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## The New Partnership for Africa's Development: Institutional and Legal Challenges of Investment Promotion

Victor Mosoti

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# **The New Partnership for Africa's Development: Institutional and Legal Challenges of Investment Promotion**

VICTOR MOSOTI\*

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“*Ex Africa Semper Aliquid Novi!*”<sup>1</sup>

## I. INTRODUCTION

For an initiative that is barely three years old, there is a surprisingly rich literature on the New Partnership for Africa’s Development (NEPAD). Indeed, in spite of the fact that Africa has produced her share of intellectually stimulating homegrown development paradigms, none in the recent past matches the enthusiasm that NEPAD has generated. NEPAD has become the most captivating of these numerous ideas, and perhaps the most promising in terms of strategy and potential to improve Africa’s economic condition. In part, this owes to the deeply intellectual yet pragmatic approach underpinning its founding, having drawn inspiration from the idea of an “African renaissance.”<sup>2</sup> It also owes its acceptability to the “partnership” concept, making the agreement seem more like the result of an agreeable bargaining process intended to mutually benefit both parties involved.

Some scholars, such as Professor S.K.B. Asante, emphasize the indisputable reality that it is a “partnership of unequal partners,”<sup>3</sup> while

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1. The phrase “*Ex Africa Semper Aliquid Novi!*” meaning “Something new always comes out of Africa” is attributed to Pliny the Elder, a senator and army commander in ancient Rome who died in 79 A.D. See generally JOHN READER, *AFRICA: A BIOGRAPHY OF THE CONTINENT* (1997).

2. See THABO MBEKI, *AFRICA: THE TIME HAS COME* (1998). The idea of an “African renaissance” was popularized most visibly by Thabo Mbeki, particularly in speeches as Deputy President of South Africa (For instance, Mbeki writes as follows, in a speech to the Corporate Council on Africa in Chantilly, Virginia, April 19–22, 1997: “Those who have eyes to see let them see. The African renaissance is upon us. As we peer through the looking glass darkly, this may not be obvious. But it is upon us.” *Id.* at 201.) After Mbeki, the idea has taken off, with numerous discussion sessions being held across the continent, and the founding of the African Renaissance Institute. See Mbulelo Vizikhungo Mzamane, *Where there is no Vision the People Perish: Reflections on the African Renaissance*, at <http://www.africavenir.org/fulltext/fulltext01.html> (visited on Sept. 2, 2003). Probably, the earliest available writing on the idea of an African renaissance was in an essay by Dr. Pixley Ka Isaka Seme, entitled *The Regeneration of Africa*, which he authored and presented as an undergraduate student at Columbia University in 1906. Pixley Ka Isaka Seme, *The Regeneration of Africa*, in *THE AFRICAN ABROAD* (Apr. 5, 1906), available at <http://www.anc.org.za/ancdocs/history/early/regeneration.htm> (visited on Sept. 2, 2003). Using the phrase “regeneration” in the place of the now more popular “renaissance” Seme captured the spirit of re-birth in the following words: “By this term regeneration I wish to be understood to mean the entrance into a new life, embracing the diverse phases of a higher, complex existence . . . The regeneration of Africa means that a new and unique civilization is soon to be added to the world. The African is not a proletarian in the world of science and art. He has precious creations of his own, of ivory, of copper and of gold, fine, plated willow-ware and weapons of superior workmanship. . . . The most essential departure of this new civilization is that it shall be thoroughly spiritual and humanistic-- indeed a regeneration moral and eternal!”

3. See S.K.B. Asante, *A Partnership of Unequal Partners*, 419 *NEW AFRICAN* 14

Professor Yash Tandon with tongue-in-cheek has described it as the "latest effort to 'do something for Africa,'"<sup>4</sup> perhaps seeking to draw attention to Africa as a naïve and passive recipient of an initiative born of the magnanimity, or other ulterior interests, of the developed world.

In basic terms, NEPAD is an undertaking by African leaders to eradicate poverty and spur sustainable economic development by participating actively in the world economy. It is a "new framework of interaction with [the] rest of world,"<sup>5</sup> and one that is "based on Africans setting their own agenda,"<sup>6</sup> "a long-term vision of an African-owned and African-led development programme."<sup>7</sup> It takes the deliberate strategy of promoting Africa as a favorable destination for foreign direct investment through initiatives on good governance and fiscal responsibility.

The NEPAD idea springs from the understanding that international trade and investment are important engines for growth, and increasingly will play a major role in any meaningful effort that seeks to bring about faster development in Africa. International trade has been demonstrably linked to greater market access opportunities, more foreign exchange, more foreign direct investment, transfer of technology, and the boosting of domestic productivity.<sup>8</sup> All these are ingredients in positive development. However, whereas NEPAD is seemingly attractive and workable, and has a groundswell of support from foreign governments and international organizations,<sup>9</sup> it has come under intense criticism in its short life span. Like any initiative or idea, NEPAD itself and its implementation, has

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(June 2003).

4. Yash Tandon, *NEPAD and Foreign Direct Investments (FDIS): Symmetries and Contradictions*, Paper presented at the African Scholars' Forum on the New Partnership for African Development, (April 26-29, 2002).

5. See *The New Partnership for Africa's Development (NEPAD)*, at para. 48, available at [http://www.touchtech.biz/nepad/files/documents/nepad\\_english\\_version.pdf](http://www.touchtech.biz/nepad/files/documents/nepad_english_version.pdf) (Oct. 2001).

6. *Id.*

7. *Id.* at para. 60.

8. See *The Doha Round and African Development: Turning Words into Deeds*, U.N. Economic Commission for Africa, ECA Position Papers, at 1 (Sept. 2003).

9. See *United Nations Declaration on the New Partnership for Africa's Development*, G.A. Res. 57/2, U.N. GAOR, 57th Sess., para. 6, U.N. Doc. A/Res/57/2 (Sept. 2002), available at <http://www.dfa.gov.za> (the resolution commits UN member countries to meeting the peculiar needs of Africa and affirms that international support for the implementation of NEPAD is essential. It also urges the UN system and the international community, in particular donor countries, to assist with the implementation of NEPAD). One would hope that all the interest is indeed genuine and not simply a search for relevance by these organizations.

been subject to the rigor of debate.<sup>10</sup> One might even add that, the very fact that it is being criticized by many is testimony to the resonance of the idea, and its immense potential. To avoid institutional inertia, it might in fact be safer to ignore some of the criticism, particularly that born of a lack of understanding of the exact dimensions of Africa's immense development imperative. However, suggestions to hinge onto NEPAD a mandate it does not have should be countered, as implementing them would make it unwieldy. Some of the criticism that could be ignored is that which springs from the 'ideology of the oppressed'. This category would include certain sections of the civil society movement, who see and describe NEPAD as furthering the "global apartheid"<sup>11</sup> system, as a "top-down imposed blue-print,"<sup>12</sup> as a "continuation of the policies that got Africa into trouble in the first place"<sup>13</sup> and as "an attempt to reverse the failed neo-liberal experiences of the 1980s and 1990s."<sup>14</sup> In general therefore, while some of these criticisms are genuine, and deserving of rebuttal, most of it could be attributed to an indignant refusal to acknowledge that the idea is a promising one. These criticisms are in part also due to the fact that NEPAD is taking shape at a time when the civil society movement in Africa is coming into its own. After decades of repressive regimes when dissent from government policy was not tolerated, many governments now have reasonably come to respect basic freedoms, hence the mushrooming of vocal grass-roots civil society organizations that demand to be consulted for input in the evolution of government policy. This is certainly a positive social and political development in the continent as constructive dissent should under no circumstances be stifled.

This short paper, wishes to add a more fundamental dimension to these criticisms. Firstly, NEPAD lacks a necessary dosage of legal and institutional grounding for an outfit that intends to fulfill the kind of development mandate that it has. We take the view that it was a mistake to place NEPAD under the unwieldy umbrella of the African Union, and one that has and will inevitably lead to institutional and legal

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10. See Lucy Harraway, *Development—Africa: 'Partnership' Called a Ruse by the Elites*, GLOBAL INFO. NETWORK, May 29, 2003. See also Nsongurua J. Udombana, *A Harmony or a Cacophony? The Music of Integration in the African Union Treaty and the New Partnership for Africa's Development*, 13 IND. INT'L & COMP. L. REV. 185 (2002) (examining economic and political integration in Africa in the context of the *African Union Treaty* and NEPAD).

11. Harraway, *supra* note 10 (quoting Patrick Bond of the University of Witwatersrand).

12. *Id.*

13. *Id.* (quoting Ravi Naidoo, director of NALEDI).

14. *Id.* (quoting Masimba Manyanya, former chief economist in the Zimbabwean Ministry of Finance).

incoherence.<sup>15</sup> NEPAD can only achieve the mandate originally envisaged for it if it has the independent institutional and legal capacity to formulate decisions, identify priorities and implement them, without the unnecessary strictures of a cumbersome institution such as the AU. It would still have been easy and welcome, to identify synergies with the African Union, and to collaborate as independent separately-mandated African inter-governmental institutions. In this way, NEPAD could avoid being bogged down by the decision-making inefficiencies of the African Union.

Secondly, no serious attempt has been made to identify the exact confluence between NEPAD, and the structured programmatic continent-wide regional integration efforts as spelt out in the 1980 *Lagos Plan of Action*, the *Final Act of Lagos*, the 1991 *Treaty Establishing the African Economic Community* and the *Constitutive Act of the African Union*<sup>16</sup> adopted in July of 2000. In our view, the necessity of dealing with how exactly NEPAD fits into the scheme of continental economic and political integration, and whether it fosters or hinders, or whether it is itself hindered, by the already existing integration schemes, was conveniently swept under the rug, by a rather hurried declaration that it is “an arm, a baby,” of the African Union. Yet, NEPAD seems to have a momentum of its own, a pseudo-independence that is bound to bring institutional and legal tensions to the fore in the not too distant future. Granted, regional integration initiatives in Africa are in a terrible state of confusion. Putting aside the WTO-legality of such initiatives, the economic and political realities seem to have been largely ignored. NEPAD just complicates matters all the more. NEPAD cannot implement WTO agreements. It cannot negotiate market access concessions, that being

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15. It seems settled now that NEPAD is “the socio-economic development program of the African Union.” See *Preamble to the Declaration on the Implementation of the New Partnership for Africa's Development (NEPAD)*, AU Doc. Assembly/AU/Decl.8(II), African Union Assembly, Second Ordinary Session, 10-12 July 2003, Maputo, Mozambique, available at [www.african-union.org/Official\\_documents/Decisions\\_Declarations/offDecisions\\_&\\_Declarations.htm](http://www.african-union.org/Official_documents/Decisions_Declarations/offDecisions_&_Declarations.htm).

16. See Organization of African Unity (OAU), *Constitutive Act of the African Union*, July 11, 2000, CAB/LEG/23.15, 8 AFR. Y.B. INT'L L. 479 (2000). For analysis of the Constitutive Act of the African Union, see generally Nsongurua J. Udombana, *Can the Leopard Change Its Spots? The African Union Treaty and Human Rights*, 17 AM. U. INT'L L. REV. 1177 (2002) (assessing the AU Treaty's prospect of bringing about a paradigm shift in the poor human rights practices of African states); see also Nsongurua J. Udombana, *The Institutional Structure of the African Union: A Legal Analysis*, 33 CAL. W. INT'L L.J. 69 (2002).

the domain of governments of countries that are WTO Members. However, NEPAD has excited such a positive response that it could be a useful channel through which capacity building and technical assistance programs could be sourced and even implemented. A solid secretariat, with a corps of well-qualified and competent professionals could serve as the intellectual nerve center for forging continent-wide common positions on investment promotion and certain aspects of trade policy. In this, the European Commission, shorn of political overtones, could be a useful model.

Thirdly, NEPAD has tremendous capacity to significantly increase the level of foreign direct investment inflows into Africa. The goodwill it has generated, if all of it is indeed genuine, could be an indication of really positive things to come. However, in excessively emotionalizing the debate,<sup>17</sup> and making it a mega-project under the AU, African leaders muted what was really the spark in the entire initiative, that is, its capacity to gallop into the future by capitalizing on the goodwill of donor-nations, and re-channeled domestic resources. It should be recognized however that NEPAD, like most other development models proposed by Africans or for Africa, has the achilles heel of excessive external dependence. Planning on how to share out resources that one does not generate or have control over could be unwise and problematic. That said, NEPAD's capacity to attract foreign investment, from whatever source, should be welcomed. The urgent thing is to go back to the drawing boards and reformulate a strategy that can ensure rational, efficient and fast decision-making and project implementation. NEPAD has to have the mandate to allocate resources based on effective and sound development policies. It has to have a strong legal and institutional structure. It has to be extricated from the African Union, and for it to be acceptable as an independent credible inter-governmental investment promotion strategy, it will have to be regionally balanced and shun any indication of control by any single particular country. However, diplomatic savvy will require that economically powerful countries that of necessity have vested economic and political interests, be recognized but tamed and managed in a constructive way. Such interests could in fact be made to work for the common good of collaborating nations as the example of pragmatic cooperation between the leadership in South Africa and Mozambique seems to show. South Africa's leadership role in Africa, both as the strongest economy and as one of the principal architects of the NEPAD idea, should be acknowledged.

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17. See Mbeki: *African Union is the Mother, NEPAD is her Baby* (Letter from South African President, Thabo Mbeki, to Prime Minister Jean Chrétien of Canada), 415 NEWAFRICAN 44 (Feb. 2003).

In ensuring the workability of NEPAD therefore, it will have to be imbued with a legal and institutional life of its own. Without this, it will most certainly turn out to be another gallant effort by Africans to improve their lot that simply didn't work because a dispassionate and sound foundation wasn't laid when it should have been. And, *a fortiori*, NEPAD's mandate will have to be clearly delimited and its internal organizational structures rationalized. It should not be saddled with too wide a mandate. The desirable thing for instance, would be to put in its charge only the trim docket of investment, with the necessary corollary being trade related aspects of investment. Whereas it is acknowledged that development issues are interlinked in such a way that it is not easy to delineate them in this manner, effort should be made not to overload and in the process overwhelm the effectiveness of the NEPAD process and secretariat by an over-expansive development plan. As is wont to happen, some otherwise inept governments may also shift blame for their inadequate development efforts to a failure in NEPAD, if it assumes a mandate so broad as to supplant individual national initiatives. Already, the President of The Gambia, Yahya Jammeh, has been quoted issuing a ringing indictment of NEPAD as a failure.<sup>18</sup>

This paper is divided into five parts. Part I introduces NEPAD, its philosophical basis and objectives. Part II discusses the investment

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18. The Gambian president is quoted to have said that NEPAD was a charter for beggars that Africa does not need. He said: "NEPAD would not work. . . Africa is the richest continent in terms of mineral resources, but because of ignorance, Africa in economic terms is the poorest continent and we Africans are the laughing stock of humanity. We have failed because some of us are agents of the same people we are supposed to fight against. We produce the bulk of the world's raw materials so why are we still poor? Some of us are fighting proxy wars in Africa for the benefit of others. Africa has never colonized anyone. Some people who prolonged apartheid are now waving the flag of democracy and freedom. The African debt is not globalized, it is Africanized. . . I Yahya Jammeh will not kneel down before any man and beg. I will only kneel down before God. Yes. People are sick and tired of African beggars. Africa does not need charity, Africa does not need ESAP and NEPAD. Africa needs liberty and independence." See *NEPAD Will Never Work*, available at <http://www.allafrica.com/stories>. For concerns on the quality of President Jammeh's leadership and development in the Gambia see *The Inability to Govern (Part One)*, in THE INDEPENDENT (THE GAMBIA)—AAGM, Aug. 29, 2003, available at <http://www.allafrica.com/stories/200308390.html>. The article, *inter alia*, states that President Jammeh "has failed to tackle hyperinflation, coupled with mass stagnation in production and other economic activities, he has shown that he does not have the political will to put in place measures guarding against the calamity we all face today. As prices of basic commodities rise (bread, rice, sugar, soft drinks, transportation etc) the President remains largely unfazed by the major hardships that Gambians face daily, and instead proceeds to chastise, criticize and threaten the populace who will determine if he will be employable in 2006...."



promotion role of NEPAD and its difference from past development thinking about Africa's problems. In Part III we discuss NEPAD's strategy for realizing investment flows into Africa, some of the NEPAD's institutional weaknesses, and the repercussions thereof in realizing the NEPAD objectives. It also highlights the potential implications of NEPAD to the regional integration plan in Africa. Taking into account the supposed political clash between NEPAD and the AU, Part IV discusses possible ways of restructuring NEPAD to enable it to function better as an investment promotion strategy and Part V concludes.

## II. INVESTMENT AND DEVELOPMENT: NEPAD AND THE AFRICAN POLITICAL PROCESSES

The marginalization of Africa and the fact that the continent has not witnessed any significant benefits from the rapid globalization and liberalization in the world needs no further elaboration. It is also a fact that African countries have made valiant efforts to try and improve their lot through numerous initiatives in the past though none has ever really been successful. In the past two decades alone, there have been at least five such efforts, that is: the Lagos *Plan of Action for the Economic Development of Africa*, 1980-2000, and the *Final Act of Lagos* of April 1980; *Africa's Priority Programme of Economic Recovery* 1986-1990, later remodeled with assistance from the United Nations into the *United Nations Programme of Action for Africa's Economic Recovery and Development* of 1986; the *African Alternative Framework to Structural Adjustment Programme for Socio-Economic Recovery and Transformation* of 1989; the *African Charter for Popular Participation for Development* of 1990; and the *United Nations New Agenda for the Development of Africa in the 1990s*, of 1991.

The birth of NEPAD on October 23, 2001 in Abuja, Nigeria, was the culmination of a long process of consolidation of "new vision" development and African revival thinking by Presidents Thabo Mbeki of South Africa, and Abdoulaye Wade of Senegal, among others.<sup>19</sup> It also drew on the *Compact for African Development*, a document that was prepared by the Economic Commission for Africa pursuant to a request by African Finance Ministers in a meeting held in Addis Ababa,

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19. The two plans, the Millennium Partnership for African Recovery Programme by Presidents Mbeki, Bouteflika of Algeria and Mubarak of Egypt, and the Omega Plan for Africa by Wade were initially merged into the New Africa Initiative, which was subsequently, renamed NEPAD. See also I. Taylor & P. Nel, 'New Africa', *Globalization and the Confines of the Elite Reformist: 'Getting the Rhetoric Right', Getting the Strategy Wrong*, 23 *THIRD WLD. Q.* 163 (2002).

Ethiopia, in November 2000. The Implementation Committee of Heads of States, which is chaired by President Obasanjo of Nigeria, adopted the revised NEPAD Document "embodying the philosophy, priorities and implementation modalities of the initiative."<sup>20</sup> The NEPAD document opens with three introductory paragraphs basically explaining Africa's position in the world and the new political commitment by African leaders to democracy and development. It then goes into setting the strategy for the attainment of the objectives, an elaboration of the programs of action and an implementation plan. The NEPAD idea is novel and different from past African development thinking in certain ways, the first being the fact that it is, developed, owned and managed by Africans. In keeping with the idea of an African renaissance, which has its roots in a uniquely African perception and intellectualization of global issues, the document rules out the idea that the continent is intellectually deprived.<sup>21</sup> Secondly, NEPAD rests on a new kind of relationship between Africa and the development partners. This relationship, unlike in the past, is described as a "partnership" based on mutual obligations, commitments, interests and benefits. It recognizes that the so-called development partners also benefit, in fact very profitably, by engaging with Africa. This is not a trivial recognition. According to a 1999 study by the United Nations Industrial Development Organization (UNIDO) Africa consistently yields the highest return for foreign investment compared to all other regions of the world; four times the return compared to developed countries, double the return from Asia and two-thirds more than from Latin America.<sup>22</sup> It is therefore a positive confidence-building measure if African countries can recognize that the donor community and foreign investors need their vast markets, immense resources and affordable labor costs, as much as they themselves need the economic benefits of massive foreign investment injections.

The third and most brilliant way in which NEPAD is different from past thinking is the African Peer Review Mechanism (APRM),<sup>23</sup> a

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20. See *The New Partnership for Africa's Development*.

21. The NEPAD architects were cognizant that "the true genius of a people is measured by its capacity for bold and imaginative thinking, and a determination in support of their development." See NEPAD, *supra* note 5, at para. 57.

22. UNIDO Report, November 1999. See also Kul Bhushan, *Africa: Last Great Investment Frontier*, NEWAFRICAN, Nov. 1999, at 32.

23. For an incisive commentary on the APRM, see Jakkie Cilliers, *From Government to Civil Society Review: An Update on the NEPAD Peer Review Process*

“systematic assessment of the performance of a country by other states or peers.”<sup>24</sup> The goal of the APRM process is to help the country under review to improve policy-making, adopt best practices and comply with generally accepted standards and commitments, principles and codes of conduct. Whereas however, Africa has instituted the peer review process as an innovative compliance self-assessment mechanism, the document does not spell out the need for or the mechanism for a similar arrangement for the development partners. Finally, NEPAD is also different in the sense that it recognizes and takes into account the diversity and variations in development levels in the continent, an obvious indictment to the “one-size-fits-all” approach of past initiatives. In this regard, it places premium on regional cooperation and integration.

The expected results from a full implementation of NEPAD are: high and sustainable continent-wide economic growth; reduction in poverty and inequality; diversified productive capacities enhanced international competitiveness and increased exports; and a more cohesive continent through integration. The NEPAD idea is “anchored on the determination of Africans to extricate themselves and the continent from the malaise of under-development and exclusion in a globalizing world.”<sup>25</sup> In the document, the leaders recognize that African resources should be “harnessed to create wealth for the well-being of her peoples.”<sup>26</sup> Further, in “doing so, the challenge is for the peoples and governments of Africa to understand that development is a process of empowerment and self-reliance. Accordingly, Africans must not be wards of benevolent guardians; rather they must be the architects of their own sustained upliftment.”<sup>27</sup> The NEPAD document lays blame for Africa’s dismal development record on “a variety of reasons,” both internal and external, including “questionable leadership”<sup>28</sup> and a lack of “ownership by Africans themselves” of the recommended development strategies.<sup>29</sup> Rather diplomatically, it also points out that the Structural Adjustment Programs (SAPs) of the 1980s “provided only a partial solution”<sup>30</sup> to the development crisis in Africa because “they promoted reforms that

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*and Structures*, Institute of Security Studies (Mar. 2003).

24. See *What NEPAD Implies for African Policy Makers*, U.N. Economic Commission for Africa, 35th Sess., at 18, U.N. Doc. E/ECA/CM.1/2 (2002) (Paper distributed at the Twenty-Fifth Meeting of the Committee of Experts of the Conference of African Ministers of Finance, Planning and Economic Development, Johannesburg, South Africa, October 16-18, 2002).

25. See NEPAD, *supra* note 5, at para. 1.

26. *Id.* at para. 20.

27. *Id.* at para. 27.

28. *Id.* at para. 42.

29. *Id.*

30. See NEPAD, *supra* note 5, at para. 24.

tended to remove serious price distortions, but gave inadequate attention to the provision of social services.”<sup>31</sup> In truth, studies have been conducted that show that Africa is indeed worse off at the moment than it was prior to the SAPs.<sup>32</sup> On the point of “questionable leadership,” it is hoped the “new” crop of leaders in the continent will change the way things have been done in the past. It states: “Significantly, the numbers of democratically elected leaders are on the increase. Through their actions, they have declared that the hopes of Africa’s peoples for a better life can no longer rest on the magnanimity of others.”<sup>33</sup> This aspiration would seem like a contradiction given that the subsequent recommendations in the action plan that lays emphasis on debt-relief and foreign investment.

NEPAD recognizes the potential and benefits of globalization. At paragraph 32, the document states that globalization has resulted in “opportunities for lifting millions of people out of poverty”<sup>34</sup> except that Africa has not reaped these benefits due to lack of capacity “to compete effectively”<sup>35</sup> and “the absence of fair and just global rules”<sup>36</sup> through which the strong have been able to “advance their interests to the detriment of the weak, especially in the areas of trade, finance and technology.”<sup>37</sup> Quite importantly for the kind of remedial action plan that the NEPAD architects map out later in the document, it is stated that

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31. *Id.*

32. See generally JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002). See also *Economic Development in Africa: From Adjustment to Poverty Reduction, What is New?*, U.N. Conference on Trade and Development, U.N. Doc. UNCTAD/GDS/AFRICA/2, (Sept. 2002) (Which traces the history of force-fed economic “experiments” in Africa from Import Substitution to the most recent one which is implemented through the World Bank’s Poverty Reduction Strategy Papers. According to the report, this latest strategy, is supposed to ensure the participation of broader society in the economic policy formulation process, ostensibly because developing country governments cannot be trusted any longer with the ability to come up with policies that work. The paper states PRSPs are the main documents defining the strategies to be pursued and are prepared by national authorities in developing countries with broad-based participation of civil society organizations, stakeholders in enterprises and the poor. The Enhanced Structural Facility (ESAF) of the IMF has been replaced by Poverty Reduction and Growth Facility (PRGF), and the PRSPs have become an integral component of the Heavily Indebted Poor Country (HIPC) initiative and a precondition for access to the Poverty Reduction Support Credit (PRSC) introduced by the World Bank in 2001. As a result, bilateral grants, concessionary loans and debt relief have all become inexorably linked to poverty reduction policies and strategies.”).

33. See NEPAD, *supra* note 5, at para. 44.

34. *Id.* at para. 32.

35. *Id.* at para. 33.

36. *Id.*

37. *Id.*

additional reasons for Africa's inability to take advantage of globalisation include "structural impediments," "resource outflows and unfavourable terms of trade."<sup>38</sup> NEPAD is emphatic that for Africa to lay stake to its "rightful place in the world" a lot rests on its ability to build "a strong and competitive economy as the world moves towards greater liberalisation and competition."<sup>39</sup> In effect, the document is clear that the objective of a strong and competitive African economy and a developed continent should be realized by riding the wave of globalization when it states: "while globalisation has increased the cost of Africa's ability to compete, we hold that the advantages of an effectively managed integration present the best prospects for future economic prosperity and poverty reduction."<sup>40</sup> It exhorts Africa to be a part of "this new economic revolution."<sup>41</sup>

The challenge of course remains as large and momentous as it has always been; perhaps worse in the sense that there is no other paradigmatic development option for poor countries at the moment other than to participate vigorously in the globalization process. In this way, there is a vague chance that Africa's priorities could be taken into account at the global negotiating table, and hence solutions demanded. We describe this chance as vague because recent experience has been that African demands are callously ignored. In the recently concluded World Trade Organization (WTO) Ministerial Conference in Cancun, Mexico, a group of West African countries tabled a proposal for the reduction of cotton subsidies by developed countries which, as they justifiably claimed, were distorting world prices and thereby hurting poor cotton farmers in West Africa.<sup>42</sup> Their case was very compelling and simple. The representative of Mali, speaking at one of the plenary sessions during the conference outlined a plan for the "elimination of distortive measures coupled with a transitional compensation mechanism under which subsidizers would pay affected least-developed countries to avoid the further deterioration of their cotton industry."<sup>43</sup> It generated

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38. *See id.* at para. 34. Quite unfortunately, the NEPAD architects shied away from stating how the unfair global rules could be reformed and how the continent could overcome the other structural impediments or in fact how the adverse terms of trade could be improved. In this regard *see id.* at para. 41, which states: "We hold that it is within the capacity of the international community to create fair and just conditions."

39. *Id.* at para. 50.

40. *Id.* at para. 28.

41. *Id.*

42. For a detailed analysis of the impact of developed country cotton sector subsidies on poor developing world farmers *see Cultivating Poverty: The Impact of US Cotton Subsidies on Africa*, Oxfam Briefing Paper No. 30.

43. *See Cotton—The 'Trips and Health' of Cancun?*, in BRIDGES DAILY UPDATE ON THE FIFTH WTO MINISTERIAL CONFERENCE (Sept. 11, 2003), available at <http://www.ictsd.org>.

immense attention and became the litmus test on how development oriented the WTO's Doha development Round of negotiations really is. According to an Argentinean negotiator quoted during the Cancun ministerial, adopting a positive decision on the cotton issue would have amounted to the "kick-off point for the 'development round.'"<sup>44</sup> Sadly, these demands were dismissed by the recalcitrance of the United States, which urged these countries to instead "diversify away from cotton" and into "the production of textiles which could then be granted preferential market access in the US via the African Growth and Opportunity Act."<sup>45</sup> This recommendation was nothing short of insolent in the manner in which it skirted the actual issue of cotton subsidies, the cause of the unsustainably low world cotton prices, and particularly in full knowledge of the fundamental structural problems that exist in Africa. According to the US, what was needed was a "comprehensive approach" to the issue pointing out the "factors beyond subsidies that cause cotton prices to fall such as general economic downturn, competition from artificial fibers and increased harvests due to good weather."<sup>46</sup> In sum, nothing came of the demands for the reduction or complete elimination of cotton subsidies, a result which contributed in no small part to the collapse of the ministerial conference as a whole.

### III. LEGAL ISSUES IN THE IMPLEMENTATION OF NEPAD'S AGRICULTURAL INVESTMENT PROMOTION STRATEGY

In order to make a break with its dismal past and be on course in the "new long-term vision"<sup>47</sup> of development, the continent will need "massive and heavy investment."<sup>48</sup> One of the most vexing questions posed by NEPAD critics rests precisely on this assertion on the need for massive investment injections into the continent. Where exactly will the investments come from? Or to put it plainly, where will the money for realizing the NEPAD vision come from? This question demands a precise answer because, as Professor Yash Tandon rather candidly stated in a paper

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44. *Id.*

45. *Id.*

46. Ambassador Josette Sheeran Shiner, Remarks on African Cotton Initiative (Sept. 10, 2003), at <http://www.ustrade-wto.gov/tr0911shiner.html> (last visited Jan. 27, 2004) (also on file with the author). See also *Bridges Daily Update on the Fifth WTO Ministerial Conference*, *supra* note 43.

47. NEPAD, *supra* note 5, at para. 66.

48. *Id.*

presented to a conference of African Scholars last year, “no amount of dreaming about new visions, or about a new kind of leadership in Africa, will amount to much unless ways are found to finance the vision.”<sup>49</sup> According to the NEPAD document, “Africa needs to fill an annual resource gap of 12 per cent of its GDP, or US \$ 64 billion. This will require increased domestic savings, as well as improvements in the public revenue collection systems. However, the bulk of needed resources will have to be obtained from outside the continent.”<sup>50</sup> Other scholars have differed with the “resource-gap” argument, in effect saying that Africa does not need any external injections of resources to develop. According to Yash Tandon, the argument that Africa has a resource gap that needs to be topped up by external financial flows is based on “spurious data”<sup>51</sup> and may actually be an incorrect conclusion. He states:

It is interesting to understand how NEPAD, or to be more correct, the economists who produced the document, came to the conclusion that there is a “resource gap” in the monetary sense in Africa. It is based on a quite simple mathematical logic, which may or may not have an empirical basis. It starts with a development goal, or rather, a “goal” in terms of projected increase in the GNP, which is not the same as development goal. In NEPAD this is stated as 7% growth rate per year for Africa up to 2015 in order to meet the millennium objectives. Then based on spurious data and the questionable concept of saving. . . the economists give a figure of say 2% or 3% as Africa’s saving rate. It then follows, logically, arithmetically, that the balance has to come from outside. Hence, it is argued, the need for capital inflows, or FDIs. The logic is so simple that anybody who questions it would by definition, be either a lunatic or simply stupid.<sup>52</sup>

Whether or not Africa does indeed have a resource gap, and its method of calculation would seem like an intellectual argument. The fact is that almost all African countries are angling for foreign investment. Whether within the NEPAD framework or not, the attraction of foreign direct investment (FDI) is a top priority for many African governments. Most of them now see it as their duty to do everything in their power to create an environment that is conducive to FDI, a tectonic shift from the prevailing autarchic thinking of the 1970s.<sup>53</sup> The vast

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49. Tandon, *supra* note 4, at para. II(C).

50. NEPAD, *supra* note 5, at para. 147.

51. Tandon, *supra* note 4, para. III(B).

52. *Id.*

53. Professor M. Sornarajah notes these changes in strategy in the following terms: “much of the 1970s was spent by developing States asserting their economic sovereignty over foreign investments which entered their territory. Doctrines like permanent sovereignty over natural resources have now become so stabilized that they are regarded as stating mere truisms. Developing States have now moved away from this rhetorical stage into the pragmatic stage, where the aim is to attract as much investment as possible into their territory and ensure that such investment is harnessed to their developmental objectives.” See M. Sornarajah, *Protection of Foreign Investment in the Asia-Pacific Economic Cooperation Region*, 29 J. WORLD TRADE 105, 126 (Apr. 1995). In being able

majority of these countries now welcome foreign investment almost unreservedly.<sup>54</sup> Consequently, on average there has been an impressive increase in cross-border flows of FDI in the past two decades.<sup>55</sup>

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to attract foreign investment, developing countries have to overcome the perception that they are "unsafe" destinations for foreign capital. In a comprehensive and wide ranging study conducted the Consumer Unity and Trust Society (CUTS) an Indian civil society organization, it was found, for instance, that "negative perceptions hamper the implementation of FDI policies. For instance investors may feel insecure about, or lack confidence in South Africa due to a high crime rate, uncertainty over property rights, government policies and political violence. There are also spillovers of the Zimbabwe land crisis, the civil wars in Angola and the Democratic Republic of Congo." See Sanchita Chatterjee, *Foreign Direct Investment in developing Countries* (CUTS, Investment for Development Project Reports, Jaipur, India, 2002). Developing countries' quest for a greater share in global foreign investment flows has spurred much literature in the past two decades. In particular, there has been a sustained focus on how to manage the risks associated with the investment. See Paul E. Comeaux & N. Stephan Kinsella, *Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses and MIGA & OPIC Investment Insurance*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 1 (1994). As Abba Kolo notes, "nothing is more important to maintaining the profitability of international companies than the successful management of exposure to political, economic, and financial risks." See Abba Kolo, *Managing Political Risks in Transnational Investment Contracts*, CEPMLP ONLINE JOURNAL (2000), at <http://www.dundee.ac.uk/cepmlp/journal/html/Vol1/article1-4.html> (last visited on Jan. 27, 2004).

54. See EDWARD M. GRAHAM, *GLOBAL CORPORATIONS AND NATIONAL GOVERNMENTS* 97-100 (1996). Several developing countries have in the recent past declared themselves welcoming of foreign investment. See BBC News, *Gambia Woos Foreign Investors* (July 4, 2002), available at <http://news.bbc.co.uk/1/hi/business/2091010.stm>; BBC News, *South Africa Targets More Investment* (February 25 2002) at <http://news.bbc.co.uk/1/hi/business/1840165.stm>; BBC News, *Nigeria Seeks Foreign Investment*, (Sept. 24, 2002, available at <http://news.bbc.co.uk/1/hi/business/1561585.stm>; David Gardner, *India Liberalizes Inward Investment Regulations*, FIN. TIMES, Feb. 3, 2000, at 12; William Wallis, *Nigeria Unveils Sell-Off Plans*, FIN. TIMES, Feb. 14, 2000, at 10; and Victor Mallet, *Mbeki Shifts the Emphasis to Business*, FIN. TIMES, Feb. 5, 2000, at 7. See also Laith Al-Qasem, *Attracting Foreign Direct Investment as a Means of Developing ICT*, available at <http://www.worldbank.org/mdf/mdf4/papers/alqasem.pdf>. Al-Qasem notes that: "FDI has become an important developmental tool for counties. Large transnational corporations have billions of dollars to invest in countries, which can provide needed services and capabilities. Foreign direct investment once attracted is a substantially more stable form of funding than either development assistance (aid) or loans. This should lead developing countries to favor foreign direct investment over other types of capital flows. Additionally, foreign direct investment appears to facilitate a one for one increase in domestic investment." The importance of FDI in the development of poor economies has also been recognized in a resolution of the United Nations. In December 1999 the Second Committee of the U.N. General Assembly approved a draft resolution calling for the creation of an "enabling environment" for FDI to developing states. Press Release, U.N., Concluding Work for Fifty-Fourth Session, Second Committee Approves Texts on Globalization; Financing for Development, U.N. Doc. GA/EF/2907 (Dec. 16, 1999), available at <http://www.un.org/News/Press>.

55. For an early indication of the veracity of this claim see generally EDWARD M. GRAHAM & PAUL R. DRUGMAN, *FOREIGN DIRECT INVESTMENT IN THE UNITED STATES* (3d



According to UNCTAD in 2001, developed countries were host to about two thirds of the total global FDI stock and took in over 68 percent of the total global FDI inflows.<sup>56</sup> On the other hand, the FDI flows to developing countries accounted for the remainder with Africa receiving 2.3 percent of the total and the bulk going to East Asia and Latin America in absolute terms.<sup>57</sup> FDI inflows into Africa in the aggregate rose from US\$ 9 billion in the year 2000 to more than 19 billion in 2001<sup>58</sup>. Even though the increase is seemingly impressive, in actual fact FDI for most countries in the region remained more or less as it was in 2000 because the reflected increase was due to a few large merger and acquisitions FDI projects in South Africa and Morocco. In 2002, Africa suffered a “dramatic decline in FDI inflows—from US\$ 19 billion in 2001 US\$ to 11 billion in 2002.”<sup>59</sup> In general, the flows to 23 out of 53 African countries declined.<sup>60</sup> The main characteristics of FDI in Africa have not changed in any significant way in the last few years. Historically, a large proportion of FDI was directed at the primary sector, especially oil and gas, which explains why countries such as Angola, Algeria, Chad, Nigeria and Tunisia have been high recipients of FDI and in 2002 accounted for more than half of the total continental inflows.<sup>61</sup>

Therefore, besides encouraging governments to mobilize and rationally use domestic resources, NEPAD’s success hinges on its ability to further re-package the African continent in a manner that makes it attractive for foreign direct investment (FDI). It is the flow of FDI that will determine whether the targeted annual growth rate of seven percent<sup>62</sup> will be attained, and ultimately whether NEPAD will be a success or not.

This imperative of FDI attraction could introduce some tensions. As many countries are already doing, they will bend-over backwards simply to attract foreign investment, and in the process give-up some of their hard-earned sovereignty. It should be recognized however that the attainment of higher standards of living for all should indeed be the overriding priority of governments and that beggars have no dignity. The example of Chad Republic is worth noting here. The discovery of

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ed. 1993).

56. See UNCTAD FDI/TNC information database.

57. U.N. Conf. on Trade and Dev. (“UNCTAD”), World Investment Report 2002, at 13-14, U.N. Doc. UNCTAD/WIR/2002, U.N. Sales No. E.02.II.D.4 (2002), available at [http://www.unctad.org/en/docs/wir2002\\_en.pdf](http://www.unctad.org/en/docs/wir2002_en.pdf).

58. *Id.*

59. U.N. Conf. on Trade and Dev. (“UNCTAD”), World Investment Report 2003, at 8-9, U.N. Doc. UNCTAD/WIR/2003, U.N. Sales No. E.03.II.D.8 (2003), available at [http://www.unctad.org/en/docs/wir2003\\_en.pdf](http://www.unctad.org/en/docs/wir2003_en.pdf).

60. *Id.* at 9.

61. *Id.*

62. See The New Partnership for Africa’s Development (*NEPAD*), *supra* note 5, at para. 147.

oil in Chad has thrust it into the limelight with the novel and rather interesting contractual provisions for oil exploitation. Under the proposed agreement, how Chad receives and spends its citizens' resources will be transparent and subject to scrutiny by the parties to the contract, the World Bank as the insurer, the United States and a consortium of oil companies led by Exxon-Mobile. The Miandoum Oilfield, the main site, is estimated to be worth about US\$ 15 billion and produces about 225,000 barrels per day at maximum production capacity.<sup>63</sup> According to the contract, the World Bank has set up a system to pay the 12.5 percent royalties due to Chad, into an escrow account in a bank in London.<sup>64</sup> Processed through the account, a portion of the funds is to be sent to two commercial banks in N'Djamena, the capital city of Chad, where an oversight committee including religious leaders will allocate the funds for various development projects, in accordance with a law passed by the parliament in 1998.<sup>65</sup> The contract also requires that 10% of the revenue is to be injected off the top into an "international investment trust fund for future generations of Chadians. At least 77.5% of the balance is also to be spent on education, health, housing, and rural infrastructure projects."<sup>66</sup> That Chad acquiesced to all these contractual provisions is testimony to the controlling power of foreign capital. On its own, Chad would never have been able to pull off a project as massive as the *Chad-Cameroon Petroleum Development and Pipeline Project*, which provided the way to transport the oil from Chad's southern desert lands through to the Gulf of Guinea on the coast of Cameroon for onward shipment, mainly to the United States. In return for the huge investment, and economic benefits, Chad opened itself up to external controls on how to conduct its spending. To a point, this is not a bad thing given Chad's inherent incapacities. In an unflattering document, the World Bank notes that: "at the moment, Chad is so poor that it cannot afford the bare minimum of public services necessary for a decent life. The pipeline project will allow Chad to use more resources to finance expenditures in health, education, infrastructure and rural development necessary to reduce poverty."<sup>67</sup>

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63. See Milan Vesely, *Chad: The Tip of the Spear*, 291 AFRICAN BUS. 36 (Oct. 2003).

64. *Id.*

65. See The World Bank, *Chad-Cameroon Petroleum Development and Pipeline Project: Note on the Use of the Petroleum Bonus*, June 2001, available at <http://www.worldbank.org/afr/ccproj/project/bonus.pdf>. See Vesely, *supra* note 63.

66. See Vesely, *supra* note 63.

67. See The World Bank, *supra* note 65.

It is necessary for African countries to remember however that even as they welcome foreign investors under the NEPAD framework, they still retain certain fundamental rights and, that above all, the admission of foreign investment should be predicated on a demonstrable positive economic impact. They need to remember that under customary international law, there is no right of admission or right to invest in a foreign country. Hence, states retain the power to determine which foreign investors or investment to allow and in what sectors.<sup>68</sup> Any rights or obligations that a state may have with respect to foreign investment are born of treaties and other instruments of international law negotiated by choice with or amongst other states. Consequently, African states, like all others, retain the autonomy and ability to regulate such inward foreign investment flows, a definite affirmation of their sovereignty.<sup>69</sup>

To go back to the question of where the NEPAD implementation money will come from, we have seen that NEPAD's answer lies in the mobilization of domestic resources and the attraction of FDI. On the point of domestic resource mobilization under NEPAD, already there has been a documented maiden attempt. On September 18, 2003, the first ever shipping line owned entirely by private African capital sourced from over 30 countries across west and central Africa, docked at Apapa Port in Lagos, Nigeria.<sup>70</sup> It had set sail about two weeks earlier from Dakar, Senegal, flagged off by one of the NEPAD high priests, President Wade, of Senegal. The launching of the shipping line, Ecomarine International, was reportedly supported by the NEPAD implementation Committee and the NEPAD Business Group. In a way, this event heralded a major break-through because shipping is one of those sectors in Africa that was almost totally dominated by foreign multinational corporations. It is also particularly positive because it shows that cross-border private capital sourcing is doable in Africa.

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68. See WTO Working Group on the Relationship between Trade and Investment, *Communication from the European Community and Its Member States: Concept Paper on Non-discrimination*, WT/WGTI/W/122 (June 27, 2002), available at [http://europa.eu.int/comm/trade/issues/sectoral/investment/docs/cp\\_122.pdf](http://europa.eu.int/comm/trade/issues/sectoral/investment/docs/cp_122.pdf) (stating: "Customary international law does not require any host country to guarantee a non-discriminatory treatment to foreign investors wishing to establish their activities in its territory or even to those already established.").

69. According to Professor M. Somarajah, the right of a state to control foreign direct investment is based on the international regarding aliens and the right of a state to deny entry to such aliens. See M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 83 (1994). A.A Fatouros extends the rights of states in this regard to cover "trade and foreign investors". See A.A Fatouros, *Towards an International Agreement on Foreign Direct Investment?* 10 ICSID REVIEW: FOREIGN INV. L.J. 181, 193 (1995).

70. See Victoria Udoh, *NEPAD: Econmarine Vessel Berths in Lagos Today*, in *This Day*, NIGERIA NEWS, Sept. 18, 2003, available at [www.allafrica.com/stories](http://www.allafrica.com/stories) (last visited Nov. 3, 2003).

With regard to attracting foreign investment, NEPAD has set the project preparatory process in motion by reaching out to various competent regional and international organizations. In elaborating on this, we wish to single out investment in the agricultural sector in particular. Without doubt, agriculture is a crucial sector for Africa, particularly in view of the fact that most of the continent's population lives in rural areas. Presently, the sector accounts for some 60 percent of Africa's employment opportunities and 20 percent of its export earnings. More than 70 percent of the total population depends on agriculture as a source of food and basic income. Yet the agriculture sector in Africa has been in a steady decline over the past two decades. The level of investment has declined, both domestically in the concerned countries, and in terms of how much funding is available from multilateral donors. For instance the World Bank's lending portfolio dropped its credit to agriculture from 39 percent in 1978 to just about seven percent in 2000.<sup>71</sup>

At the moment, most African countries are not providing any significant domestic support to their agricultural sector. In fact, many levy taxes on the sale of agricultural produce. This is a definite farming disincentive. It should be admitted that for low-income economies, many of which are single-commodity agricultural producers, this is both the most reliable source of income for the government, and also the main exchange and income earner for the country. An imaginative revision of the tax laws, to remove production-constraining taxes, throughout the continent could boost farmer-incomes and morale and should be a necessary corollary to the anticipated agricultural reforms. Such revision however will have to be done in a manner that does not derogate from WTO commitments.

The NEPAD document gives prominence to agriculture by stating that "improvement in agricultural performance is a prerequisite of economic development on the continent."<sup>72</sup> It points out that improving productivity in the sector would require the removal of a number of structural constraints including "climatic uncertainty, which raises the risk factor facing intensive agriculture based on the significant inflow of private investment."<sup>73</sup> It then goes on to call upon governments to "support the provision of irrigation equipments and develop arable lands when private

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71. *The New Partnership for Africa's Development*, *supra* note 5, at para. 134.

72. *The New Partnership for Africa's Development*, *supra* note 5, at para. 131.

73. *Id.* at para. 132.

agents are unwilling to do so.”<sup>74</sup> Most importantly for our further analysis here, it requires governments to improve rural infrastructure including roads and rural electrification grids.<sup>75</sup>

Efforts to reverse the decline in agriculture in Africa have resulted in calls for a “green revolution.”<sup>76</sup> The United Nations Food and Agriculture Organization (FAO), the lead UN agency on agriculture, has taken steps to offer assistance to African countries in this regard, and a natural ally was found in the NEPAD initiative. At the 22nd FAO Regional Conference for Africa held on February 8, 2002, in Cairo, a resolution outlining the key steps to achieve improvements in the sector was adopted.<sup>77</sup> As a follow up to this resolution, the participating government officials also undertook to hold a special NEPAD—focused session of the FAO Regional Conference for Africa. This was eventually held in Rome on June 9, 2002,<sup>78</sup> and resulted in an endorsement of the NEPAD *Comprehensive Africa Agriculture Development Programme* (CAADP) document.<sup>79</sup> The process of converting the CAADP into implementable

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74. *Id.*

75. *Id.* Paragraph 133 requires governments to invest in further promotional activities with the following words: “The institutional environment for agriculture also significantly affects the sector’s productivity and performance. Institutional support in the form of research centres and institutes, the provision of extension and support services, and agricultural trade fairs will further boost the production of marketable surpluses. The regulatory framework for agriculture must also be taken into account, including the encouragement of local community leadership in rural areas, and the involvement of these communities in policy and the provision of services.”

76. Kofi Annan, Secretary-General’s Address to the Governing Council of the International Fund for Agricultural Development on its 25th Anniversary, (Feb. 19, 2003), available at [www.ifad.org/events/gc/26/speeches/sg.htm](http://www.ifad.org/events/gc/26/speeches/sg.htm). According to Kofi Annan, “We must address the fact that for them, the rapid march of globalization internationally, and liberalization domestically, currently creates more risks than opportunities. We need to work together to help them reach the quality and standards required, and to ensure that trade policies and intellectual property rights regimes allow poor producers a sustainable position in the new system. This will require committed efforts in the new trade round as well as in broader policy discussions. I am happy to see the United Nations working ever more closely with WTO and the Bretton Woods institutions towards that end. *And it will require us to work towards a green revolution in Africa’s agricultural sector, so that Africa may move towards the self-sufficiency that we have seen achieved elsewhere*” (emphasis added).

77. Conference of Ministers of Agriculture of the African Union *A Brief Presentation of the Process of Converting the Comprehensive Africa Agriculture Development Programme (CAADP) to Implementable Plans of Action at National and Regional Levels*, Doc. AU/MIN/AGRI/3 (July 1, 2003).

78. At the request of the NEPAD Steering Committee, the Program was prepared by the NEPAD Secretariat in cooperation with the Food and Agriculture Organization of the United Nations.

79. See *Comprehensive Africa Agriculture Development Programme*, New Partnership for Africa’s Development (NEPAD) (Nov. 2003) (published with technical support from the Food and Agriculture Organization of the United Nations) [hereinafter CAADP].

action plans is already ongoing.<sup>80</sup>

The CAADP seeks to restore agricultural growth, rural development and food security in the continent. It captures the development priorities for agricultural recovery in Africa and for contributing to poverty reduction and economic growth through four main strategies: expansion of the area under sustainable land management and reliable water control systems;<sup>81</sup> improvement of rural infrastructure and trade—related capacities for improved market access;<sup>82</sup> enhancement of food supply and reduction of hunger;<sup>83</sup> and the development of agricultural research, technological dissemination and adoption to sustain long—term productivity growth.<sup>84</sup> As a follow-up to the CAADP document, the African Union Assembly of Heads of State and Government ratified the *Declaration on Agriculture and Food Security in Africa* in July 2003.<sup>85</sup> In support of the process that culminated in the CAADP document, the leaders resolved, *inter alia*, to revitalize the agricultural sector

through special policies and strategies targeted at small scale and traditional farmers in rural areas and the creation of enabling conditions for private sector participation, with emphasis on human capacity development and the removal of constraints to agricultural production and marketing, including soil fertility, poor water management, inadequate infrastructure, pest and diseases.<sup>86</sup>

The leaders also basically adopted the CAADP document as a blueprint for the efforts needed in the sector and agreed to implement it “at the national, regional and continental levels”.<sup>87</sup>

To go back once more to the point of sources of funds for NEPAD projects, it would be worthwhile here to use the model of financing in the agricultural sector. The CAADP document, calls for investment of up to US\$ 251 billion.<sup>88</sup> The preparation and mobilization of these vast

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80. See *A Brief Presentation of the Process of Converting the Comprehensive Africa Agriculture Development Programme (CAADP) to Implementable Plans of Action at National and Regional Levels*, Conference of Ministers of Agriculture of the African Union, Maputo, Mozambique, Doc. AU/MIN/AGRI/3 (July 1–2, 2003), available at <http://www.fao.org/tc/Tca/rpfs/maputo/maputo3e.htm>.

81. See CAADP, *supra* note 79, at ch. 2.

82. See *id.*, at ch. 3.

83. See *id.*, at ch. 4.

84. See *id.*, at ch. 5.

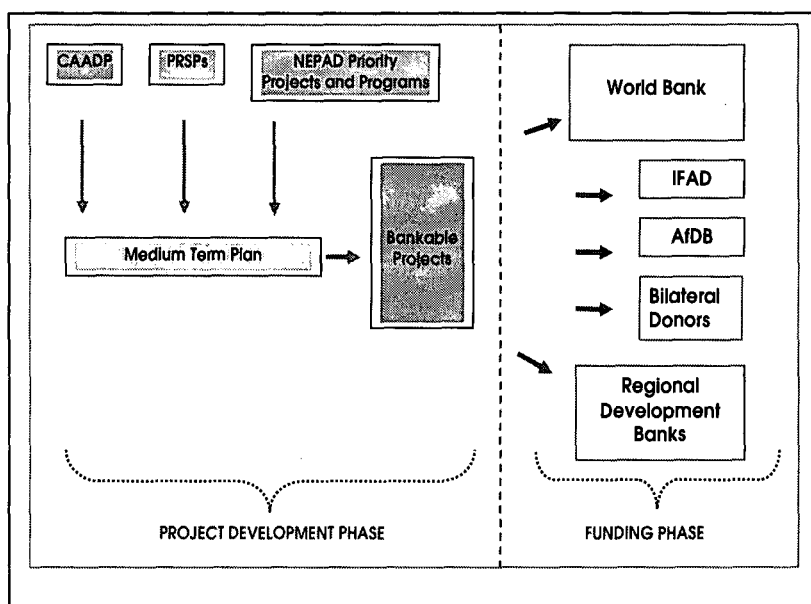
85. See *Declaration on Agriculture and Food Security in Africa*, AU Doc. Assembly/AU/Decl.7 (II), African Union Assembly, Second Ordinary Session, 10–12 July 2003, Maputo, Mozambique, available at <http://www.african-union.org>.

86. See *id.* at para. 1.

87. See *id.* at para. 2.

88. See CAADP, *supra* note 79, at para. 3.

sums is certainly bound to be a herculean task. In effect, the desirability of a particular project will determine its ability to attract funding. Hence the idea of “bankable projects,” defined as projects that are attractive to investors in the sense that they are clear enough for the investors to determine their worthiness, and that also have the key NEPAD attributes of being either Africa-led or significantly African-funded.<sup>89</sup> The process of preparation of “bankable projects,” would have to draw from a number of processes, some of which are already on-going such as the World Bank Poverty Reduction Strategy, particularly for projects that target World Bank funding. This is both for the sake of domestic policy coherence at national level and also because as a matter of policy, the World Bank has indicated that it will no longer support any programmes that do not fall within a country’s PRSP. The NEPAD CAADP implementation process could therefore be divided loosely into two phases; the project development phase, and the project funding phase as below.<sup>90</sup>



89. Remarks of Mr. Mafa Chipeta, on *Bankable Projects to Revitalize African Agriculture*, Meeting on Support to CAADP Implementation, Rome, 17 September 2003.

90. I am extremely grateful to Michael Wales and Claudio Gregorio of the FAO Investment Centre Division who let me sit in at a meeting with members of the NEPAD secretariat in which they sketched this diagrammatic representation of the CAADP funding strategy.

The project development phase will involve the melting of various novel and on-going processes into a "medium term plan" which will in turn be broken up into a number of "bankable projects." Ideally, the project development phase, inclusive of the feasibility studies, should be undertaken by the NEPAD secretariat with the technical collaboration of specialist international organizations such as the FAO in the case of agriculture, UNIDO with regard to industrial development and so on. Once the process of project development is sufficiently ripe, the project could then be shopped around, again with the NEPAD secretariat as an intermediary, to possible investors, including the World Bank, the African Development Bank and regional development banks, the International Fund for Agricultural Development (IFAD), and bilateral donors such as the European Communities.

Very importantly, the NEPAD architects also agreed to "adopt sound policies for agricultural and rural development, and committed themselves to allocating at least 10 percent of national budgetary resources for their implementation within five years."<sup>91</sup> Operationalizing and properly implementing the commitment to allocate a portion of budgetary resources into agriculture is bound to be a difficult task for many reasons. We here examine the possible legal approach to implement this. The first approach could be to simply provide for it in annual *Parliamentary Appropriations Bills, Budget Law* or budget for each country, as the case may be. A useful example might be Tanzania, which in its 2003/2004 budget has committed to give "subsidies to farmers in four bread-basket regions."<sup>92</sup> It is good to remember that a national budget should not be seen simply as a technical instrument that sums up how much was received in income and spent in expenditures but also as an important policy statement by a sitting government. In this regard, and aside from providing an opportunity for the government to

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91. See *Declaration on Agriculture and Food Security in Africa*, *supra* note 85, at para. 2. In addition, they undertook to engage in consultations at national and regional levels with civil society organizations and other key stakeholders, including the small-scale and traditional farmers, private sector, women and youth associations, etc., aimed at promoting their active participations in all aspects of agricultural and food production; ensure, through collaborative efforts at the national and regional levels, the preparation of bankable projects under CAADP for the mobilization of resources for investment in agricultural growth and rural development.

92. See F. Rwambali, *Dar's People-Centred Budget Praised*, THE EAST AFRICAN, June 16 2003, available at <http://www.nationaudio.com/News/EastAfrican/16062003/Regional/Regional40.html>.



present its future intentions and review past performance, it reflects the fundamental development imperatives of the government, outlines the government views on fiscal and economic aspirations and *sets social and economic priorities*.

One of the ways to ensure that this provision or the commitment of budgetary allocation is respected is through an external public auditing process, that is, by opening up the budgetary process to public scrutiny.<sup>93</sup> In this way, a sensitized public, broadly aware of the policy to commit resources into agriculture, could raise objections if such an allocation is not made in any particular year. This is warranted since the budget is officially the document that portrays a government's expenditure and income revenue estimates and reflects its policy priorities and fiscal targets. However, the content of the budget document usually results from a careful analysis of government priorities and sometimes sectoral pressure. Hence periodic exigencies, including seemingly mundane ones such as presidential re-election interests inevitably come into play, and Africa is not unique in this sense.

A mere declaration therefore to commit a certain percentage of the budget for a specific purpose without real guarantees and effort to ensure that this is actually done could amount to nothing. It is important to understand that in most countries in Africa, the budget process comprises three main stages: the budget formulation stage at which the budget plan is put together almost exclusively by the executive branch of government, usually the minister for finance or economy; the enactment stage at which the budget estimates are debated, altered, and approved by the legislative branch; the execution phase at which the policies of the budget are carried out by the government.<sup>94</sup> In implementing the *Declaration on Agriculture and Food Security in Africa*, a close monitoring of all three phases will be necessary. In this regard, the constitutional guarantees for further modifications of the budget, particularly in the second stage where the legislature is expected to debate and suggest changes, would be crucial. A sound domestic legal framework would be essential therefore for an effective implementation of the ten percent commitment, just as it is necessary in general, for an effective and enduring budget system. In some countries, this legal framework is part

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93. For an interesting discussion of this "external auditing process" see Warren Krafchik, *What Role Can Civil Society and Parliament Play in Strengthening the External Auditing Function?*, presented at Towards Auditing Effectiveness (an African regional workshop organized by the World Bank Institute and held in Ethiopia), May 12–15, 2003, at <http://www.internationalbudget.org/auditorgeneral.htm>.

94. See generally, Allen Schick, *A Contemporary Approach to Public Expenditure Management*, WORLD BANK INSTITUTE, (1998), available at <http://www1.worldbank.org/publicsector/pe/handbooks.htm>.

and parcel of the core legal documents, for instance the constitution or basic law, or in fact, a dedicated statute often annually revised.

A key goal of such a legal framework, regardless of the form it takes, should be to incorporate a monitoring system, or perhaps a spending evaluation system to ensure that the required 10 percent is really set aside and used as intended. Thus, such a legal framework should ensure that there is a role for the legislature with specific responsibility being vested in the Ministry of Agriculture, and for an independent auditing institution, which could be an independent statutory committee under the Ministry of Agriculture, to guard against extraneous concerns by the executive that may work against the sectoral allocation. Further, legislative room should be created to invoke external monitoring, to a measured degree, perhaps by an explicit provision that the allocation will be subject to the NEPAD peer review mechanism.

In general as is certainly the case in most democracies throughout the world, such a legal framework also establishes the rules and regulations that guide the budget decision-making process and the management of government revenue and public expenditure. This is the point where the 10 percent commitment would need to be included. In general the 10 percent rule would fall within the *corpus* of rules that dictate the scope of the budget. Such legislative provisions could be extended to cover sectoral priorities such as the procurement specificities for each individual agricultural sub-sector including, for instance, rural access roads, irrigation schemes, and support to agricultural marketing boards and so on. In general since NEPAD is about ownership of the development process by African governments, it would be important to simply establish benchmarks on the allocation of the 10 percent funding and to cede a reasonable degree of managerial responsibility to the relevant government officers. The minimum benchmarks could include issues such as a cap on the portion of the 10 percent funding that could be spent on salaries for instance.

In most of Africa at the moment, budget transparency and public participation in the allocation of resources is quite limited, and is almost exclusively the preserve of the executive and to a lesser extent, the parliament. In South Africa, classified in a recent study<sup>95</sup> as having a

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95. See generally, INSTITUTE OF DEMOCRACY IN SOUTH AFRICA, BUDGET TRANSPARENCY AND PARTICIPATION: FIVE AFRICAN CASE STUDIES, (Alta Fölscher ed. 2002). (A useful summary of the contents of the book is available at <http://www.internationalbudget.org>).

“good legal framework”<sup>96</sup> that accords “transparency and participation in the budget process,”<sup>97</sup> there has been substantial improvements in public availability of information in addition to a “clear framework of accountability for public resources and delivery.”<sup>98</sup> In Kenya and Ghana, the budget process is based on comprehensive but “outdated legal frameworks which often conflict with government policy.”<sup>99</sup> The budget process in Kenya does not lend itself to external participation. It is tightly controlled by the executive given that the Minister for Finance prepares and presents the budget for parliamentary approval, which has never been denied. Zambia and Nigeria have “weak legal frameworks and weak transparency and participation.”<sup>100</sup> In Zambia, the law allows for “virtually limitless expenditure”<sup>101</sup> with *ex post* approval and almost no requirement for release of information to the public.<sup>102</sup> In general however, there is heightened realization that parliaments and civil society groups should have a monitoring role in the budget process. This is a positive development and one that could aid the process of implementation of the 10 percent agricultural investment commitment in the *Declaration* issued by African leaders in Maputo. In good faith, governments could help foster openness in the budgetary openness by making accurate budget documentation, fiscal policy statements and allocation decisions, available quickly and widely.

#### IV. FIRST THE LAW: THE LEGAL BASIS FOR AN INSTITUTIONALLY SOLID NEPAD

In this part of the paper, our objective is to look at what the legal basis for a solid NEPAD process and secretariat could be. Contemporary “law and development” discourse emphasizes the need to bring law to bear in the struggle for development. NEPAD therefore has to incorporate a general appeal to technical and legal expertise and ideas on best practices. As Professor David Kennedy of Harvard Law School notes, “If development means more than a one time growth spurt—means some sort of sustained, upward spiral, or some kind of socio-economic transformation—then one needs an idea about how a political choice will generate such a change.”<sup>103</sup> Effectively prioritizing such political

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96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. See David Kennedy, *Laws and Developments*, in *CONTEMPLATING COMPLEXITY: LAW AND DEVELOPMENT IN THE 21ST CENTURY* (Amanda Perry & John Hatchards

choices, particularly in situations involving more than one sovereign government will inevitably be a daunting and potentially divisive task. To attempt do so, without any pretense to some kind of legal framework would seem preposterous. This is what NEPAD as currently constituted, especially when looked at as a realistically pseudo-independent body in operation from the African Union, tries to do and it is well nigh impossible.

NEPAD is the window through which big-time investors are looking at possible investment projects in Africa. The role of NEPAD in packaging and marketing these potential projects is essentially that of a catalytic middleman, a marketing agent. It is a basic marketing strategy that the marketing agent herself should believe in the product being marketed. That way, she can inject infectious vigor and enthusiasm about the good qualities of the product or project that is being marketed. The agent has to look the part. It would be un-inspiring and difficult to rely on money market advice from a visibly impecunious stockbroker for instance. NEPAD will inevitably find itself in this situation. Its internal decision-making processes should be subject to clear legal procedures. It should project the image of an agent that is both competent, trustworthy and that recognizes the certainty and assurances that result from adherence to basic legal principles. A chaotic NEPAD secretariat and internal decision-making process would be a disservice to its mandate. As it is, NEPAD is a marketing agent of a seemingly undesirable product: much has been written about the standards of respect for the rule of law in Africa. The most graphic recent example is perhaps Swaziland, where all the judges in the Court of Appeal resigned last year because the government was ignoring judgments issued by the court. For the past one year therefore, the country has been without a court of last resort. For our purposes, the plight of litigant investors would seem extremely precarious in this situation. Obviously, the Swazi government makes nonsense of the wisdom of the late Dr. Ibrahim Shihata, who advised that "a complement to economic reform is judicial reform and legal reform. Without effective laws, without effective structures there may not be investment, there may not be growth."<sup>104</sup> This correlation was graphically captured in Kenya recently when the shares at the Nairobi Stock Exchange gained dramatically after the government

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eds., 2003).

104. See IBRAHIM F.I. SHIHATA, *THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS AND LECTURES 2* (1995).

purged the judiciary of corrupt judges following a report that cited almost half of the country's judges for corruption and other unprofessional practices.<sup>105</sup>

In fashioning out an effective institutional set-up for both the NEPAD secretariat and the independent APRM Secretariat, it is inevitable that their relationship with the African Union will need to be addressed once and for all. To begin with, the APRM Secretariat should be independent of both the general NEPAD secretariat and all other institutions by virtue of the potentially sensitive assessment work it will be expected to carry out. It must have a separate staff and budget if its credibility and efficiency is to be established and maintained. For the moment, the NEPAD and APRM secretariats operate independently of their parent body, the African Union, on the basis of a temporal arrangement in which NEPAD's offices in Midrand operate as AU offices outside of the AU Addis Ababa headquarters.<sup>106</sup>

The general perception however remains that NEPAD is a plan for implementing the AU's objectives. Given the manner in which it has incorporated and referred to on-going development and integration processes in the continent and the fact that it is subsumed within the AU, NEPAD could also be said to be a mandated mechanism for furthering the goals of the *Abuja Treaty* of 1991. Since NEPAD is listed as a "special program" under the AU, the AU Chairperson and the AU Commission Chairperson are *ex-officio* Members of the Implementing Committee. Further, NEPAD is supposed to work closely with and to complement the AU's Conference on Security, Stability, Development and Cooperation in Africa (CSSDC).<sup>107</sup> This is the positive way of looking

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105. See Tom Mogusu, *Equity Market Reaps from Purge in Judiciary*, FINANCIAL STANDARD, Oct. 28-Nov. 3, 2003, available at <http://www.eastandard.net/financialstandard/news/news281003002.htm> (last visited on Feb. 17, 2004). According to the source, the Kenyan "government's decision to push through its long-promised radical surgery in judiciary is already bearing fruit.... Shares at the Nairobi Stock Exchange (NSE), that for a long time have only known volatility, are now looking at a bullish stretch. Analysts say that while the market has been reluctant to buy into the government's economic recovery story, it has actually been won over by the President's decision to send home key Members of the judiciary accused of involvement in corruption. . . banking stocks have gone up. For a long time they have been dogged by a judicial system that has simply refused to move. These changes are pushing up the index indicating that the changes in the judiciary are positive...."

106. See *Declaration on the Implementation of the New Partnership for Africa's Development*, *supra* note 15, at para. 9(ii) in which the AU Assembly mandates the Chairperson of the Commission to "enter into a temporary host agreement with the government of the Republic of South Africa with the view to providing the NEPAD Secretariat with a legal status of an AU Office operating outside the African Union headquarters for a *transitional period* of three (3) years as from January 2003, or until such time the relevant structures of the African Union are fully operational, whichever comes first" (emphasis in original).

107. The Conference on Security, Stability, Development and Cooperation in Africa

at an otherwise problematic framework. We say problematic because what NEPAD has taken under its mandate lies astride *all* the AU Commissions portfolios, ranging from the commissions on peace and security, political affairs, infrastructure, economic affairs, trade and industry, rural economy and agriculture.<sup>108</sup> In fact, if properly constituted and adequately staffed, NEPAD's competence could see it function exactly as, and parallel to the AU Commission. Another issue hinges on the budget and the legal definition of NEPAD in AU documents. As we indicated earlier, it seems settled now that NEPAD is a "programme" of the African Union.<sup>109</sup> Article 20 of the *Statute of the Commission of the African Union* lays out the content of the Programme and Budget of the AU. It states that this shall be prepared by the Commission and be submitted to the Executive Council through the Permanent Representatives Committee every two years. Article 20(2) goes on to say that the Programme and Budget "shall include" among others "the programme of

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(CSSDCA) was held in May 1991 by African Heads of State in Kampala, Uganda. The conference was the initiative of President Yoweri Museveni of Uganda, in his capacity as a chairman of OAU at that time, and President Olusegun Obasanjo of Nigeria who was the Chairman of African Leadership Foundation then. The meeting agreed on a unified strategy for development in Africa, linking issues of security, stability, development and cooperation among African States. The CSSDCA is listed as a "special program" under the AU. For further documentation and implementation reports see <http://www.african-union.org>.

108. *Statutes of the Commission of the African Union*, Assembly of the African Union, at art. 12, AU Doc. ASS/AU2(I)-d (2002). "The portfolios of the Commission shall be as follows: The portfolios of the Commission shall be as follows: a) Peace and Security (Conflict Prevention, Management and Resolution, and Combating Terrorism. . .); b) Political Affairs (Human Rights, Democracy, Good Governance, Electoral Institutions, Civil Society Organizations, Humanitarian Affairs, Refugees, Returnees and Internally Displaced Persons); c) Infrastructure and Energy (Energy, Transport, Communications, Infrastructure and Tourism. . .); d) Social Affairs (Health, Children, Drug Control, Population, Migration, Labour and Employment, Sports and Culture. . .); e) Human Resources, Science and Technology (Education, Information Technology Communication, Youth, Human Resources, Science and Technology. . .); f) Trade and Industry (Trade, Industry, Customs and Immigration Matters. . .); g) Rural Economy and Agriculture (Rural Economy, Agriculture and Food Security, Livestock, Environment, Water and Natural Resources and Desertification. . .); h) Economic Affairs (Economic Integration, Monetary Affairs, Private Sector Development, Investment and Resource Mobilization. . .)."

109. See *Preamble to the Declaration on the Implementation of the New Partnership for Africa's Development*, *supra* note 15. See also *Decision on Integration of NEPAD into the Structures and Processes of the African Union*, Executive Council of the African Union, AU Doc. EX/CL/60 (III), at para. 3 (2003), in which the AU Executive Council "Reaffirms that NEPAD being an AU programme, the integration of its Secretariat into the AU Commission should be gradual and should commence after the Maputo Summit, with a possible duration of three (3) years, or until such a time as the Structures of the AU become operational, whichever comes first;" (emphasis added).

activities of the Commission”<sup>110</sup> and “the expenses of the Assembly, the executive Council, the Committees and others Organs of the Union.”<sup>111</sup> Does “activities” in this sense include the activities of the NEPAD Secretariat? Put another way, is NEPAD an “activity” of the AU Commission? What is the difference in funding priorities, if any, for “a program” as opposed to “an activity”? The AU funding procedural rules do not clearly include a reference to NEPAD, in spite of the fact that the statutes were drawn up when NEPAD was already in existence. And in fact, the statutes do make reference to NEPAD at other points for instance in Article 3(2)(h). Given its *sui generis* nature (it is described in some documents as a “special program”) and its high profile nature, the issue of operational funding of NEPAD will have to be dealt with conclusively. At the moment, the expectation seems to be that funding for the NEPAD secretariat will not come from AU budget until such a time that an amendment to the statutes is effected. It does not help matters when it is stated in another document that AU members are “encouraged to make voluntary contribution towards the operational budget of NEPAD and its structures during the transitional period.”<sup>112</sup> This decision seems inconsistent as it contemplates NEPAD receiving operational funding from the AU budget without there being a specific provision for it. The import of the description of NEPAD as a “programme” therefore has budgetary implications that the NEPAD secretariat may wish to have clarified.

Since NEPAD is an arm of the AU, all African countries that are Members of the AU have in effect endorsed its structure, operations and objectives. This is in reality far from the case on the ground. A few countries have taken the lead in the initiative, the majority being those in eastern, southern and western Africa. Northern Africa has largely been a distant observer of the NEPAD process. For instance, although President Hosni Mubarak of Egypt is listed as a member of the NEPAD Heads of State Implementation Committee, he “has never attended a meeting of that committee.”<sup>113</sup> Regrettably also, Morocco, another country whose economic strength would have made it a key player in the NEPAD process, is not a member of the AU and is, by extension, absent from the NEPAD process as well. The expansion of the original five-member steering committee into a 15 member implementation committee, with three

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110. Article 20(2) (a) *Statute of the Commission of the African Union*.

111. Article 20(2) (b) *Statute of the Commission of the African Union*.

112. See *Declaration on the Implementation of the New Partnership for Africa's Development*, *supra* note 15, at para. 11.

113. See Ross Herbert, *AU Summit: What Happened and What Matters*, in *E-Africa, The Electronic Journal of Governance and Innovation*, Vol.1 Aug. 2003 at 6-7. Available at [www.wits.ac.za/saiaa](http://www.wits.ac.za/saiaa).

members from each regional grouping should be seen against this backdrop. Each region's member states decide which countries will represent them on the implementation committee, but each member of the AU is a "member" of NEPAD, at a theoretical level since NEPAD is not legally constituted to have a membership as such. The APRM on the other hand is different in this regard. Since it is a voluntary process, only countries that wish to open up their systems for peer review take part in the process. Its highest decision making organ is therefore the Committee of Participating Heads of State and Government, known as the APR Heads of State Forum.<sup>114</sup> Underneath the APR Forum, would be the APR Panel of Eminent Persons, who will oversee and ensure the integrity and credibility of the peer review process.<sup>115</sup> The APRM Secretariat is the operating organ of call and will provide the "secretarial, technical, coordinating and administrative support services for the APRM,"<sup>116</sup> with individual country teams being set as the peer review process kicks off.<sup>117</sup>

Quite unfortunately, NEPAD's current pseudo-independence may not last long. Its complete integration into the African Union structures seems to be a matter of priority. In a recent brainstorming meeting at the AU headquarters, "fresh emphasis was placed on the need to systematically and, *without delay*, study the modalities for the smooth integration of the NEPAD Secretariat into the structure of the Commission."<sup>118</sup> And curiously, NEPAD itself welcomes this eventuality given the remarks by the Executive Head of the NEPAD Secretariat in a

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114. See the *African Peer Review Mechanism base document* (AHG/235 (XXXVIII) Annex 2), approved by the NEPAD Heads of State and Government and Implementation Committee and endorsed by the African Union (AU) Summit in Durban, South Africa in July 2002.

115. See NEPAD Secretariat, *The African Peer Review Mechanism Organization and Process*, NEPAD/HGSIC-3-2003/APRM/Guideline/O&P (Mar. 9, 2003), available at <http://www.touchtech.biz/nepad/files/documents/48.pdf>. See also the *African Peer Review Mechanism base document* (AHG/235 (XXXVIII) Annex 2), approved by the NEPAD Heads of State and Government and Implementation Committee and endorsed by the African Union (AU) Summit in Durban, South Africa in July 2002.

116. See NEPAD Secretariat, *supra* note 115, at para. 4.1

117. See the *African Peer Review Mechanism base document* (AHG/235 (XXXVIII) Annex 2), approved by the NEPAD Heads of State and Government and Implementation Committee and endorsed by the African Union (AU) Summit in Durban, South Africa in July 2002.

118. See Press Release, African Union, Press Release No. 089/2003: The Commission of the African Union Charts a New Vision to Implement Its Mandate, (Oct. 29, 2003), at <http://www.african-union.org/home/Welcome.htm>



meeting recently concluded in Nairobi.<sup>119</sup> It was proposed that the Executive Head of NEPAD should report directly to the Chairperson of the AU Commission, and that the Heads of State Implementation Committee, NEPAD's highest body, should be re-constructed as a sub-committee of the AU Assembly.<sup>120</sup> This will create nothing short of a disaster in decision-making. If this indeed happens, NEPAD will lapse into a lackluster undertaking, with decisions on the simplest of issues having to run the gamut of the AU machinery. A close reading of Article 3(1) and 3(2)(a)-(z) of the *Statute of the Commission of the African Union*, would reveal that the AU Commission is under the direct authority and "guidance" of the Executive Council. The Executive Council is a large body comprising all Ministers of Foreign Affairs of the AU member states,<sup>121</sup> which meets usually twice a year "or in exceptional cases, on such other dates as shall be agreed, at the initiative of the Commission, in consultation with the Chairperson and Member States."<sup>122</sup> "Extra-ordinary sessions shall only be convened with the approval of two-thirds of the Member States,"<sup>123</sup> something not difficult to achieve, but cumbersome nevertheless.

Hence, should it be agreed that, and there is every indication that it will, the NEPAD executive head reports directly to the Chair of the AU Commission, who himself has to seek guidance from the Executive Council, the NEPAD decision making process will be an extremely tenuous one. As suggested, also, let us assume that the Heads of State Implementation Committee becomes a sub-committee of the AU Assembly. In effect, the current position of the Chairman of the NEPAD Steering Committee, held by Professor Wiseman Nkuhlu will have to be scrapped off since the executive head of the secretariat will be reporting directly to the AU Commission chairperson. However, a dose of political reality would suggest that this is a very unlikely eventuality given the clout and persona of Professor Nkuhlu, and his exemplary performance thus far as the face of NEPAD.

## V. CONCLUSION

NEPAD is the kind of institution that should simply not go wrong. The consequence of failure would be a disastrous blow to a long-

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119. See Mark Agutu, *NEPAD Seeks Bond with African Union*, DAILY NATION (Nairobi), October 30 2003, available at <http://www.nationaudio.com/News/DailyNation/30102003/News/News 04.html>.

120. See *id.*

121. See *Rules of Procedure of the Executive Council 3*, Assembly of the African Union, 1st Sess., AU Doc. ASS/AU/2(I)-b (July 9–10, 2002).

122. *Id.* at Rule 8.

123. *Id.* at Rule 12.

suffering continent. Everything should therefore be done to ensure that this eventuality does not occur. For NEPAD critics, particularly African intellectuals, the onus to provide well intentioned and constructive criticism should be the dividing line between historical relevance and irrelevance. Collectively, Africa is clearly under-performing in all fields of human endeavor, and intellectuals have to be careful in explaining their role as vanguards to such a tattered legacy. Getting the rhetoric right is easy, and this has been done quite effectively by the NEPAD architects. Moving beyond that and into a series of concrete plans, and following through with them will continue to be difficult. However building an Africa-wide consensus on the structural changes to NEPAD's functioning will be an important step. In this regard, the functional independence of the NEPAD secretariat should be retained and carved into law. Further, NEPAD's mandate needs to be clearly delimited to avoid creating overly ambitious and unattainable expectations.

In this paper, we have demonstrated that given the obvious interest of African countries in sourcing FDI, NEPAD's strategy in this regard is smack *in tandem* with the collective continental priorities, and could be a vehicle to push this further. We have also explained that for the simple reason that Africa is an agrarian continent, the promotion of agricultural investment under the CAADP process will be crucial to the overall objective of poverty alleviation. One of the key conclusions to be drawn is that NEPAD is positively focusing on the long haul, 2015 at the earliest, and it has a clear action-oriented strategy, whose implementation has already commenced. For a continent that is usually caught off-guard and that has then to resort to short-term solutions to its development problems, this should be a welcome strategy and a brave undertaking. There is also a tremendous amount of support from South Africa, as the host government, and the other actively involved countries like Nigeria, Senegal, Algeria, and more recently, Kenya. Another positive aspect is that NEPAD has gone all out to establish, consolidate or popularize best practices in its development programs, including key areas such as corporate governance and political governance.

Finally, neither the NEPAD secretariat nor the staff has held themselves out as the panacea to Africa's problems. This is a positive recognition and that leaves room for wide consultations and technical expertise, and the building of a broad coalition of goodwill amongst Africa's diverse population, civil society groups, the diaspora, the international community and other partners from outside the continent. NEPAD has all the

potential of a real revolution, and as Professor Shadrack Gutto has remarked, “it is an opportunity to participate and influence the making of our own history”<sup>124</sup> regardless of its imperfections and our different takes on it.

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124. See Shadrack B. O. Gutto, *The Rule of Law, Human and Peoples' Rights and Compliance/Non Compliance with Regional and International Agreements and Standards by African States*, Prepared for presentation at the African Forum for Envisioning Africa (April 26-29, 2002), available at <http://www.worldsummit2002.org/texts/ShadrackGutto2.pdf>.