THE IMPORTANCE OF AN ADR PROGRAM FOR THE EFFECTIVE ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS UNDER THE FREE TRADE AGREEMENT *HOPE II BETWEEN THE UNITED STATES AND HAITI

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*Haitian Hemispheric Opportunity through Partnership Encouragement Act (HOPE II)

GARRICK APOLLON

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ABSTRACT: The objective of this article is to highlight the importance of a mandatory Alternative Dispute Resolution (ADR) program managed by the UN (ILO) using the dispute resolution methods of negotiation, mediation and arbitration (in the following sequence) with respect to human rights adjudication under the Free Trade Agreement (FTA) HOPE II between the United States and Haiti (this FTA is in force until 2018). This article advocates for the creation of a UN arbitral tribunal for the effective enforcement of international human rights under HOPE II. First, a historical overview of the barriers to the development of the Rule of Law and international human rights in Haiti will be examined. Second, I will present a brief overview of HOPE II and its weaknesses and strengths as part of the legislative intent of the United States to promote fundamental human and labor rights in Haiti via HOPE II. Finally, this article concludes with the argument that justice under HOPE II cannot be just for businesses registered in HOPE II, and that a mandatory ADR Program and UN arbitral tribunal should be created to ensure more effective enforcement of human and labor rights under HOPE II.

I. INTRODUCTION: A SYNOPSIS OF INTERNATIONAL HUMAN RIGHTS IN HAITI;

The purpose of this article is to highlight the importance of a mandatory Alternative Dispute Resolution (ADR) program and the creation of a UN arbitral tribunal for the effective enforcement of international human rights under HOPE II. First, this article examines the legal barriers to the development of the Rule of Law and international human rights in Haiti. Using William Ewald’s logic of legal transplants, this article does not confine itself to an investigation of a single, present-day legal system, but also contains a substantial historical overview. In light

2In December 2006, the 109th Congress passed the Haitian Hemispheric Opportunity through Partnership Encouragement Act of 2006 (HOPE I), which included special trade rules that give preferential access to U.S. imports of Haitian apparel. These rules were intended to promote investment in the apparel industry as one element of a broader economic growth and development plan. HOPE I allowed for the duty-free treatment of select apparel imports from Haiti made from less expensive third-country inputs (e.g., non-regional yarns, fabrics, and components), provided Haiti met rules of origin and eligibility criteria that required making progress on worker rights, poverty reduction, and anti-corruption measures. Early assessments of the effectiveness of HOPE I, however, were disappointing. The 110th Congress responded by amending HOPE I with the Hemispheric Opportunity through Partnership Encouragement Act of 2008 (HOPE II). HOPE II extended the preferences for 10 years, expanded coverage of duty-free treatment to more apparel products, particularly knit articles, and simplified the rules, making them easier to use. Early evidence suggests that apparel production and exports are responding to these changes. HOPE II aims for the enforcement of core international and national Haitian labour laws such as freedom of association, the effective recognition of the right to bargain collectively, the elimination of all forms of compulsory or forced labor, the effective abolition of child labor and a prohibition on the worst forms of child labor, the elimination of discrimination in respect of employment and occupation. Therefore, the word international and fundamental will both be used interchangeably throughout this article. For more information on HOPE II, see J. F. Hornbeck, The Haitian Economy and the HOPE ACT, Congressional Research Service (2010), available at http://fpc.state.gov/documents/organization/145132.pdf (last visited Nov. 25th 2011) (discussing in depth the socio-economic impact of HOPE I and HOPE II on Haiti’s economy).

3William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplant*, 43 AM. J. COMP. L. 489, 509 (1995) (discussing a new approach to study comparative law and legal transplants). This article helps us to understand that the study of the history of law is particularly important to understand the historical, social, economic and legal irritants to the transplant of the Rule of Law and international human rights in Haiti. A comparative study of the Rule of Law and human rights between Haiti and the United States is beyond the scope of this article.
of this approach, this article will first discuss the main historical factors associated with the current international human rights crisis in Haiti.

In 1804, Haiti became the first Black Republic in the world and second republic in the Western Hemisphere. The legendary freedom-fighter slave Spartacus led to the failure of the first known major slave uprising against the Roman Republic called the Third Servile War in 73-71 BCE. The Haitian Revolution became the first successful slave-based revolution against an empire known in world history. The Haitian Revolution left an incredible landmark of hope and freedom on the liberation movements throughout many continents. A group of African-decent slaves led by a former slave named Toussaint Louverture (also known as Black Spartacus or Black Napoleon) defeated the great Emperor Napoleon Bonaparte and the French Empire in its apogée. This rebellion succeeded against all odds. To avoid losing face worldwide to a Negro slave’s rebellion, the French Emperor Napoleon Bonaparte sent his brother-in-law, General Charles Victoire Emmanuel Leclerc to re-establish control over the lucrative French colony of Saint-Domingue (now Haïti). The republican victory in Haiti over the cruel tyranny and slavery of the French colonialism suggested that this nation and its people would be destined for a great future.

The Preamble of the Universal Declaration of Human Rights now recognizes that, “the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” Historically, this recognition of inherent dignity and equality has been denied to the Haitian people. Like American or French republicans, Haitian republicans fought bravely for their freedom. But because their skin colour was not

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5 Mario Silva, Island in Distress: State Failure in Haiti, 23 Fla. J. Int’l. L. 49, 51 (2011) [Hereinafter State Failure in Haiti].
6 Id at 51-52.
7 Toussaint Louverture was gifted with remarkable intelligence and leadership and ironically was also the first Black Slave of Saint Domingue (now Haiti) to become a plantation owner and general of the French army for the colony of Saint Domingue. See documentary on Public Broadcasting Service (PBS) documentary, Egalité for All: Toussaint Louverture and the Haitian Revolution, (2009). Available at [http://www.pbs.org/programs/egalite-for-all/](http://www.pbs.org/programs/egalite-for-all/) (last visited Dec. 20th 2011). Specific episode of the documentary in relation to statements about Toussaint Louverture is available at [http://www.youtube.com/watch?v=mDat9b5cYik](http://www.youtube.com/watch?v=mDat9b5cYik) (see film at 9:05), (last visited Dec. 20th 2011).
white\textsuperscript{9} and because they were, for the most part, former slaves of African descent owned by White Westerners, Haitians were denied inherent dignity and equality. Moreover, Haiti as a nation was immediately punished for its rebellion with blockades and quarantines from other nations, such as France and the United States.\textsuperscript{10} In fact, France imposed a massive financial penalty in the form of indemnities to cover the value of slaves, plantations and lands “expropriated” in the wake of the revolution. The state of Haiti did not finish paying back the amounts until 1947.\textsuperscript{11} The United States was initially hostile to the new Haitian state on account of its southern states. The southern states were still slave-based economies and the United States feared that the geo-political proximity of the Haitian Revolution would instigate a revolt of its own African-Americans slaves.\textsuperscript{12} It was not until Abraham Lincoln became President in 1860 that the United States finally extended diplomatic recognition to Haiti.\textsuperscript{13} Thus, Haiti as a new free country, “remained endemically weak even after achieving independence.”\textsuperscript{14}

The historical and cultural collective memory of Haitians is built on a strong sentiment of nationalism and stark realism. Haitians are extremely proud to be the first Black republic in the world, but are also aware that they continue to pay the heavy price for the bravery of their ancestors. Haitians often point to the examples of the rich Caribbean islands of Martinique and Guadeloupe, both sharing the same Créole culture and language and French colonial past, but both having chosen not to sever colonial ties with France. The argument can be made that Western nations have been racist and hostile to an independent Black republic in the Western hemisphere as a means of safeguarding their colonial interests for centuries. In light of this, the international development assistance now being provided by the United States, France and the Western world to Haiti can be viewed as just and proper historic compensation for slavery and colonialism against Haiti. It is important to note that the world’s leading industrialised nations led

\textsuperscript{9} The Republic of Haiti was founded by a strategic alliance between the Mulattos and Blacks. For instance, Alexandre Pétion born in Port-au-Prince to a black Haitian mother and a wealthy French white father was President of the Republic of Haiti from 1806 until his death in 1818. He is considered as one of Haiti’s founding fathers, together with Toussaint Louverture, Jean-Jacques Dessalines, and his rival Henri Christophe.

\textsuperscript{10} State Failure in Haiti, Supra n.5 at 52.

\textsuperscript{11} State Failure in Haiti, Supra n.5 at 52.

\textsuperscript{12} Id.

\textsuperscript{13} Id.

\textsuperscript{14} Id.
by the United States (G7 nations) have pledged to write $1.2 billion off the debts that Haiti owes them, following the devastating earthquake Haiti suffered in January 2010.\textsuperscript{15}

Haitians often neglect to mention that the failure of the Haitian state is also largely self-imposed due to their lack of self-determination capability. In response to the blind nationalism of many Haitians, my father often asked his Haitian brothers and sisters if they think that the White man should pick up their garbage in the streets of Port-au-Prince. This humoristic and sarcastic observation from my father states that Haiti cannot and should not, sustainably, continue to rely on the benevolence and donations of Western nations.\textsuperscript{16}

The drafters of the Haitian Constitution inspired by the country’s French heritage, intended to create a true democracy based on the Rule of Law and separation of powers.\textsuperscript{17} Nevertheless, the comparative law approach of Montesquieu shows that l’État de droit est un état d’esprit (state of law is a state of mind)\textsuperscript{18} and that there is often a dichotomy between the law-in-books, the law in-action and the law in-mind at play in a society.\textsuperscript{19} In practice, the Rule of Law in Haiti has been such that its people have come to embrace the Créole proverb: “Konstitusyon se paye, bayonet se fè”.\textsuperscript{20} This popular Haitian Créole proverb clearly illustrates that Western conceptions of the Rule of Law and the primacy of fundamental human rights have always been nothing more than an aspirational dream for Haitians.\textsuperscript{21}

\textsuperscript{16} On the state failure in Haiti as a self-imposed condition by Haitians see Louis Aucoin, \textit{Haiti’s Constitutional Crisis}, 17 B.U. Int’L. J. 115, 115-140 (1999) (discussing the historical roots of Haiti’s constitutional crisis)\[Hereinafter Haiti’s Constitutional Crisis]\textsuperscript{17} Id. at 117 (discussing that the founding fathers of Haiti’s constitution embraced the revolutionary concept of constitutionalism).
\textsuperscript{17} Charles de Secondat, Baron de Montesquieu, The Spirit of Laws, Book 11, chapter 6 (1748) (reprinted Cambridge: Cambridge University Press, 1989) (discussing the political treatise of Montesquieu that advocates constitutionalism and the separation of powers, the abolition of slavery, the preservation of civil liberties and the Rule of Law, and the idea that political and legal institutions ought to reflect the social, cultural and geographical character of each particular community. Hence, Montesquieu was a strong proponent of the legal mirror-theory stating that law is the reflection of social, cultural and geographical character of each particular community).
\textsuperscript{18}William Ewald, Comparative Jurisprudence (I): What Was like to Try a Rat? 6 U. Pa. L. Rev. 143, 1894 (1995) (discussing “comparative jurisprudence” model that aims to understand the ideas that inform the law-in-minds is a crucial part of law-in-action).
\textsuperscript{19} Haiti’s Constitutional Crisis, Supra n. 16 at 117 (translating the Haitian proverb “Konstitusyon se paye, bayonet se fè” by Constitution is paper, a bayonet is iron).
\textsuperscript{20} Id. at 140 (discussing that despite Haiti’s enduring constitutional crisis the Haitian Constitution “remains the very symbol of the victory of the people in their rejection of dictatorship and hope of freedom and liberty”).
sadly been marked by violence, tyranny, corruption, human misery and racial tensions. Haiti as a country has always been raped by a ruling elite that effectively controlled the national economy for self-serving purposes. Describing the era of the ruthless dictator Duvalier (also known as Papa Doc), the Canadian government defined the Haitian state as a “Kleptocratic State” at that time. In 2004 President Aristide, the first democratically elected president in Haiti’s history, was forced to leave the country in total chaos. The newly formed United Nations Peacekeeping Stabilization Mission in Haiti (MINUSTAH) was established to restore peace and stability to the country. Since then, MINUSTAH has been the subject of much criticism, including allegations of international human rights violations by Haitian human rights advocates. An historic class action lawsuit against the UN was recently filed in Haiti for the responsibility of the MINUSTAH in the post-earthquake Cholera epidemic in Haiti.

Haiti’s long history of political instability, violence and corruption has just been intensified by the recent earthquake in January 2010. The earthquake killed more than 200,000 people.

22 State Failure in Haiti, Supra n.5 at 52.
23 I am using the word “rape” purposely to expose the greater vulnerability of Haitian women and girls to sexual violence since the earthquake in Haiti. See Lisa Davis, Still Trembling: State Obligation Under International Law to End Post-Earthquake Rape in Haiti, 65 U. Miami L. Rev. 867, 867-892 (2011) (discussing that Haiti suffered yet another surge in sexual violence, but this time due to an earthquake on January 12, 2010. Natural disasters such as Haiti’s earthquake disproportionately affect women and girls. Women who are forced live in crowded, poorly lit internally displaced persons (IDP) camps experience a heightened likelihood of exposure to sexual violence or crime simply because they are women).
24 State Failure in Haiti, Supra n.5 at 52.
26 State Failure in Haiti, Supra n.5 at 59.
27 Institute for Justice & Democracy and Bureau des Avocats Internationaux, 12th session 122-136 (2011) Universal Periodic Review, Republic of Haiti, Submission to the UN Human Right Council, available at http://ijdh.org/wordpress/wp-content/uploads/2011/04/LERN-Compiled-UPR-Submissions1.pdf (discussing that Haiti also has the responsibility to prosecute human rights violations committed by international actors, including crimes in which MINUSTAH soldiers are complicit in not having investigated or prosecuted. Also discussing alleged sexual exploitation and abuse by MINUSTAH soldiers, failure to investigate its MINUSTAH’s sanitation facilities after clear evidence that it may have contaminated a local river with cholera and responsible for post-earthquake cholera outbreak in Haiti, refusal to Investigate the hanging of a Haitian boy on the MINUSTAH base, MINUSTAH’s failure to protect/respond to gender-based sexual violence Post-Earthquake, and finally MINUSTAH’s failure to protect/respond to cases of forced eviction).
28 See The UN in Haiti “Damned if you do”, The Economist, Nov. 10th 2011, available at http://www.economist.com/blogs/americasview/2011/11/un-haiti, last visited Jan. 11th 2012 (discussing On November 8th the Institute for Justice and Democracy in Haiti (IJDH), a Boston-based advocacy group, submitted 5,000 class action claim against the UN for damages totaling at least $250m on behalf of Haitian cholera victims, on the grounds that Minustah imported the disease into the country. The UN’s response to the petition could affect peacekeeping missions around the world, which generally enjoy immunity from legal action.)
people\textsuperscript{30}, making it one of the world’s most devastating natural disasters in recent history. The Inter-American Development Bank estimated the cost of rebuilding Haiti to be as much as $14 billion (U.S.), more than double the country’s annual GDP.\textsuperscript{31} The international community and private donors all over the world responded generously by donating and pledging millions of dollars in aid to Haiti after the earthquake.\textsuperscript{32} However, according to a World Bank report, the last 15 years of development assistance in Haiti have produced “no noticeable effect” on Haiti’s democracy, the Rule of Law and international human rights or Haiti’s pathological socio-economic situation.\textsuperscript{33} With a GDP of approximately $11.9 billion in 2009, Haiti is the least developed economy in the Western Hemisphere.\textsuperscript{34}

In the wake of the devastating earthquake and persistent chaos in Haiti, the Haitian people along with the international community raise the same question: what should be done to promote the sustainable development of Haiti? I believe that the answer to this question depends first and foremost on the collective motivation of Haitians and the good faith of the international community led by the United States. There is no magic formula, “quick fix” or band aid solution. Haiti will have to be rebuilt primarily by Haitians on an incremental basis via projects such as “Brick by Brick”.\textsuperscript{35} History shows that neither nations nor individuals get a “free ride” in this world. Negotiation and ADR methods demonstrate that there are mainly three ways of getting what you want in life or for resolving a dispute.\textsuperscript{36} First, you can follow a power-based approach, and use coercion as a means to negotiate what you want or for resolving a dispute.\textsuperscript{37} Second is

\begin{itemize}
\item \textsuperscript{30} State Failure in Haiti, Supra n.5 at 49.
\item \textsuperscript{31} Id.
\item \textsuperscript{33} State Failure in Haiti, Supra n.5 at 67.
\item \textsuperscript{34} Id. at 65.
\item \textsuperscript{35} The author is the founder of a registered Canadian charity for Haiti named FSDH that is currently working on a project to build post office and rebuild the postal system in Haiti called “Brick by Brick”. This project is executed by the UN special agency Universal Postal Union, more information available at http://www.canadapost.ca/cpo/mc/aboutus/haiti/default.jsf and http://www.fddh-fsdh.org/eng/index.html (last visited Nov. 26th 2011).
\item \textsuperscript{36} William Ury, Jeanne M. Brett & Stephen Goldberg, Getting Disputes Resolved 3-19 (1988) (discussing the three approaches to resolving disputes: Interests, Rights, and Power).
\item \textsuperscript{37} Id.
the interest-based approach, whereby consideration is offered as a way of bargaining for what you want or for resolving a dispute.38 Finally, the third is the right-based approach, whereby rights are advocated and the dispute is resolved by enforcing obligations through formal adjudication in court.39 The first two approaches are usually more effective than the rights-based approach for those who want to obtain what they want or to resolve a dispute. The correlation between bargaining and dispute resolution in international relations, international commercial and international human rights disputes is evident; in all instances, the power-based and interested-based approaches for negotiating and resolving international disputes are viewed as more effective than the rights-based approach.40 This being said, it appears that too many developing nations like Haiti often naively rely on the benevolence of the Western world.41 This analysis might run counter to the idealist “peace and love” philosophy of many international human rights advocates, but it is realistic and pragmatic. This pragmatic view is also expressed by Haiti’s new President Martelly calling for nations like United States, Canada and France to forge a new, more sustainable, relationship with Haiti based on trade, not aid.42

Therefore, sustainable solutions for Haiti lie in innovative development assistance programs such as the Haiti Hemispheric Opportunity Through Partnership Encouragement Act (hereinafter HOPE II), a Free Trade Agreement (FTA) between the United States and Haiti

38 Supra n. 36.
39 Id.
40 The UN is well informed that the Human Rights-Based Approach across developing nations like Haiti is currently weak and must be reinforced. The UN Secretary-General’s Programme for Reform (1997), and its second phase, An Agenda for Further Change (2001), called upon UN Agencies to make human rights a cross-cutting priority for the UN system. In 2003, a group of UN agencies, including UNFPA, committed to integrating human rights into their national development cooperation programmes by adopting the Common Understanding on a rights-based approach. See United Nations website, available at http://www.unfpa.org/rights/approaches.htm (last visited Nov. 25th 2011). See also Alison N. Kurth, Rethinking The Syria Accountability Act: Are Sanctions On Syria In The Best Interest Of The United States, 20 Transnational Law & Contemporary Problems 239, 269, Available at Http://Www.Uiowa.Edu/~Tlcp/Tlcp%20articles/20-1/Kurth_Final_Jyz.04132011.Pdf (Last Visited Dec. 12th 2011) (discussing that following Senators Kerry and Hagel an interest-based U.S. foreign policy of engagement is preferable to an isolationist policy and that a “carrot and stick” negotiation and diplomatic policy should be preferred over only a hard-liner punitive foreign policy).
42 Sonia Verm, Forging a new Haitian strategy: trade, not aid, Tuesday, Oct. 18, 2011 http://m.theglobeandmail.com/news/national/time-to-lead/forging-a-new-haitian-strategy-trade-not-aid/article2035116/?service=mobile (last visited Dec. 20 2011) (discussing that experts say Canada should seek to answer President Martelly’s call by forging a new relationship with Haiti based on trade, not aid. Haiti has turned Haiti into some kind of a laboratory of experiments and projects that has installed over 40,000 NGOs in the country)
which was passed by the U.S. Congress in 2008. This FTA aims to assist the socio-economic sustainable development of Haiti by allowing Haitian exporters to obtain a duty-free licence to export certain textiles to the United States if they meet eligibility criteria related to international human rights. The legislative framework and functions of HOPE II will be analyzed henceforth. The objective of this article is to explain the importance of Alternative Dispute Resolution (ADR) for the effective enforcement of international human rights under HOPE II.

II. BRIEF OVERVIEW OF HOPE II AND ITS WEAKNESSES AND STRENGTHS AS PART OF THE LEGISLATIVE INTENT OF THE UNITED STATES TO PROMOTE INTERNATIONAL HUMAN RIGHTS IN HAITI;

As a FTA between the United States and Haiti, the goal of HOPE II is to assist Haiti in rebuilding its economy and developing fundamental human and labor rights by encouraging socially responsible investment and job creation in the textile and garment industry in Haiti. President George W. Bush and the U.S. Congress first passed HOPE I in December 2006. HOPE I demonstrated great leadership by President Bush but yielded modest results. Therefore, to enhance the effectiveness of this initiative, President Obama and the 110th Congress amended and expanded the initial legislative intent of HOPE I into HOPE II in June 2008 when the U.S. Congress passed the Food, Conservation, and Energy Act of 2008.

A) THE WEAKNESSES OF HOPE II

One significant weakness of HOPE II is that it supports the promotion of exports in the garment industry. This industry is considered by many international human rights advocates as

44 Id.
47 Id at Summary of this Congressional Research Report (discussing that the early assessments of the effectiveness of HOPE I, however, were disappointing. The 110th Congress responded by amending HOPE I with the Hemispheric Opportunity through Partnership Encouragement Act of 2008 (HOPE II).
48 Id.
being associated with sweatshops. The industry has been criticized by many international human rights observers and Haitians as well, as being non-sustainable and worse, a subtle reinstatement of modern slavery insofar as it confines Haitians to harsh working conditions in dark sweatshops for long hours. The garment industry accounts for Haiti’s core export sector. The garment industry is also essential for Haiti’s economic well-being since it generates up to 80% of the country’s foreign exchange. The foreign exchange that is generated from the garment industry is used to finance Haiti’s large food import bill, among other needs.

U.S. foreign policy advisor Paul Collier and U.S. Secretary of State Hillary Rodham Clinton believe that alternatives to manufacturing agricultural exports or natural resource exports are much less likely to lift a country out of poverty over the long term. For a country like Haiti, this policy orientation is persuasive on a short-term basis; but in my view, trade preferences such as the preferences found in HOPE II should focus instead on the promotion of agricultural exports. Assisting Haiti in alleviating its current food crisis should be the legislative priority for Canada, the United States and any other developed nation that wants to assist in Haiti’s

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52 J. F. Hornbeck, The Haitian Economy and the HOPE Act, Congressional Research Service (2010), See p. 5 available at http://fpc.state.gov/documents/organization/145132.pdf (last visited Jan. 11th 2012), (discussing Haiti exports is primarily the garment industry (apparel sector), which accounts for 75%-80% of foreign exchange earnings and for 92% of total exports to the United States. Cacao, mangoes, and coffee compose the small basket (4%) of agricultural exports).

53 Id.

54 Id.

55 Paul Collier, CBE is a Professor of Economics, Director for the Centre for the Study of African Economies at The University of Oxford and Fellow of St Antony's College. From 1998 – 2003 he was the director of the Development Research Group of the World Bank.

56 State Failure in Haiti, Supra n.5 at 70.

57 Sonia Verm, Forging a new Haitian strategy: trade, not aid, Tuesday, Oct. 18, 2011 http://m.theglobeandmail.com/news/national/time-to-lead/forging-a-new-haitian-strategy-trade-not-aid/article2035116/?service=mobile (last visited Dec. 20 2011) (discussing Haiti is the largest recipient of Canada's foreign aid for 2010-2011 surpassing Afghanistan. Also discussing that experts say Canada should seek to answer President Martelly’s call by forging a new relationship with Haiti based on trade, not aid.)
sustainable development. To a large extent, food insecurity is a key factor which impacts international human rights, peace-building, security and the Rule of Law instability in Haiti.\textsuperscript{58}

Generally, Haitians tend to agree that the garment industry should not be neglected, but that more sustainable sectors such as agriculture and tourism should be prioritized.\textsuperscript{59} The U.S. government is currently investing in the sustainable development of Haiti’s agricultural sector through a partnership between the U.S. Agency for International Development (USAID) and the Coca-Cola Company, a public-private initiative that seeks to develop a sustainable mango industry in Haiti.\textsuperscript{60}

A second weakness of HOPE II is that, despite its aim to support the development of international human rights in Haiti, it does not incorporate any formal method of adjudication. The adjudication of human rights violations is vested in Haiti’s judicial system and Hope II does not contain provisions for a mandatory ADR program with a UN arbitral tribunal to render decisions on matters of alleged international human rights violations by registered businesses in HOPE II.\textsuperscript{61} However, the formation of a mandatory ADR program with a UN supranational or multinational arbitral tribunal to render binding judicial decisions under HOPE II can never take place without Haiti’s consent as sovereign nation. In response to overly negative comments against Haiti’s state, my father often says that Haiti might be a small and poor country, but Haiti is a sovereign nation. My father’s views resonate particularly with Québec separatists in Canada who still dream of being a sovereign nation even after losing two referendums in 1980 and

\textsuperscript{58} Clare Ribando Seelke and J. F. Hornbeck, Haiti: Legislative Responses to the Food Crisis and Related Development Challenges, Congressional Research Service (2008), available at http://fpc.state.gov/documents/organization/106146.pdf (last visited Jan. 11th 2012), (discussing the problems caused by the current food crisis in Haiti. Haiti suffers enduring massive and deep poverty. Over one-half of the population (54%) lives in extreme poverty, living on less than $1 a day; 78% live on $2 or less a day, according to the World Bank. Hunger is also widespread: 81% of the national population does not get the minimum daily ration of food defined by the World Health Organization. Haiti was already in an acute environmental crisis).

\textsuperscript{59} State Failure in Haiti, Supra n.5 at 70 (discussing that the Prime Minister of Haiti, Jean Max Bellerive has stated that the garment industry should not be ignored, but has also sought increased investment in more enduring sectors such as agriculture and tourism).


\textsuperscript{61} Sec. 15403 (Labor Ombudsman and technical assistance improvement and compliance needs assessment and remediation program) under HOPE II only stipulates the training and technical assistance to labor inspectors, judicial officers, and other relevant personnel to build their capacity to enforce national labor laws and resolve labor disputes, HOPE II legislation available at http://www.gpo.gov/fdsys/pkg/BILLS-110hr6124enr/pdf/BILLS-110hr6124enr.pdf (last visited Jan. 11th, 2012).
1995. Therefore, the basic tenet of sovereignty is jurisdictional independence and delegating judicial sovereignty to an international court such as an UN arbitral tribunal in Haiti’s territory must be in compliance with the theory of consent. Pursuant to the consensual theory is that, “the binding quality of international law – its existence as ‘law’ – flows from the consent of states. It is said to be a ‘positivistic’ system of law based on the actual practice of states. In its pure form, this consensual or positivist theory stipulates that no international law can be created without the consent of the state which is to be bound.” Therefore, I believe the U.S. should have incorporated the condition for Haiti to consent to delegating its judicial sovereignty to an ADR program with a UN arbitral tribunal to render judicial binding decisions under HOPE II as a fundamental condition. The creation of a UN arbitral tribunal under HOPE II should be incorporated with ease since HOPE II already mandates the UN International Labour Organization (ILO) as responsible for the technical assistance, improvement and compliance needs assessment and remediation program for the enforcement of fundamental human and labour rights of Haitian workers as per Section 15403 of HOPE II.

Moreover, the Haitian judicial system is dysfunctional and corrupt, it should not be entrusted with the task of adjudicating any human rights claims in the first place. The corruption of Haiti’s judicial system as it relates to HOPE II will be discussed later in this article.

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62 My father Carl Apollon, agronomist and leader within the Haitian diaspora in Quebec, raised me to respect Haiti but also to always remain critical. As an illustration of my respect for Haiti, I once met Haiti’s President Préval with my father in October 2008 during his official visit to Montreal. After meeting Haiti’s President, I apologized to my father for my unusual nervousness as I explained the agricultural projects of my father’s NGO to President Préval. My father responded wisely: “my son this was your first time talking to a President and Chief of state, I was not expecting you to talk and act like the “confident” lawyer that you usually are.” My father finished by telling me: “I was very proud to see you talking so humbly to Haiti’s President; you truly showed me today your respect for my country of origin.”

63 Martin Dixon, International Law, 16 (6th ed. 2007). (discussing the nature of international law and the international system).


65 State Failure in Haiti, Supra n.5 at 62–63.

66 Stefan Sottiaux & Gerhard Van Der schyff, Methods of International Human Rights Adjudication: Towards a more Structured Decision-Making Process for the European Court of Human Rights, 31 Hastings Int’L & Comp. L Rev. 115, 151-152 (2008) (discussing the opinion of some legal scholars that national tribunals should be given the first opportunity to adjudicate international human rights if possible because supranational tribunals like the European Court of Human Rights may be interpreted as a compromise to respect the domestic constitutional identity of a nation for the principles of certainty and efficiency). This legal barrier to a UN arbitral tribunal is important because Haitians are very patriotic about their constitutional identity. See Haiti’s Constitutional Crisis, Supra n. 18
B) THE STRENGTHS OF HOPE II

The core strength of HOPE II in supporting international human rights is its semi-effective enforcement mechanism of issuing permits or export licences to register Haitian or foreign exporters. Therefore, the enforcement of HOPE II deals directly with registered businesses. As a result, HOPE II is not dependent on the good faith and willpower of the Haitian state and its politicians. This makes HOPE II more effective because the enforcement of international human rights conventions and agreements is usually handicapped and/or ineffective because it is too often perceived as secondary to the national interests of many sovereign states and their political leaders. It is commonly known that too many sovereign state leaders lack the political willpower and/or self-interest to enforce human rights.

HOPE II may be an indication that international trade law may soon play an important role in effectively promoting the protection of human rights throughout the world. In my opinion, trade benefits and penalties in cases of human rights violations should be linked to businesses/exporters, as contemplated by HOPE II, to more effectively enforce international human rights and/or environmental protections. No global consensus exists on using international trade to promote international human rights, therefore, “most of the activity in this area is emerging through regional and bilateral trade agreements, as opposed to agreements negotiated at the multilateral level through the World Trade Organization.”

Prior to HOPE II,
the best example of a regional and bilateral trade agreement which incorporates international human rights as a central concern is the European Union Chile Association Agreement that came into force in February 2003. Following the drafting principles of the Universal Declaration of Human Rights (UDHR) which gives the first articles of the convention greatest importance, Article 1 of the European Union Chile Association Agreement clearly specifies the commitment of the parties to respect fundamental human rights as laid down in the UDHR:

Article 1

Respect for democratic principles and fundamental human rights as laid down in the Universal Declaration of Human Rights and for the principle of the rule of law underpins the internal and international policies of the Parties and constitutes an essential element of this Agreement.

HOPE II aims to attract responsibility to foreign direct investments (FDI) in Haiti in order to uphold fundamental human and labor rights. The goal of HOPE II is to stimulate sustainable development in Haiti by ensuring that exporting multinational corporations operating (i.e. businesses registered under HOPE II) in Haiti adhere to, “internationally recognized corporate social responsibility standards and principles and pursue best practices”. In other words, HOPE II ensures the corporate accountability of multinational foreign investors in Haiti.

Recently, criticism of global corporations went so far as to label select multinational corporations “pathological” on account of their pursuit of profit and power whatever the environmental or social cost. Multinational corporations are viewed by many critics as the worst offenders, ahead of states, for international human rights violations. Multinational corporations are also often viewed as encouraging or aggravating international human rights

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70 This international trade agreement establishes a comprehensive political and economic association covering trade, financial, scientific, technical, social and cultural matters and cooperation. It provides for closer political dialogue, strengthened cooperation, greater participation in framework programmes and development and diversification of bilateral trade relations. See [http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/latin_america/r14015_en.htm](http://europa.eu/legislation_summaries/external_relations/relations_with_third_countries/latin_america/r14015_en.htm), See also: [http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/chile/](http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/chile/) (last visited Jan. 11 2012).

71 The first two articles as drafting priority lay the universal foundation of human rights: human beings are equal because of their shared essence of human dignity; human rights are universal, not because of any State or international organization, but because they belong to all of humanity. See United Nations web site, available at [http://www.un.org/rights/HRToday/declar.htm](http://www.un.org/rights/HRToday/declar.htm) (last visited Nov. 25th 2011).


73 CSR; a legal analysis, Supra n. 68 at 318.

74 Id. at Chapter 8 (pp. 285-345) (discussing the CSR concept of Consistent Best Practices or transnational corporate accountability. Emphasizing the importance that whether at home or abroad, corporations must seek to apply the highest environmental and social standards throughout their operations and during their interactions with their business partners).


76 Id.
violations. In the documentary “The Corporation: The Pathological Pursuit of Profit and Power”, the organizational behaviour of a typical profit-oriented multinational corporation is compared to the profile of a sociopath. The behavioral resemblances appear to be troubling.

Overall HOPE II is a promising legislative solution because it avoids relying on the Haitian state for its enforcement. Instead it deals directly with the main actors – i.e. businesses/exporters registered in HOPE II by offering these businesses strong incentive for respecting their international human rights obligations under HOPE II.

HOPE II functions in a straightforward and practical manner: if registered businesses comply with HOPE II, they receive a duty-free licence to the United States and if they fail to comply they lose their licence. The potential opportunity of HOPE II to promote fundamental human and labor rights can be demonstrated by the major racial discrimination law suit involving Denny’s restaurants:

“In 1994, Denny’s agreed to pay USD$54 million to settle two lawsuits involving some 300,000 visible minority customer claimants who claimed that Denny’s was systematically refusing to serve them or subjecting them to differential treatment such as insisting that they pay before being served at the table. While the claimants sought and received compensation, they also sought to change the way the corporations behaved and to have their needs and interests engaged. By 1998, Denny’s was among Fortune’s best rated corporations in the United States for engagement with Asians, Blacks, and Hispanics.”

In this case, compliance occurred only after the massive lawsuits and compensation settlements. When Denny’s was criticized for being non-discriminatory only after this massive lawsuit, one of their corporate leaders responded by comparing the corporate response of Denny to a church offering: “maybe you put money in the plate because you’re scared of going to hell; maybe you do it to support the good works of the church. Motivation is not important. What we

77 For instance the giant Canadian global mining corporation Barrick Gold Corporation recently posted a formal response on their web site to the influential NGO Amnesty International regarding accusations that it encouraged and facilitated international human rights violation in Papua New Guinea. See Barrick official web site: http://www.barrick.com/CorporateResponsibility/KeyTopics/PorgeraJV/Amnesty/default.aspx
78 Supra n. 75.
79 CSR; a legal analysis, Supra n. 68 at 180-181.
Today Denny’s continues to emphasize its “diversity policy” and in 2006 and
2007 was ranked at the top of Black Enterprise Magazine’s “Best 40 Companies for Diversity”.

This case shows that two core motivational factors for violating or enforcing human rights are
greed and fear! In my view, the legislative intent of HOPE II is pragmatic because it plays on
both fear (power-based approach) and greed (interested-based approach). Therefore, HOPE II
promises to be a more effective way to motivate employers operating in Haiti to change
workplace practices.

C) INTERNATIONAL HUMAN RIGHTS CONDITIONS UNDER HOPE II FOR REGISTERED
EXPORTERS, AS RECIPIENTS OF A PERMIT OR LICENSE TO EXPORT DUTY-FREE INTO THE
UNITED STATES

HOPE II stipulates in Section 15403 (Labor Ombudsman and Technical Assistance
Improvement and Compliance Needs Assessment and Remediation Program) that the
International Labor Organization is responsible for assessing the compliance of Haitian exporters
listed in the HOPE II registry. The conditions are described in Section 15403 (3) (B) as follows:

“(B) CONDITIONS DESCRIBED.—The conditions referred to in subparagraph (A) are—

‘(i) compliance with core labor standards; and

‘(ii) compliance with the labor laws of Haiti that relate directly to core labor standards and to
ensuring acceptable conditions of work with respect to minimum wages, hours of work, and
occupational health and safety.

Pursuant to Section 15403 of HOPE II, core labor standards are defined as follows:

3) CORE LABOR STANDARDS.—The term “core labor standards”
means—

‘(A) freedom of association;
‘(B) the effective recognition of the right to bargain collectively;
‘(C) the elimination of all forms of compulsory or forced labor;
‘(D) the effective abolition of child labor and a prohibition on the worst forms of child labor; and
‘(E) the elimination of discrimination in respect of employment and occupation.’

80 CSR; a legal analysis, Supra n. 68 at 180-181.
81 Id.
82 HOPE II legislation, Supra n.61.
83 Id.
84 Id.
Therefore, HOPE II aims to protect specific labor rights. However, the fundamental labor rights stated in Section 15403 of HOPE II are a subset of other fundamental human rights found in the UDHR. Generally, HOPE II aims to promote the following fundamental human and labor rights under the UDHR:

**The UDHR:**

Haiti voted in favour of the UDHR in 1948. The UDHR is not a binding treaty for states like Haiti but it provides a strong normative basis for international human rights standards. Essentially, the spirit of HOPE II aligns itself with the promotion of social progress stipulated in the Preamble of the UDHR:

“Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.”

HOPE II also aims to humanize labor practices in Haiti by preventing modern servitude often associated with sweatshops. Consequently, Sections 15403 (3) (A), (B) and (C) of HOPE II relate to Article 4, 23 and 24 of UDHR:

**Article 4**

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

**Article 23**

1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

2. Everyone, without any discrimination, has the right to equal pay for equal work.

3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

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86 The UHDR may not legally binding, but when a nation pledges itself by virtue of its signature, there is an ethical obligation to uphold the obligations contained in this Declaration.
88 HOPE II legislation, Supra n.61.
89 Supra n. 87.
(4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Finally, Section 15403 (3) (E) of HOPE II that focuses on the elimination of discrimination in employment relates to Article 7 of UDHR:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

In summary, this means that the overall legislative objective of HOPE II must be interpreted with a view to achieving the sustainability of political, economic and social institutions in Haiti.

D) ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS UNDER HOPE II

Under Section 15403 (4) (B) (ii), on the basis of the reports of the International Labor Organization, the President of the United States has the power to withdraw, suspend, or limit the application of trade preferential treatment to businesses registered in HOPE II. Section 15403 (4) (B) (iii) allows the President of the United States upon determination that a Haitian exporter is later in complying with HOPE II conditions, to reinstate the application of trade preferential treatment. Therefore, Section 15403 is the central section for enforcing human and labor right in Haiti under HOPE II.

E) CONCLUSION ON ENFORCEMENT OF HUMAN RIGHTS UNDER HOPE II

In summary, HOPE II is drafted to modify corporate behavior in an effective way by linking the motivation of businesses registered to comply with their international human rights.

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90 HOPE II legislation, Supra n.61.
91 Supra n. 87.
92 HOPE II legislation, Supra n.61.
93 Id.
obligations. HOPE II is linked with their pursuit of profit by getting a trade duty-free export licence to the large U.S. market and the fear of losing it.

III. JUSTICE CANNOT BE FOR ONE SIDE ALONE: CREATION OF A MANDATORY ADR PROGRAM AND UN ARBITRAL TRIBUNAL FOR THE ADJUDICATION OF HAITIAN WORKERS INTERNATIONAL HUMAN RIGHTS UNDER THE HOPE II;

Eleanor Roosevelt chaired the committee that drafted and approved the UDHR. In tribute to her human rights achievements, she was called the "First Lady of the World" by U.S. President Truman.\(^94\) Eleanor Roosevelt once said: Justice cannot be for one side alone, but must be for both.\(^95\)

Arguably, without the creation of a mandatory ADR program and a UN arbitral tribunal for the adjudication of fundamental human and labor rights in Haiti, justice under HOPE II will be for one side alone: the powerful employers. Since the judicial system in Haiti is largely corrupt\(^96\) and lacks independence and impartiality, common-sense would have it that registered exporters/employers under HOPE II could easily obtain any judgments against their employees to legalize their actions as long they are willing to pay the price. The majority of Haitian workers are of extremely poor means and make on average less than $2 per day\(^97\). Due to power disparities, Haitian workers will likely have a difficult time engaging in legal battles with oppressive employers.

This power imbalance remains despite the current enforcement mechanism envisaged by HOPE II. Therefore, without an effective adjudication mechanism, HOPE II looks good on paper but in practice, it will have limited actual effects on the protection of Haitian workers’ rights. The adjudication of human right transgressions is a vital component of any effective human rights initiative; it has a powerful remedial function in solving disputes, thereby giving relief to vulnerable Haitian workers seeking justice.\(^98\) While formal adjudication through litigation or arbitration is often a necessary means of resolving human rights disputes, this article advocates

\(^96\) State Failure in Haiti, Supra n.5 at 53.
\(^97\) See Methods of International Human Rights Adjudication, Supra n. 66.
\(^98\) Id. at 124 (discussing the remedial function of adjudication of human rights).
for the creation of a mandatory ADR program for HOPE II where negotiation and mediation are preferred. Employees involved in human rights disputes against their employers usually express a strong reluctance to resolve such matters through adjudicative forums like litigation and arbitration. Caroline Rees states that: “contrary to how the term is used in mainstream dispute resolution discourse, its use in the development field opens up an understanding of how mediation can support and advance the enjoyment of human rights in practice. From this perspective, it becomes in many instances a complement to litigation or other adjudicative avenues for remedy and justice.” Indeed, traditional methods of dispute resolution often fail to address the underlying circumstances that cause these conflicts in the first place. The strategic advantage of mediation is that the theory and practice of mediation have evolved to allow the co-existence of rights-based and interests-based approaches in its practice:

“It has done so by defining different modes or styles of mediation to address each, according to the parties’ preferences or the exigencies of the situation. The key distinction made is between evaluative and facilitative mediation. [...] Evaluative mediation leans the process towards so-called ‘rights-based approaches’, and is indeed referred to by some as ‘rights-based mediation’. The evaluative mediator draws on law, industry practice or other authoritative sources to provide direction to the participants on appropriate grounds for settlement. Her experience, training and objectivity are seen as validating this role. As such, this approach arguably moves towards a form of non-binding, persuasion-based adjudication. By contrast, facilitative mediation focuses more on an interest-based process and a less interventionist role for the mediator. The facilitative mediator focuses on enhancing and clarifying communications between the parties to help them decide themselves what to do, presuming that they are better placed to devise effective solutions than is the mediator.”

Finally, in my view formal human rights adjudication under HOPE II via a UN arbitral tribunal should be the last resort.

100 Id at 51 (discussing for instance that about 75% to 95% of all men and women in a given institution or workplace will not willingly choose, or even cooperate with, a formal, polarized grievance process when they feel harassed).
102 Id at 4-5.
103 Supra n.99 at 57 (supporting the idea that effective human rights advocate will possess the skills to identify disputes specifically involving human-rights issues, evaluate the rights and interests, power, and legal dynamics involved in the complaint, and be capable of prescribing and operating competently within a variety of means for resolving the dispute and use litigation only if necessary).
Under HOPE II, the U.S. President is responsible for granting export duty-free licences. But, without an efficient, independent, fair and impartial judicial system in Haiti, how will the President really know which Haitian employers registered in HOPE II persistently violate rights? The U.S., along with the international community, are aware that the Haitian judicial system is too corrupt to be relied upon. Therefore, on what basis should HOPE II put its faith in the Haitian judicial system for the adjudication of human rights? Should we qualify the legislative intent of the U.S. government and President Obama to rely on the Haitian judicial system to adjudicate human rights as an honest intention to respect Haiti’s sovereignty or an innocent, negligent or fraudulent diplomatic and legal mistake? This question, while important, is beyond the scope of this article. It also strays from the solution-focused discussion of this article. Haiti ranked 146 out 178 countries surveyed in Transparency International’s 2010 Corruption Perceptions Index. Arguably, Haiti is one of the most corrupted countries in the world and the judicial branch is just as corrupt as the executive branch of the government. The judicial branch in Haiti is known to operate the mob and as a result, it further alienates the general population. Generally, the Haitian government has been associated with deep failures in essential public security services such as the judicial system. The Haitian state is viewed as being, “incapable of effectively addressing the country’s needs.

Understanding Haiti today requires a historical analysis of the persisting systemic weaknesses of the state”. In this context, the legislative intention of the U.S. government to rely on the Haitian judicial system for the adjudication of fundamental human and labor rights violations under HOPE II can be viewed as negligent and can be interpreted as an intentional

104 Raj Bhala, Philosophical, Religious, and legalistic Perspective on Equal Human Dignity and U.S. Free Trade Agreements, 28 St. Louis U. Pub. L. Rev. 9 (2009) (discussing that American FTAs and international trade policy are formulated principally in an economic crucible. Principles like absolute advantage, comparative advantage, free trade and fair trade, and policies like managed trade, strategic trade, infant industry and rust belt manufacturer protection, and agriculture support, mixed in a large dose of national security, makeup most American trade policies. The author argues that the incorporation of excellent labor, environmental and human rights into FTAs should not be viewed as incompatible but as practical and complimentary. Yet the author argues that changing the FTA paradigm to one in which excellent labor, environmental and human rights standards predominates would require careful consideration of efficiency trade-offs, legal capacity, sovereign state responsibility, managed and strategic trade policy, and effective trade remedies (sanctions). The effort may well be worthwhile. Throughout many parts of the word, the tide favoring unrelenting and uncompromising free trade has turned).
106 Id.
107 Id.
108 Id.
109 Id.
diplomatic omission to avoid “overcomplicating” the parameters of HOPE II as a FTA.\textsuperscript{110} In that regard, it can be argued that HOPE II is in breach of Article 10 of UDHR\textsuperscript{111}, which stipulates that:

\textit{Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.}

The fact that the corrupt Haitian judicial system lacks independence and impartiality is well-known by the international community. Therefore, the U.S. government should have incorporated a mandatory ADR Program and UN arbitral tribunal in to HOPE II as an effective adjudication mechanism for allegations of human rights violations against Haitian workers.

A) \textbf{RECOMMENDATIONS FOR THE CREATION OF A MANDATORY ADR PROGRAM AND UN ARBITRAL TRIBUNAL FOR THE ADJUDICATION OF HAITIAN WORKERS INTERNATIONAL HUMAN RIGHTS UNDER HOPE II}

The effective enforcement of international human rights cannot be achieved if there lacks a comprehensive compliance initiative to motivate changes in behavior.\textsuperscript{112} The enforcement cycle of trade agreements with international human rights obligations must include a full range of activities such as compliance training, monitoring/auditing, sanctions and legal remedies when the regulated community fails to meet its obligations under the law.\textsuperscript{113} In the case of HOPE II, the establishment of an arbitral tribunal led by the United Nations (International Labor Organization) is needed to have a more comprehensive enforcement of international human rights.\textsuperscript{114} The current regulatory approach under HOPE II which solely utilizes export trade

\textsuperscript{110}Supra n. 104 (explaining that changing the focus of American FTA and international trade policy to one which human rights predominates will require substantial effort and might be viewed as too complicated. Because such change will require careful consideration of efficiency trade-offs, legal capacity, sovereign state responsibility, managed and strategic trade policy, trade remedies and sanctions. The author note that the effort may well be worthwhile since the philosophy favoring unrelenting and uncompromising free trade is dying).

\textsuperscript{111}United Nations, Article 10 UDHR, available at \url{http://www.un.org/en/documents/udhr/}

\textsuperscript{112}W. Davis Jones, The Relationship Between Trade and Effective Enforcement, 36 Denv. J. Int’L L. & Pol’Y, 389, 390 (2008) (discussing the relationship between trade and effective environmental enforcement and that compliance cannot be achieved if there is not an effective compliance program to motivate people to change behavior).

\textsuperscript{113}Id at 390-392.

\textsuperscript{114}Id at 392.
permits or licences is a good start but is not sufficient. The current enforcement approach under HOPE II does include compliance training\(^\text{115}\), monitoring/auditing\(^\text{116}\) or sanctions for regulated registered exporters under HOPE II.\(^\text{117}\) Without an independent, impartial, transparent, consistent and fair adjudication system taking in consideration appropriate remedies\(^\text{118}\), the effective enforcement of international human rights under HOPE II is uncertain.

In the United States, most labor disputes are resolved by ADR methods (i.e. negotiation, mediation or arbitration).\(^\text{119}\) A survey of more than 530 corporations in the Fortune 1,000 category showed that 90% viewed ADR as a critical cost-control technique, and more than half (54 percent) said cost pressures directly affected their decision to use ADR.\(^\text{120}\) Users said that ADR provided better outcomes than litigation (66%), and preserved confidentiality and good business relationships (59%).\(^\text{121}\) Therefore, I believe a mandatory ADR program under HOPE II for the adjudication of Haitian human rights should seek to resolve any dispute arising out of employment contracts or work conditions by recourse to ADR dispute resolution methods in the following sequence:

1) Negotiations in good faith\(^\text{122}\);

2) Non-binding mediation with caucusing\(^\text{123}\) (mediation caucusing means that separate meetings are conducted by the mediator with the employer or employee(s) separately); and

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\(^{115}\) Supra. 104 at 390.

\(^{116}\) Id.

\(^{117}\) Id.

\(^{118}\) See William M Carter, Jr., Rethinking Subsidiarity in International Human Rights Adjudication, 30 HAMLINE J PUBLIC LAW POLICY 319, 331 (2008) (discussing that the enforcement stage must deal with what measures are best suited to remedy the violation of the right)

\(^{119}\) See the survey, The Use of ADR in U.S. Corporations, a joint initiative of the Institute on Conflict Resolution at Cornell's School of Industrial and Labor Relations, the Foundation for the Prevention and Early Resolution of Conflict (PERC) and Price Waterhouse LLP, polled more than 530 corporations in the Fortune 1,000 category available at [http://www.news.cornell.edu/chronicle/97/6.19.97/dispute_resolution.html](http://www.news.cornell.edu/chronicle/97/6.19.97/dispute_resolution.html) (last visited Nov. 13th 2011)

\(^{120}\) Id.

\(^{121}\) Id.

\(^{122}\) In *DELGAMUUKW v. BRITISH COLUMBIA*, a human rights decision of the Supreme Court of Canada in relation to aboriginal (indigenous) rights, the Court held that the provincial Crown (Government of the province of British Columbia) was under a moral, if not a legal, duty to enter into and conduct negotiations in relation to the legal interest in the land of Canada’s Aboriginal peoples in good faith. The Court held the “Negotiated settlements” must be in good faith and based on give and take on all sides to achieve the reconciliation between the parties, Jan. 1998, available at [http://www.parl.gc.ca/Content/LOP/researchpublications/bp459-e.htm](http://www.parl.gc.ca/Content/LOP/researchpublications/bp459-e.htm) (last visited 25th 2011). I think this human rights decision from the Supreme Court of Canada defines the moral duty and legal duty of employers registered under HOPE II to negotiate out of court settlements with their Haitian employees in good faith.

\(^{123}\) David A Hoffman, Mediation and the Art of Shuttle Diplomacy, Negotiation Journal July 2011 (discussing the economic rationales for mediation caucusing include: avoiding adverse selection, overcoming the prisoner’s dilemma, communication, emotional, information, strategic and cultural barriers, unrealistic expectations, obstacles to generating options, internal conflicts,
3) Binding arbitration via the UN arbitral tribunal for HOPE II.

Encouraging parties to engage in negotiation and mediation first will demonstrate the mutual desire of the parties to preserve a fair and durable working relationship. This kind of dispute resolution orientation for fundamental human and labor rights also aligns with the concept of Social Dialogue developed by the ILO in order to manage labor conflicts through cooperation, collaboration and maintain harmony. The promotion of the Social Dialogue is already the core mandate of the ILO in the context of HOPE II in Haiti and can be defined as follows:

“Social dialogue is defined by the ILO to include all types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers and workers, on issues of common interest relating to economic and social policy. It can exist as a tripartite process, with the government as an official party to the dialogue or it may consist of bipartite relations only between labour and management (or trade unions and employers' organisations), with or without indirect government involvement. Concertation can be informal or institutionalised, and often it is a combination of the two. It can take place at the national, regional or at enterprise level. It can be inter-professional, sectoral or a combination of all of these. The main goal of social dialogue itself is to promote consensus building and democratic involvement among the main stakeholders in the world of work. Successful social dialogue structures and processes have the potential to resolve important economic and social issues, encourage good governance, advance social and industrial peace and stability and boost economic progress.”

Negotiation and mediation are customarily favored over litigation and/or arbitration amongst American labor law attorneys. The creation of an UN arbitral tribunal to adjudicate disputes between Haitian employers registered in HOPE II and their employees is crucial for two reasons. A UN arbitral tribunal led by the ILO will ensure transparency, efficiency, impartiality and accountability to avoid having to deal with corrupt and/or self-interested Haitian judges.
Second, as much as negotiation and mediation should be favored in labor dispute resolutions, conventional legal practice holds that formal adjudication is often a necessary last resort to resolve a dispute. Often dispute resolution negotiations involve a mix of all three approaches previously mentioned (interest-based, power-based and rights-based). Some approaches attempt to satisfy interests, some discussions of rights, and some reference to relative power.\textsuperscript{127} Unfortunately, in the context of labor disputes in a developing country like Haiti, where the Rule of Law is absent, employers tend to resolve disputes on the basis of their power. Acts of aggression such as withholding benefits, termination of employment without cause, and even physical attacks are common in labor disputes in Haiti.\textsuperscript{128} In this social context, a UN arbitral tribunal will offer Haitian employees a satisfactory alternative to adjudicate their rights if negotiation and/or mediations fail.

Finally, should the UN arbitral tribunal, as a supranational arbitral tribunal utilize categorical or balancing methods in fundamental adjudication? This debate is predominant in the European Court of Human Rights.\textsuperscript{129} Sottiaux and Van Der Schyff states that: “the principal arguments of the debate are by now: that categorical or rule-like decision-making fosters consistency, stability, and predictability; a balancing process or standard-like decision-making, by contrast, ensures adaptability to changing social conditions and the particular circumstances of each case.”\textsuperscript{130} Legal scholars conclude that the debate regarding international human rights adjudication cannot be polarized and considered in the abstract. Rather, the adjudication method depends on various factors, one of which is the nature of the court that is charged with adjudicating the matter at issue\textsuperscript{131}:

“To shift the focus from domestic to international human rights does not remove the tension between the different values and interests at play. On the contrary, some of the arguments on both the pro-balancing and pro-categorization sides gain particular importance when the decision-making authority is located in a multinational court. On the one hand, the use of a reliable and predictable method of adjudication is indispensable when the court is in a position to give guidance to a great number of domestic decision-makers and prospective applicants to the Convention on Human Rights. However, on the other hand, the creation of an inflexible doctrine at the international level is problematic given the subsidiary role a

\textsuperscript{127} Supra n. 36.
\textsuperscript{128} Supra n. 50 (discussing affirmative measures to combat violence in the labor sector in Haiti, particularly gender-discrimination, gender-based violence, and child labor in Haiti).
\textsuperscript{129} Supra n. 66. Methods of International Human Rights Adjudication.
\textsuperscript{130} Id at 115-116.
\textsuperscript{131} Id.
multinational court plays in the enforcement of applicable rights in states with different constitutional identities. This role entails, among other things, that such a court is usually not a final court of appeal or fourth instance, and that it is not to substitute its views for that of domestic courts which bear the primary responsibility for the enforcement of regional or international guarantees (or similarly worded domestic constitutional provisions). The guiding idea of this article is that international courts should, in their decision making process, seek to find a middle ground between these opposing concerns. In other words, an international tribunal's style of opinion writing should reflect the inherent tension between its constitutional guidance function on the one hand, and the principle of subsidiarity on the other.”

Therefore, fundamental human and labor rights violations under HOPE II should be adjudicated by a mandatory ADR program, with negotiation in good faith and mediation encouraged as the first methods of ADR dispute resolution. Arbitration by a UN arbitral tribunal should be utilized as a last resort. Without this ADR initiative to adjudicate violations in an efficient, timely, independent, impartial, transparent, consistent and fair manner by considering appropriate remedies for employees, the minimalist attitude of the United States towards the enforcement of international human rights under HOPE II and its reluctance to develop a mandatory ADR program to adjudicate human rights violations leads HOPE II to have “symptoms of radical mootness.”

IV. CONCLUSION

A mandatory ADR program and UN arbitral tribunal with the power to sanction, make judicial decisions, and provide remedies in the name of universal justice, is sine qua none for genuine international human rights compliance under HOPE II. With the establishment of a mandatory ADR program and a change to the trade orientation of HOPE II from the garment industry to the more sustainable agriculture and tourism industries, the United States could proudly claim to be champions of the sustainable development of human and labor rights in Haiti. For a trade compliance program to be effective, “every link in the chain must function together” and all parties and stakeholders should work together. There is a Haitian maxim

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132 Supra n. 66, Methods of International Human Rights Adjudication. At 115-116.
134 Supra n. 119 at 394.
saying that *bel dan pa di zanmi.* Therefore, HOPE I and HOPE II are undeniably significant U.S. initiatives to help foster the sustainable development of Haiti, but the U.S. can and should set the bar higher. For the protection of human rights in Haiti will only be as meaningful as the institutions dedicated to ensuring compliance, enforcement and rendering penalties.

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135 This Créole proverb can be translated in English: “Just because someone is smiling at you doesn't mean they're your good friend with your best interests at heart.”