iraq war and is offering base rights to the U.S. military, arguably "to woo the Bush administration into ignoring its repressive measures."¹²² By certifying its eligibility for AGOA, the U.S. government is "propping up this repressive regime as a Cold War-style political payoff for joining the 'war on terrorism.'"¹²³

Ultimately, as of January 2004, the U.S. government withdrew AGOA membership from Eritrea. Because Eritrea's performance did not improve throughout 2003, the USTR finally pulled the plug and expelled Eritrea.¹²⁴ While this step is laudable, it does not alter the underlying analysis—the acceptance of a country for AGOA merely out of strategic foreign policy reasons, without regard for the conditions aimed at genuine political and economic reform.

CONCLUSION

Although the IMF has little in common with AGOA, both regimes could substantially improve their ability to help developing countries by applying conditionality consistently with their official rhetoric and objectives.¹²⁵ To improve AGOA, the U.S. government should rigorously enforce the Act's articulated criteria. In theory, AGOA's conditions supply countries with an attractive carrot, by providing them with beneficial market access as a consequence of their own policy choices—or a hurtful stick, by excluding them from beneficial market access as a consequence of their own policy choices. In reality, the current certification process makes a mockery of those conditions and undermines the credibility and reputation of the U.S. government's efforts in Africa and beyond.

It appears as if not all conditions are created equal, or perhaps some are more equal than others. In particular, demands for political pluralism, the protection of civil, human, and worker's rights, and the fight against corruption—those conditions that primarily benefit do-

121. Smyth, *supra* note 115, at B5.

122. Connell, *supra* note 113, at A17.

123. *Id.*

124. *See supra* note 65.

125. In the case of AGOA, the U.S. government should also waive the harmful rule-of-origin requirement and substantially increase funding for technical trade capacity building of the region. Since 1999, the U.S. government has only provided a meager \$345 million for that purpose. *See AGOA Foreign Relations Hearing*, *supra* note 56, at 26 (prepared statement of Stephen Hayes).

mestic populations in sub-Saharan Africa—often take a back-seat to strategic interests of the U.S. government and U.S. investors.

The rationale behind the AGOA conditions demanding political and economic reform is plausible and positive, as such changes will ideally result in more international economic transactions, more transparent and democratic governance, and in better lives for sub-Saharan Africans. Unfortunately, a secondary condition which blandly refers to “foreign policy interests”¹²⁶ is being abused in an entirely self-serving manner. The U.S. government is effectively displaying schizophrenic and distasteful behavior: it enforces only those conditions that are in its immediate self-interest and in the process tolerates and rewards governance standards which AGOA sets out to discourage.

While the primary conditions speak to a wide array of political, economic, social, judicial, and human development, the certification scheme is directed and authored by one single agency within the U.S. government bureaucracy, the Office of the United States Trade Representative. Unsurprisingly, the result is an undue emphasis on economic interests, at the expense of conditions focused on political pluralism, democracy, health, education, and human rights. A broader and more formal interagency process, incorporating high-level representatives from relevant State Department offices, the Treasury Department, the Agency for International Development, and the National Security Council, might produce a more balanced evaluation mechanism.¹²⁷ Beyond instituting these structural improvements, the U.S. government must resist the temptation to use AGOA in a selfish manner. It must remember that AGOA is intended to be a device to encourage sub-Saharan African governments to pursue policies that will positively affect the well-being and development of their own people.¹²⁸

In contrast, the IMF’s shortcomings stem not from selfish motives but from an institutional failure to look beyond basic macroeconomic figures in order to examine the long-term causes of its clients’ economic woes. In particular, the IMF should include corruption and

126. AGOA § 104(2).

127. Currently, to determine country eligibility, the USTR chairs the Subcommittee of the Trade Policy Staff Committee (TPSC). The Committee receives information from U.S. embassies, U.S. government agencies, and other public comments that have been posted to the Federal Register. While it formally resembles interagency meetings, the eligibility results suggest a lack of sufficient input from other departments and agencies.

128. *See* AGOA § 103.

transparency in governance as important factors in its funding decisions. Since corruption is inversely related to a country's long-term fiscal and monetary stability, greater IMF involvement in the struggle for transparency in government would comport with the Fund's mission.¹²⁹ In fact, the IMF's official rhetoric already acknowledges that the institution should play a role in fighting corruption.¹³⁰ Unfortunately, the decision-makers at the Fund have not acted consistently with their rhetoric, but have allowed corruption to take a back seat to more superficial and short-term macroeconomic concerns.

We are not arguing that the beneficiary countries of IMF and AGOA should meet unattainable goals. We recognize that AGOA's eligibility standard is "making continual progress"¹³¹ toward complying with the conditions, not constructing a postmodern liberal democracy overnight. Yet, when countries undoubtedly make "continual regress" they must be denied AGOA benefits. All that is required is a basic consistency and honesty in the interpretation of the U.S. Trade Representative-authored country reports.

Similarly, we do not believe that the IMF should suspend payments as soon as corruption is found, but only that corruption should be treated as a genuine factor in the Fund's decision-making process. Financial disclosure requirements on borrower countries (and on their government officials) would send a clear message to corrupt regimes that actions have consequences. The recent scandal involving Argentina's former economy minister Cavallo¹³² affirms the popular view that the IMF does nothing to prevent the very officials with whom it negotiates from robbing their country blind. Taking a more active role in the fight against corruption would prove beneficial to the IMF and its clients: it would enhance the Fund's sullied reputation, and improve transparency and accountability in borrower governments.¹³³ Thus, the Fund would contribute more effectively to its clients' development, and in the process decrease the risk of default.

David Fuhr & Zachary Klughaupt

129. See IMF Articles, *supra* note 1, art. I. See also IMF, REVISED CODE OF GOOD PRACTICES ON FISCAL TRANSPARENCY (2001), at <http://www.imf.org/external/np/fad/trans/code.pdf> (last visited May 5, 2004).

130. See also *supra* note 25.

131. AGOA § 104.

132. See *supra* note 27.

133. The Fund's recent actions in the Dominican Republic are a welcome step in the right direction. See *Dominican Republic in Crisis*, *supra* note 25, at A16.