Northwestern Journal of International Law & Business

Volume 23
Issue 1 *Fall*

Fall 2002

Implications for Foreign Direct Investment in Sub-Saharan Africa under the African Growth Opportunity Act

Rebecca Trent

COMMENTS

Implications for Foreign Direct Investment in Sub-Saharan Africa Under the African Growth Opportunity Act

*Rebecca Trent**

When you look at the World
What is it that you see?
People find all kinds of things
That bring them to their knees...

—U2

FALL 2002 POSTSCRIPT

Since completing this paper in the spring of 2002, much has happened in the global arena with respect to investment, aid, trade, and development

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* J.D. Candidate, May 2003, Northwestern University School of Law. A special thanks to Gabriel Gabiro and friends in East Africa who showed me (whether they know it or not) that when Things Fall Apart they can certainly be put back together again. Thanks to my parents for riding the roller coaster with me, and to Ms. Jacobs for pointing out that there is virtue in simplicity.

in Sub-Saharan Africa. To cover all the events as they relate to the African Growth Opportunity Act ("AGOA") in detail would necessitate an entirely new paper, or perhaps, papers. I have left the original text of this comment virtually untouched because it serves as a benchmark from which to assess progress on initiatives undertaken in the AGOA to promote foreign direct investment in burgeoning African economies that so badly need increased capital flows.

These are tumultuous times, and in recent months everything from homeland terrorist alerts, to corporate scandals, to the presence of the Irish rock star Bono touring Africa with American Treasury Secretary Paul O'Neill[1] has given new credence to the phrase "expect the unexpected." Indeed, the post 9/11 world, a world plagued with unforeseen economic and geo-political crises, has tested the bonds and fissures of our global community. In the midst of all the chaos, there have been several key developments that will impact foreign direct investment, particularly in Sub-Saharan Africa. The resolve of world leaders to promote a world of shared prosperity, albeit with strict conditions, was highlighted in June, 2002 when G-8[2] nations pledged billions of dollars in a program called the New Partnership for Africa's Development, which aims to provide grants and promote foreign investment in African nations.[3]

In late August and early September, 2002, the United Nations World Summit on Sustainable Development took place in Johannesburg. At the Summit, African nations asserted their autonomy by announcing the formation of the African Union and by requesting that poorer states in the World Trade Organization ("WTO") be given the right to retaliate collectively against rich powers in disputes.[4] With respect to the United States specifically, President Bush was granted "fast track" Trade Promotion Authority by Congress in August, and he signed a farm bill that grants subsidies to U.S. farmers in May that will likely have detrimental effects on Africa's economic competitiveness for agricultural products.[5] Indeed, events in re-

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[1] *Helping the Poor: Of Celebrities, Charities, and Trade*, ECONOMIST, June 1, 2002 at 74 ("It was an odd spectacle: American finance ministers do not often hang out in African slums, and rock stars rarely take part in roundtable discussions about development economics... The question is, can the celebrity-charity alliance persuade voters that rich country protection hurts the poor?")

[2] The G-8 nations include the United States, Canada, Britain, France, Germany, Italy, Japan, and Russia.

[3] *See* David E. Sanger, *G-8 Adopts African Aid Package, With Strict Conditions*, N.Y. TIMES, June 28, 2002, *available at* http://www.nytimes.com/2002/06/28/international/africa.

[4] *See* Host Country Official Site for the United Nations World Summit on Sustainable Development, *at* http://www.joburgsummit2002.com/Jowsco/index.html (last visited October 16, 2002).

[5] *See* Daniel Guido, *Senate Approves 'Fast Track' Trade Authority For President*, *at* http://www.newsmax.com/archives/articles/2002/8/1/191151.shtml (last visited October 16,

cent months illustrate that the backdrop for foreign direct investment in Sub-Saharan Africa is marked by a series of radical ups and downs with no clear stabilization in sight.

I. INTRODUCTION: THE NEED FOR FOREIGN DIRECT INVESTMENT IN A WORLD OF SELECTIVE GLOBALIZATION

"Globalization" is a term that will forever be associated with the booming silicon era of the late 1990s: the word attempts to capture the "interconnectedness" of a world linked by high-speed internet connections, global telecommunications, and a zeal to capitalize on profitable waves of emerging markets. While the essence of a "globalized" world is one in which all countries and peoples are connected, the results of globalization have tended to divide rather than unite, and to increase the disparity between rich and poor rather than level the playing field.[6] Indeed, a "Special Report on Globalization" in the Economist noted that "2 billion people live in countries that have become less rather than more globalized. In these countries—including ... much of Africa—trade has diminished in relation to national income, economic growth has been stagnant, and poverty has risen."[7] While wealthy nations have reaped the benefits of globalization, nearly one third of the world has not been a part of the process,[8] a process, which, from the very root of the term coined to describe it, implies the existence of a forum, a world economy, in which everyone gets to participate.

In the wake of the September 11th attacks on the United States, there has been an outcry in the media over the economic, social, and political rights of individuals in less developed nations.[9] The need to integrate developing nations into the global economy has been called for, not only for sheer humanitarian reasons, but also as a means to prevent catastrophic actions by those who feel left out when it comes to globalization.[10] It is said

2002).

[6] *See* Mahmood Monshipouri, *Promoting Universal Human Rights: Dilemmas of Integrating Developing Countries*, 4 YALE HUM. RTS. & DEV. L.J. 25, 32 (2001). Monshipouri points out that concentrations of wealth stemming from globalization are evident, not only between nations of the North and South, but also *within* developing nations. Wealth that *does* reach nations of the South is often concentrated and therefore only benefits a certain strata of the population: "Even those analysts who stress the tremendous potential benefits that globalization has for developing countries, warn about the ways in which globalization exacerbates inequality and heightens social tensions...Globalization—in particular, privatization—presents considerable risks of concentration of wealth unless undertaken with effective regulation." *Id.*

[7] *Special Report on Globalisation: Is it at Risk?*, ECONOMIST, February 2, 2002, at 73 [hereinafter *Special Report*].

[8] *Id.*

[9] *See* Lael Brianard, *Textiles and Terrorism*, N.Y. TIMES, Dec. 27, 2001; Richard Solkolsky & Joseph McMillian, *Foreign Aid in Our Own Defense*, N.Y. TIMES, Feb. 12, 2002.

[10] *Id.*

that "rich countries will pay a price"[11] if they cannot find ways to integrate developing nations into the international economy and that "security depends on the idea that others [meaning lesser developed nations] have a stake in our international system."[12] While some critics argue that integration of developing nations can be achieved through revised foreign aid programs and debt forgiveness,[13] such programs do not foster the sort of autonomy that is needed for these nations to truly become viable players in the global market. Debt forgiveness, such as that required by the latest Heavily Indebted Poor Countries Initiative ("HIPC") is essential.[14] Moreover, foreign aid is needed to assist nascent development initiatives across the globe. Debt forgiveness and aid, however, are only the first elements needed to solve the disparities created by globalization.[15] If integrated markets within a truly globalized world are to be sustained, foreign direct investment and free trade will need to become a reality.[16] This paper will focus on the United States' relation to the former by examining implications for foreign direct investment under a piece of Congressional legislation entitled the African Growth Opportunity Act ("AGOA").[17] Ultimately this paper illustrates that foreign direct investment will benefit from a universal policy[18] that offers broad accessibility and transparency to investors, while

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[11] *See Special Report*, *supra* note 7.

[12] *See* Brianard, *supra* n. 9; Solkolsky & McMillian, *supra* note 9.

[13] *See id.*

[14] *See Debt Relief under Heavily Indebted Poor Countries (HIPC) Initiative: A Factsheet*, *at* http://www.imf.org/external/np/exr/facts/hipic.htm (last visited Feb. 15, 2002). The HIPC Initiative aims at giving debt relief to some of the world's most heavily burdened economies. For a history of the developments and current status of HIPC Initiatives *see generally* Eric. A. Friedman, *Debt Relief in 1999: Only One Step in a Long Journey*, 3 YALE HUM. RTS. & DEV. L.J. 191 (2000).

[15] *See generally*, J. M. Migai Akech, *The African Growth Opportunity Act: Implications for Kenya's Trade and Development*, 33 N.Y.U. J. INT'L L & POL. 651 (2001).

[16] For the latest discussion on sustainable development see discussion of UNCTAD report on FDI *infra* Part II.C, and discussion on Doha trade talks *infra* Part III.

[17] "The African Growth Opportunity Act" is a sub-section of the Trade and Development Act of 2000, 106 P.L. 200, 114 Stat. 251 (May 18, 2000).

[18] It has been suggested that bilateral trade agreements will be a productive bi-product of the AGOA legislation. *See* Akech, *supra* note 15, at 701. While bilateral trade agreements are a means to strengthen ties between individual African nations and the United States, and while such agreements are necessarily catered to each specific country, they are not a substitute for a broad commitment to a universal trade and development policy. Negotiating such agreements is time consuming, and researching each agreement is costly for investors. Moreover, some African nations have better infrastructure and a wider base of natural resources than others. Bi-lateral investment treaties, while a good option, should be only one part of a universal trade and development program for Africa. For more information on bilateral investment treaties and foreign direct investment in developing nations see Kenneth J. Vandevelde, *Sustainable Liberalism and the International Investment Regime*, 19 MICH. J. INT'L L. 373 (1998) [hereinafter *Sustainable Liberalism*]; Kenneth J. Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36

simultaneously preserving individual nuances and recognizing the autonomy of each unique nation in Sub-Saharan Africa.[19]

The AGOA's policy to promote trade development and private sector investment has important implications for foreign direct investment ("FDI") in Sub-Saharan Africa. This paper begins with an overview of the economic situation in Sub-Saharan Africa as it exists today. Part II examines the current state of FDI in general and then in particular as it exists in Sub-Saharan Africa. Part III moves backwards historically from a specific discussion of FDI today to a broader examination of previous privatization initiatives, known as structural adjustment programs ("SAPs"), instituted by multilateral lending institutions. By looking back at prior efforts to liberalize investment in Africa, Part III articulates the downfalls of SAPs imposed by multilateral lending institutions. The premise of Part III is that SAPs have depleted rather than bolstered investment in many African economies and therefore should not be duplicated in future trade and investment legislation. In addition to critiquing SAPs, Part III also traces the participatory role of Sub-Saharan African nations in the governing policies of global trade and development institutions.

After outlining the current status of FDI in Part II and the status of Sub-Saharan African economies after structural adjustment in Part III, Parts IV and V move to a study of the specific impact the AGOA will have on FDI in Sub-Saharan Africa. Part IV explores the policy rationale behind the Act. Part V examines, in depth, different sections of the AGOA, noting which sections are likely to achieve the goal of promoting more FDI. Such sections include the provisions that deal with regionalism, the Economic Forum, investment dispute mechanisms, working conditions, and commercial trade representatives and employees. The second half of Part V is a critical analysis of different sections of the Act that will likely *not* achieve the goal of bringing more foreign direct investment, and hence *sustained*

COLUM. J. TRANSNAT'L L. 501 (1998) [hereinafter *Investment Liberalization*].

[19] The countries of sub-Saharan Africa have since been defined in the African Growth Opportunity Act ("AGOA") as

> the following countries or any successor political entities: Republic of Angola, Republic of Benin, Republic of Botswana, Burkina Faso, Republic of Burundi, Republic of Cameroon, Republic of Cape Verde, Central African Republic, Republic of Chad, Federal Islamic Republic of the Comoros, Democratic Republic of Congo, Republic of the Congo, Republic of the Cote d'Ivoire, Republic of Djibouti, Republic of Equatorial Guinea, State of Eritrea, Ethiopia, Gabonese Republic, Republic of Gambia, Republic of Ghana, Republic of Guinea, Republic of Guinea-Bissau, Republic of Kenya, Kingdom of Lesotho, Republic of Madagascar, Republic of Malawi, Republic of Mali, Islamic Republic of Mauritania, Republic of Mauritius, Republic of Mozambique, Republic of Nambia, Republic of Niger, Federal Republic of Nigeria, Republic of Rwanda, Democratic Republic of Sao Tome and Principe, Republic of Senegal, Republic of Seychelles, Republic of Sierra Leone, Somalia, Republic of South Africa, Republic of Sudan, Kingdom of Swaziland, United Republic of Tanzania, Republic of Togo, Republic of Uganda, Republic of Zambia, Republic of Zimbabwe.

See Trade and Development Act of 2000, *supra* note 17, at § 107.

development, to the region. In particular, the degree of executive discretion and debt relief initiatives that dangerously mirror unsuccessful SAPs created by the World Bank and International Monetary Fund ("IMF") are criticized. In conclusion, Part VI suggests several modes of selective government intervention and privatization that will promote state agency while simultaneously advancing the goals of both developed and developing nations to increase the flows of foreign direct investment to sub-Saharan Africa.

II. FOREIGN DIRECT INVESTMENT: THE PRESENT STATUS OF FDI GLOBALLY AND FACTORS AFFECTING FUTURE INFLOWS OF FDI TO DEVELOPING NATIONS, PARTICULARLY SUB-SAHARAN AFRICA

A. FDI Defined

Definitions for FDI can vary depending on the legal instrument being used, and the country asserting the definition. In defining FDI, multilateral institutions focus on the management characteristic asserted by the home (investing) country. For example, the WTO secretariat says that FDI "occurs when an investor in one country (the home country) acquires an asset in another country (the host country) with the intent to manage that asset. The management dimension is what FDI distinguishes from portfolio investment in foreign stocks, bonds, or other financial instruments."[20] Similarly, the IMF defines FDI as an "investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of an investor, the investor's purpose being to have an effective choice in management enterprise."[21] The definition of foreign direct investment presents an interesting dichotomy. On one hand, bringing investment funds directly to developing nations and their emerging markets offers a surge in capital, and the economy of the developing nation seeks to benefit, through increased opportunities for labor and training, from the presence of large multi-national enterprises.[22] On the other hand, the definition of foreign direct investment illustrates that the management of the investment does not rest with the host nation but rather with the entity supplying the funds from

[20] *See* WTO Secretariat, *Trade and Foreign Direct Investment*, Press/57, Oct. 9, 1996, at 6.

[21] *See* International Monetary Fund, BALANCE OF PAYMENTS MANUAL ¶ 408 (1980).

[22] *See* UNCTAD, *World Investment Report 2001: Promoting Linkages* 19, *at* http://www.unctad.org/en/docs/wir01ove_a4.en.pdf, (last visited Feb. 15, 2002) [hereinafter *World Investment Report 2001*] (stating that "the strongest channel for diffusing skills, knowledge, and technology from foreign affiliates is the linkages they strike with local firms and institutions").

the foreign country.[23]

While the locus of management control for the foreign investor is in the investment itself and not in the overall structure of the host economy, there is a fear in developing nations that in order to attract foreign direct investment government policies will need to be catered to the demands of foreign direct investors.[24] Many developing nations are eager to attract investors,[25] but they want to do so while retaining autonomy over policies specific to the needs of their nation.[26] Indeed, the scope of the definition of FDI favored by capital exporting countries over capital importing countries illustrates this pattern of developing countries favoring control over as much of their infrastructure as possible. Not surprisingly, the scope of the definition of FDI favored by capital exporting countries is broader than that of capital importing countries. Countries that invest their capital in foreign markets want to ensure that the investment is protected, and therefore they favor a broad definition of FDI that regulates and legally protects a range of investments.[27] In contrast, countries importing capital want to retain as much of their own sovereignty as possible and therefore support "a narrow definition of FDI in order to minimize their liberalization obligations in an international agreement."[28] The tension surrounding the scope of the definition of FDI parallels tension in the legislation explored in latter sections of this paper: broadly, there is a need to attract investors by offering reliable and secure investment arenas, but specifically, there is a need to maintain the autonomy of individual nations within Sub-Saharan Africa.[29]

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[23] *See* LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT 3 (Daniel D. Bradlow & Alfred Escher eds., 1999).

[24] *See* Akech, *supra* note 15, at 699-700. The article notes that it is possible that if FDI is not regulated by the host country, it could actually be harmful rather than helpful to developing nations. In order to ensure that the benefits of FDI are diffused, governments need to have the freedom to "establish a suitable regulatory framework to monitor foreign business operations."

[25] *See* Glen Kelley, *Multilateral Investment Treaties: A Balanced Approach to Multilateral Corporations*, 39 COLUM. J. TRANSNAT'L L. 483, 498-99 (2001). (stating that the low volatility and high potential for FDI to increase "healthy competition, increase exports, upgrade local technology and management skills," likely influenced the decision of African leaders at a conference in 1999 to conclude that FDI was an integral part of any development strategy).

[26] For an example of developing nations opting for "homegrown" economic policies over those of multilateral institutions, *see Nigerians to Withdraw from Accord with IMF*, N.Y. TIMES, Mar. 6, 2002, *available at* http://www.nytimes.com/2002/03/06/international/africa/06LAGO.html?ex =1016399638&ei=1&en=3581d63ecfaf9920.

[27] *See* LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT, *supra* note 23, at 27.

[28] *See id.*

[29] *See* Sherif H. Seid, GLOBAL REGULATION OF FOREIGN DIRECT INVESTMENT 27 (2002), (noting that effective state intervention in foreign direct investment involves a government matching its role to its capacity, focusing capabilities on tasks it can and should undertake).

B. Global Status of FDI

According to the United Nations Conference on Trade and Development ("UNCTAD"),[30] global flows of foreign investment are expanding rapidly, making international production and the role of transnational corporations ("TNCs") driving forces in the world economy.[31] In 2000, FDI surged by 18%, surpassing the growth figures of world production, capital formation, and trade.[32] While FDI increased in 2000, the overall flows of FDI are expected to decline in 2001.[33] The surge and the downfall of FDI parallel the growth and decline of mergers and acquisitions ("M&A"), which account for much of the worldwide flow of FDI.[34]

The primary destinations for FDI are within developed countries, which receive three-fourths of the global inflows of FDI.[35] Within developed nations, FDI is concentrated even further, with 71% of inward FDI going to "The Triad"—the United States, Japan, and the European Union.[36] While the overall FDI flows to *developing* nations did rise to 240 billion dollars in 2000, the overall percentage of incoming FDI to developing nations actually dropped to 19% - a sharp decline from the peak-high 41% reached in 1994.[37]

While the last decade has witnessed an overall increase in foreign direct investment to developing nations, Sub-Saharan Africa has represented only a tiny portion of that investment.[38] Moreover, while inflows of FDI to Africa have risen since the mid-1990s, incoming FDI to Africa actually declined in 2000 from 10.5 billion dollars to 9.1 billion dollars.[39] This drop left Africa with less than 1% of the total incoming FDI globally.[40] From the statistics, including a new inward FDI index compiled by UNCTAD, FDI is "unevenly distributed"[41] with Africa receiving "less FDI flows in comparison with the region's relative economic size."[42]

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30 UNCTAD is a United Nations organization that focuses on matters related to foreign direct investment ("FDI") and transnational corporations ("TNCs").

31 *See World Investment Report 2001*, *supra* note 22, at 6.

32 *See id.*

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 *See* Peter K. Nyikuli, *Unlocking Africa's Potential: Some Factors Affecting Economic Development and Investment in Sub-Saharan Africa*, 30 LAW & POL'Y INT'L BUS. 623, 623 (1999).

39 *See World Investment Report 2001*, *supra* note 22, at 6.

40 *See id.*

41 *Id.* at 10.

42 *Id.* at 15.

C. Factors Affecting Inflow of FDI to Developing Nations, Particularly Sub-Saharan Africa

A survey done by UNCTAD in 1999 examining what industries in Sub-Saharan Africa attracted investment indicated that telecommunications, food and beverages, tourism, textiles and clothing, and mining and quarrying were all potentially attractive investment sectors for foreigners.[43] Despite the fact that some FDI does reach these markets, the UNCTAD report also noted that:

> ...in spite of the reforms that have taken place and the progress expected in a number of African countries in terms of improving the business environment, further work is needed to change the image of Africa and to develop among foreign investors a more differentiated view of the continent and its opportunities.[44]

If a more "investment friendly image of developing nations" is to be marketed to investors, the factors inhibiting investment need to be articulated and then overcome. With respect to Sub-Saharan Africa in particular, there are a host of barriers to investment that have been pinpointed by scholars. Some of the factors that pose particular challenges include: a fear of domestic law,[45] uncertainty about the future of the reform process, debt burdens (Africa's external debt is the highest of any developing region), and sub-Saharan Africa's limited participation in the global trading system.[46] Further, a recent World Bank study that examined problems of privatization in Africa cited "lack of political commitment, poor design, insufficient resources, weak management, and corruption"[47] as factors inhibiting privatization initiatives in the region. This same World Bank report articulated the need for African governments to make their information more transparent to the public, thereby ensuring their commitment to investors and their willingness to ensure accountability in the investment process.[48]

Most recently, UNCTAD's World Investment Report for 2001 noted that drivers behind FDI are changing rapidly in response to changes in international society.[49] Many of the factors attracting FDI that were cited in

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[43] *See* UNCTAD, *World Investment Report 1999: Foreign Direct Investment and the Challenge of Development* 24, *at* http://www.unctad.org/en/docs/wir99ove.pdf (last visited Feb. 16, 2001).

[44] *See id.* at 24-25.

[45] *See* LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT, *supra* note 23, at 27.

[46] *See* Irving Williamson & Stephen D'Alessandro, *New Prospects for Development in Sub-Saharan Africa*, 30 LAW & POL'Y INT'L BUS 637, 641 (1999).

[47] *See id.* at 642.

[48] *Id.*

[49] *See World Investment Report 2001*, *supra* note 22, at 17.

1999, such as large markets, natural resources, and access to unskilled labor, have been replaced in UNCTAD's latest findings.[50] The latest report states that regionalism is of growing importance and notes that FDI brought about by TNC activity "increasingly reflects development and policy liberalization, technological progress, and evolving corporate strategies" within developing nations.[51] UNCTAD asserts that developing nations must understand the need to not only liberalize their FDI policies, which many governments have already done, but also to actively market their countries by articulating their corporate strategy in an age of globalization.[52]

While it is essential that governments in developing nations create policies to compensate for weak financial markets and institutions, there are no "ready made prescriptions" for attracting investors. In order to benefit from the linkages with TNCs, developing nations need to construct policies that are "often highly context-specific and need to be adapted to the specific circumstances prevailing in each country."[53] The next part of this paper will illustrate the downfalls of applying uniform development programs to developing nations, particularly countries in Sub-Saharan Africa, without considering the nuances of each particular country. The suggestions of UNCTAD and the lessons learned from the following examination of structural adjustment programs of multilateral lending institutions will then be used in Parts III and IV as a springboard from which to analyze the United States investment policy in the AGOA.

III. THE GRIM ECONOMIC PICTURE IN SUB-SAHARAN AFRICA: CONSEQUENCES OF PRIVATIZATIONS IMPOSED BY MULTILATERAL LENDING INSTITUTIONS

Today we speak of globalization, but for a period of thirty years—from the mid 1940s until the mid 1970s—the world economy experienced a rapid expansion that is referred to as the "Golden Age".[54] During this period, the industrialized economies grew at a rate of 5% annually.[55] In order to manage this growth, which was nearly double the normal rate for industrialized economies, three key international institutions emerged: the International Monetary Fund ("IMF"), the World Bank, and the General Agreements on Tariffs and Trades ("GATT").[56] The IMF, World Bank, and GATT all had independent but interrelated missions associated with promoting a liberal-

[50] *See id.*
[51] *Id.*
[52] *Id.* at 19.
[53] *Id.* at 22.
[54] *See* DYING FOR GROWTH: GLOBAL INEQUALITY AND THE HEALTH OF THE POOR 18 (Jim Yong Kim et al. eds., 2000) [hereinafter DYING FOR GROWTH].
[55] *See id.*
[56] *Id.* at 19.

ized trade agenda in an age of booming industrial expansion.[57]

The missions of the IMF and World Bank, collectively known as the "Bretton Woods Institutions," were associated with promoting a liberalized trade agenda.[58] Established in 1946, the IMF was created to prevent economic crises like the Great Depression of the 1930s.[59] The IMF promotes "international monetary cooperation, exchange stability, and orderly exchange arrangements...to foster economic growth...and to provide temporary financial assistance to countries to help ease the balance of payment adjustments."[60] The World Bank, which started in 1946-47, was originally established to aid reconstruction of economies devastated by the Second World War.[61] By 1948, the Bank's agenda shifted, and it began to provide development loans to poor countries.[62] Today, the Bank "has sharpened its focus on poverty reduction as the overarching goal of its work."[63] Historically, the IMF's emphasis on short-term financial assistance distinguished it from the World Bank, which focused more on providing medium to long term financing for development.[64] Today, both institutions remain distinct but work cooperatively on many financial matters in developing countries.[65]

The Bretton Woods Institutions began to dominate the global financial market during the debt crisis of the 1970s and 1980s when developing nations were unable to pay off their loans to commercial banks.[66] The IMF

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[57] *Id.*

[58] The IMF and World Bank are often referred to collectively as the "Bretton Woods Institutions" because plans for the two organizations were drafted at a conference in Bretton Woods, New Hampshire in July of 1949. *See id.*

[59] *See* International Monetary Fund Web site, *at* http://www.imf.org/external/about.htm (last visited Feb. 15, 2002).

[60] *See id.*

[61] *See* The World Bank Web site, *at* http://www.worldbank.org/about/history/ (last visited Feb. 15, 2002).

[62] *See* DYING FOR GROWTH, *supra* note 54 at 19.

[63] *See* The World Bank Web site, *supra* note 61.

[64] *See* Balakrishnan Rajagopal, *From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions*, 41 HARV. INT'L L.J. 529, 572-73 (2000).

[65] *See* Michel Chossudovsky, THE GLOBALISATION OF POVERTY: IMPACTS OF IMF AND WORLD BANK REFORMS 35 (1997); *see also* Heavily Indebted Poor Countries (HIPC) Initiative Factsheet, *supra* note 14, for one such example of this cooperation.

[66] *See* DYING FOR GROWTH, *supra* note 54, at 20. For a history of the debt crisis *see* LIMITS OF ADJUSTMENT IN AFRICA: THE EFFECTS OF ECONOMIC LIBERALIZATION, 1986-1994 at 6-7 (Poul Engberg-Pedersen et al. eds., 1996) [hereinafter LIMITS OF ADJUSTMENT] (From 1973-1982 there was a "world wide monetary boom arising from petro dollar recycling. This was associated with a burst of donor spending in many African countries, which blew away the emerging macroeconomic constraints and set in motion as investment (or project) boom . . . the availability of donor funds also accelerated expansion of economic and social infrastructure and services, with similar effects on efficiency, or rather its absence ... [in the] early 80's there was worldwide retrenchment, declining terms of trade, tight money and massively increased debt.").

and World Bank, multilateral institutions controlled by the voting power of a few select nations who were also substantial lenders,[67] were eager to prevent a global financial crisis. Consequently, these institutions intervened in the debt crisis and agreed to give nations funds to offset their debts as long as they in turn agreed to restructure their economies.[68] The restructuring came in the form of loans that were conditioned on "macro economic structural adjustment policies that required painful reductions of budget deficits and currency devaluations."[69] The structural adjustment policies, known as "SAPs," promoted the neo-liberal trade ideology of "state retrenchment, market liberalization, and liberalization of capital flows on a global scale."[70] The general idea behind structural adjustment programs was the notion that debtor nations "submit their economies to international market forces through privatization, [thus] opening up the economy to capital market forces through privatization, offering more incentives to private foreign investment, and through policy reform."[71] In other words, free markets and privatization initiatives, coupled with policies to attract investors, would "solve" the financial problems of developing nations.

Structural adjustment programs were developed with little concern for the unique problems associated with individual developing nations.[72] Program reforms were fueled by several *general* policy guidelines including: reductions in aggregate demand and government expenditure, expenditure switching both within the government budget and through exchange rate devaluation, reduction of trade barriers and controls, market and price liberalization, and institutional reform.[73] SAPs tended to be uniform from country to country,[74] imposing a top-down approach with little consideration for the subtle nuances of each developing nations' culture and economy. Moreover, the programs were wrought with conditions that forced governments to compromise public spending and social objectives in order to allo-

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[67] *See* DYING FOR GROWTH, *supra* note 54, at 20.

[68] *See id.*

[69] *See Sustainable Liberalism*, *supra* note 18, at 389.

[70] *See Lopsided Rules of North-South Engagement: The African Growth Opportunity Act* at Part IV, *at* http://www.southcentre.org/publications/usafrica/toc.htm (last visited Nov. 22, 2002) [hereinafter *Lopsided Rules*].

[71] *See* Diana E. Moller, *Intervention, Coercion or Justifiable Need? A Legal Analysis of Structural Adjustment Lending in Costa Rica*, 2 SW. J. L. & TRADE AM. 483, 501 (1995).

[72] *See* BEYOND ECONOMIC LIBERALIZATION IN AFRICA: STRUCTURAL ADJUSTMENT AND THE ALTERNATIVES 3 (Kidane Mengisteab & B. Ikubolajeh Logan eds., 1995) [hereinafter BEYOND ECONOMIC LIBERALIZATION IN AFRICA].

[73] *See id.* at 139-140

[74] *See* Mark Baker, *Privatization in the Developing World: Panacea for the Economic Ills of the Third World or Prescription Overused?*, 18 N.Y.L. SCH. J. INT'L & COMP. L. 233, 253 (1999).

cate more money to privatization initiatives and debt repayment.[75] Indeed, SAPs prevented developing nations from having agency to solve discrete problems specific to a single country.

Structural adjustment programs have been largely successful. They were not developed specifically for individual nations and because they favored overwhelming privatization at the expense of public spending and institution building.[76] A 1994 World Bank Report concluded that out of twenty-nine adjusting African countries, only six were successful.[77] The failure of structural adjustment programs founded on *general* rather than *context specific* policies supports the latest findings of UNCTAD that "well designed government intervention" and policies that are "adapted to the specific circumstances prevailing in each host country" are needed to create an environment which is favorable to investment.[78] General, sweeping reforms, like structural adjustment, are the very "ready made policy prescriptions" that must be avoided.[79]

Like the IMF and World Bank, there are also lessons to be learned from approaches of multilateral trade organizations. The GATT, which also went into effect in 1947, was an integrated trade agreement signed by twenty-three countries that sought to promote free trade on a global scale.[80] In 1994, the rules governing international trade were strengthened at the Uruguay Round of Multilateral Trade Negotiations at the time the World Trade Organization ("WTO") was created to replace the GATT.[81] Notably, the majority of countries in Sub-Saharan Africa were unable to assert their own agency by participating in the negotiations at the Uruguay Round.[82] Consequently, these countries have remained on the periphery of the current global trading system, *responding to* rather than *assisting in* decisions made by the global capital powers.[83]

The latest trade talks, launched in Doha, Qatar, are intended to reconcile this disparity between developed and developing nations.[84] Coined as the "development round" of world trade talks, the Doha meeting is expected

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[75] *See generally id.* at 234.

[76] *See generally* LIMITS OF ADJUSTMENT, *supra* note 66.

[77] *See* George B.N. Ayittey, *How the Multilateral Institutions Compounded Africa's Economic Crisis*, 30 LAW AND POL'Y INT'L BUS. 585, 593 (1999) ("[T]he failure rate of eighty percent would have been even higher had Burkina Faso, Nigeria, and Tanzania been excluded in light of recent developments.").

[78] *World Investment Report 2001*, *supra* note 22, at 16-17.

[79] *See* discussion of UNCTAD recommendations for FDI in developing nations *infra* Part II.C.

[80] *See* DYING FOR GROWTH, *supra* note 54, at 19.

[81] *See* Williamson & D'Alessandro, *supra* note 46, at 644.

[82] See *id.*

[83] *Id.*

[84] *See* Brainard, *supra* note 9, at 19.

to launch a new dialogue concerning how to bring the benefits of globalization to poor countries.[85] Indeed, in the WTO's Doha Ministerial Declaration released in November 2001, the WTO pledges the following with respect to fostering the relationship between trade and development:

> We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organizations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.[86]

The Doha trade talks are a step in the right direction with respect to global trade discussions. They mark a shift toward embracing the perspective of developing nations by including them in discussions rather than imposing trade and development mandates without thorough consultation. Indeed, the notion of "selective globalization" is dwindling in the face of a rapidly changing society, and there is a new recognition for the essential need to decrease the divide between the rich and poor. The next two sections of this paper will examine the United States' response to this new global reality by analyzing the African Growth Opportunity Act.

IV. Policy Behind African Growth Opportunity Act Aims to Increase Privatization and Foreign Investment

A. Presidential Trade Initiative for Africa

On June 17, 1997 President Clinton announced the "Partnership for Economic Growth and Opportunity in Africa," a piece of legislation stemming from agreements reached at the Uruguay Trade Agreements concerning African trade and development initiatives.[87] This new initiative sought to shift the US policy outlook towards Africa from one of passive ambivalence to a strategy aimed to capitalize on sub-Saharan Africa's reforming and burgeoning economies. This would be accomplished by building strong trade relationships, promoting private sector investment, and invest-

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[85] *See id.*

[86] Doha WTO Ministerial 2001, *Ministerial Declaration*, WT/MIN(01)/DEC/1 at § 21 (adopted on 14 Nov. 2001), *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#tradeinvestment.

[87] *See* Robert H. Edwards Jr. et al., *International Investment, Development, and Privatization*, 35 INT'L LAW. 383, 384 (2001).

ing in people, health and education [88] The policy shift was triggered, not by the humanitarian "Doha development" agenda of today, but largely because the United States, a country accustomed to dominating the global marketplace, trailed behind both France and Britain with only a 7% share of the industrial country supplies to sub-Saharan Africa.[89]

B. Congressional Response to African Trade Initiative

On May 18, 2000, Congress passed the Trade and Development Act of 2000,[90] which contained the African Growth Opportunity Act[91] (hereinafter "AGOA"). The AGOA complemented the Clinton Administration's African Trade Initiative and ensured that key elements of the trade and development policy would be implemented.[92]

The Congressional findings articulated in § 102 of the AGOA reiterate policy statements made by the Clinton Administration in 1997 (when the "Partnership for Economic Opportunity in Africa" was first announced). The Clinton Administration's objective was to eliminate barriers to free trade in an effort to increase foreign investment and gain market share in the industrial supplier sector of the Sub-Saharan African economy.[93] Subsections 8 and 9 of § 102 indicate that Congress favored the Clinton Administration's neo-liberal trade agenda. In those provisions, Congress found:

> (8) increased trade and investment flows have the greatest impact in an economic environment in which trading partners *eliminate barriers to trade and capital flows* and encourage the development of a vibrant private sector that offers individual African citizens the freedom to expand their economic opportunities and provide for their families.
>
> (9) offering the countries of sub-Saharan Africa enhanced trade preferences will encourage both *higher levels of trade and direct investment* in support of the positive economic and political developments under way throughout the region.[94]

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[88] *See id.*

[89] *See* Presidential Report, *A Comprehensive Trade and Development Policy for the Countries of Africa*, Dec. 1997, at 9, *at* www.ustr.gov/pdf/africa98.pdf (last visited Feb. 19, 2002) [hereinafter *A Comprehensive Trade and Development Policy*].

[90] Trade and Development Act of 2000, *supra* note 17, at Introduction ("[The Act sought] to authorize a new trade and investment policy for sub-Saharan Africa, expand trade benefits to the countries of the Caribbean Basin, renew the generalized system of preferences, and reauthorize the trade adjustment assistance programs.").

[91] *Id.* at Title I.

[92] *See* Edwards et al., *supra* note 87, at 384.

[93] *See* Akech, *supra* note 15, at 652.

[94] Trade and Development Act of 2000, *supra* note 17, § 102 (emphasis added).

The locus of policy behind the AGOA is embedded in a mission to enhance trade and increase investment. Implicit in provisions 8 and 9 of the Act, however, there is a political agenda that promotes limited government and an economic agenda favoring virtually limitless privatization. A 1997 Presidential report to Congress on the subject of African trade and development policy states, in very explicit terms, that on the subject of "improved policy management and governance, the Administration attaches importance to policies aimed at streamlining and reducing the scope of government activities . . . ."[95] These policy statements dangerously parallel development agendas imposed by multilateral institutions in structural adjustment programs that have proven to be ineffective.[96] While it is commendable to promote improved policies and governance in Africa, and while such improvements will help to stimulate interest in investing in Sub-Saharan Africa, there is also a fine-line between establishing trade incentives and agenda setting through "good governance" programming.

The impetus for creating the AGOA was founded on the notion that investors need to feel more comfortable in a place - sub-Saharan Africa - that is so intrinsically *different* from their home environments. Yet, despite the broad differences in the culture, history, and experience of African nations, Congress continues to look at the countries and development issues in Africa through an American lens of experience that does not offer the best means of creating a brighter image (or reality) for Sub-Saharan Africa. Section 102(7) of the AGOA is a perfect illustration of this all too American development perspective:

> (7) trade and investment, *as the American experience has shown*, can represent powerful tools both for economic development and for encouraging broader participation in a political process in which political freedom can flourish.[97]

Although it is certainly not unfounded for Congress to cite trade and investment as significant contributors to the success of the United States, it is wrong to use the American experience as a foundation for African trade and development policy. As one critic has noted, "[t]he right of all sovereign countries to articulate their own developmental perspectives based on their history, experience, and goals is a notion that is completely absent from the letter and spirit of the Act."[98]

Some of the policy behind the AGOA is unfortunately too couched in the "American capitalist experience." There are several more policy justifications behind the Act that are not only neutral, but that also hit the

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[95] *A Comprehensive Trade and Development Policy*, *supra* note 89, at 5-6.
[96] *See supra* Part III for discussion on SAPs.
[97] Trade and Development Act of 2000, *supra* note 17, § 102 (emphasis added).
[98] *See Lopsided Rules*, *supra* note 70.

cations behind the Act that are not only neutral, but that also hit the very points that investors have noted as reasons why they are wary to invest in sub-Saharan Africa. These initiatives, again, articulated by the Clinton Administration in a report to Congress, include "increasing professionalism, transparency and accountability of the public sector, and developing a judicial system in which published rules are impartially applied and for which appeal procedures are in place."[99] As these more universal policies illustrate, certain provisions of the AGOA are rooted in a foundation that can help increase FDI in sub-Saharan Africa.

Tthe Administration and Congress did not understand that in order for their neo-liberal trade objectives to succeed, privatization initiatives will have to be catered to the nuances of the governments and economies of sub-Saharan African nations. The policy cannot be one of top-down privatization initiatives that have proven successful in the United States.[100] The next part of this paper will explore which parts of the AGOA strike a balance between liberalization and cooperation with developing governments. Understanding the particular economic, social, and cultural environments of each sub-Saharan African country, and working though dialogue and selective government intervention to make reforms will likely succeed in fostering an environment that will bring more FDI to Sub-Saharan Africa.

V. THE AFRICAN GROWTH OPPORTUNITY ACT'S ROLE IN INCREASING FDI FLOWS TO SUB-SAHARAN AFRICA

A. AGOA Provisions with Positive Implications for FDI

Several provisions of the AGOA strike a balance between advocating market liberalization and accounting for particularities unique to Sub-Saharan African nations. These provisions, which this article contends will aid in making the region more attractive to investors because they will lead to sustainable liberalization. Such provisions cover issues of regionalism, dispute resolution, dialogue between nations, worker rights, and attention to particular development issues, especially those related to health, that are dire in sub-Saharan Africa today.

In § 103 of the AGOA, Congress notes support for "expanding United States assistance to sub-Saharan Africa's regional integration efforts."[101] This provision of the AGOA recognizes the importance of fostering alli-

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[99] *A Comprehensive Trade and Development*, *supra* note 89, at 6.

[100] *See* Seid, *supra* note 29, at 30 ("[I]n order to realize the full potential of FDI, it may be necessary for any government to have an interventionist role and adopt a policy that is selective with respect to projects and the volume and timing of FDI inflows . . . Liberalization should also be seen as a continuous movement, rather than a one-off radical measure."

[101] Trade and Development Act of 2000, *supra* note 17, § 103(3).

ances in sub-Saharan Africa that will assist the region in developing an internal market. Such regional markets have been cited by UNCTAD as a means of fostering attractive areas for FDI because regional markets have the potential to create platforms from which African countries can negotiate with the global capital powerhouses.[102] In addition, African economies seek to benefit strategically from regional alliances: "Developing countries which join major regional arrangements will become more attractive locations for foreign investors. Their attraction will reflect assured access to export markets and more visible and credible hospitable policies towards foreign firms."[103] Promoting regional alliances in sub-Saharan Africa will not only make the markets more visible, but also encourage nations to be more autonomous and enable them to create transparent networks of information that ensure accountability. By bolstering African nations from within, regional integration efforts require African nations to become more familiar with the global trading network from their own perspective, and in turn create an environment that is more conducive to both foreign *and domestic* investment.[104]

As mentioned earlier, studies of FDI in sub-Saharan Africa cited fear of national laws, debt burdens, corruption, and poor infrastructure and management as just some of the factors inhibiting investment in the region.[105] The AGOA addresses many of these concerns in the eligibility requirements, thereby offering investors added assurances that their concerns will be either alleviated or lessened when they know they are dealing with a country that is eligible for the benefits of the AGOA. To qualify for assistance under the AGOA, governments must protect private property rights, provide national provisions for the resolution of bilateral trade and investment disputes, expand physical infrastructure, and protect worker rights.[106] Indeed, if sub-Saharan governments meet the multitude of eligibility requirements imposed by the AGOA, they will be required to work towards the kind of liberalized, efficient, transparent, and accountable environment that foreign investors desire.

While some of the foundational polices behind the AGOA give too much credence to the "American experience," the Act does create a Cooperation Forum to promote the free exchange of ideas between nations.[107]

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[102] *See World Investment Report 2001*, *supra* note 22, at 17.
[103] *See* John H. Dunning, THE NEW GLOBALISM AND DEVELOPING COUNTRIES 72-73 (1997), *at* http://emedia.netlibrary.com.
[104] *See* Nyikuli, *supra* note 38, at 648.
[105] *See id.* at 641.
[106] Trade and Development Act of 2000, *supra* note 17, §104.
[107] The first Cooperation Forum was held in Washington DC on Oct. 29-30. A report of the forum is *available at* http://www.agoa.gov/AGOAUpdate/agoa_update.html (last visited Feb. 17, 2002). Notably, President Bush's remarks at the Forum were couched in language

Such a provision is essential because it enables the United States to participate in an ongoing dialogue with nations of sub-Saharan Africa about what *they* believe is the best way to enhance trade, development, and foreign investment in their region. The requirements for the "United States-Sub-Saharan Africa Trade and Economic Cooperation Forum" are outlined in § 105 of the AGOA, and not only include ongoing discussions between high level government officials, but also encourage meetings and discussions between nongovernmental organizations and private sector representatives from the United States and countries of sub-Saharan Africa.[108] Participating in ongoing dialogues gives the African countries the kind of autonomy and agency they need if they are going to be part of the global trade arena. Moreover, because the Act seeks to encourage the exchange of ideas, not only at the government level, but also between private sector parties and NGOs, the range of topics and perspectives should be broad enough to capture the myriad of issues that need to be addressed in order to adequately reform the investment environment.

In addition to fostering dialogue under the auspices of the Cooperation Forum, the AGOA also creates new, specialized positions for a trade representative and additional commercial service employees to be stationed in sub-Saharan Africa. Section 117 of the AGOA establishes an "Assistant United States Trade Representative for African Affairs" who will serve as "a primary point of contact in the executive branch for those persons engaged in trade between the United States and sub-Saharan Africa."[109] Furthermore, the Congress calls for the Secretary of Commerce to take steps to create "(1) *at least* 20 full-time Commercial Service employees [who] are stationed in sub-Saharan Africa; and (2) full-time Commercial Service employees [who] are stationed in not less than 10 different sub-Saharan African countries."[110] Direct contact with the executive branch via the Trade Representative for African Affairs coupled with additional commercial service employees in a range of African countries will offer investors assurances that any concerns or problems they have in Africa can be addressed by personnel specifically designated to deal with the challenging issues specific to sub-Saharan Africa. Knowing that such onsite communication and reporting channels exist should ease investors' fears and alleviate some of the resistance to foreign direct investment in the region.

Many provisions of the AGOA are couched in terms of trade and eco-

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against the war on terrorism, thereby illustrating what has become an undeniable link between "selective globalization" and the roots of terrorism. President Bush thanked the African countries for their support against terrorists, then pledged $200 million to OPIC, pledged to create a Trade and Development Agency in Johannesburg, and announced the Trade for African Development and Enterprise Program.

[108] Trade and Development Act of 2000, *supra* note 17, § 105.

[109] *Id.* § 117(A).

[110] *Id.* § 125(b)(1), (2) (emphasis added).

nomic development, and the free market ideology behind the AGOA is undeniable. However, having a free market ideology behind the Act does not mean that development initiatives for sub-Saharan Africa are completely ignored in favor of creating incentives for the private sector. The AGOA, albeit to a limited extent and more often than not under the auspices of creating a more "liberalized environment," does advocate that privatization and market liberalization initiatives be met with a commitment to promoting development in sub-Saharan Africa. For example, the Act has an entire provision dedicated to encouraging businesses to "provide assistance to sub-Saharan African countries to prevent and reduce the incidence of HIV/AIDS in sub-Saharan Africa."[111] The Act also instructs participants in the Cooperation Forum to review "the HIV/AIDS epidemic in each sub-Saharan African country."[112]

Development initiatives, as well as investment and free trade policies, need to account for the unique cultural, historical, social, and economic situation in each and every one of the forty-eight countries of sub-Saharan Africa. The task is daunting, which is evidenced by the fact that the AGOA groups all the countries together under the category of sub-Saharan Africa. While new attention to the region in terms of investment, trade, and development is encouraging, each country's economic and development problems must be taken into consideration on an individual basis if any kind of trade or development is to be sustained.

B. Shortcomings of the AGOA

The AGOA takes affirmative steps through initiatives like the Economic Cooperation Forum, commercial service employees, and calls to study health and education. To understand the nuances of each of the countries in sub-Saharan Africa, however, the neo-classical trade ideology that underlines the Act ultimately seeks to attain the uniform objective of promoting free and open markets as fast as possible and with as little government intervention as possible. This "top-down" approach dangerously mirrors the conditions of structural adjustment programs imposed by the IMF and World Bank that have failed miserably.[113] Moreover, a sweeping reform agenda fails to advocate the selective intervention by governments proposed by UNCTAD[114] and instead favors a wholesale market liberalization initiative, irrespective of the country at hand. The AGOA, because it favors such quick, sweeping liberalization, fails to account for the fact that many African nations are unable to provide the ingredients necessary for a

[111] Trade and Development Act of 2000, *supra* note 17, § 128.
[112] *Id.* § 105(e).
[113] *See supra* Part III, discussion of SAPs.
[114] *See World Investment Report 2001*, *supra* note 22, at 21.

free market to operate effectively.[115] A strategy of liberalization coupled with protectionism has been cited as one of the reasons for the success in the emerging East Asian markets.[116] The AGOA, rather than push for an aggressive privatization plan, should instead focus on creating free markets while allowing selective government intervention by the nations of Sub-Saharan Africa. In order for the liberalization favored by the Clinton and Bush Administrations to succeed in Africa, governments in the host nations must be allowed to intervene in their own development efforts, and developed nations must be prepared "to assist [these] developing states to create the economic, legal and physical conditions required by a properly functioning market."[117] The key to sustainable growth, and hence a more attractive environment for FDI, is a collaborative effort on the part of both the developed and developing nations, along with selective intervention by host governments in their own development strategy.

Although the majority of eligibility requirements under the Act are beneficial and, as the US Commerce Department states, "standards which Africans themselves have espoused and most are striving to uphold,"[118] the eligibility requirements for privatization initiatives in relation to government intervention are too stringent. The first eligibility requirement "minimizes government interference in the economy through measures such as price controls, subsidies, and government ownership of economic assets."[119] While the objective of this requirement is to prevent covert government protectionism,[120] the use of the term "interference" indicates that Congress sees any government involvement as a hindrance to development rather than something that could be used to foster market growth. Once again, this universal favoritism for all things private goes against recommendations in the latest UNCTAD study.[121] Moreover, the radical and rapid privatization approach advocated in § 104 of the AGOA is completely contrary to the selective role of government that has been cited as a factor in the development

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[115] *See generally World Investment Report 2001*, *supra* note 22, at 21.

[116] *See* David Katona, *Challenging the Global Structure Through Self Determination: An African Perspective*, 14 AM. U. INT'L L. REV. 1439, 1450 (1999). A recent World Bank report cited four main factors that contributed to the success of the economies in the region: "macroeconomic stability, extensive investment in social infrastructure, efficient export push efforts, and *selective government intervention*." *Id.*

[117] *Sustainable Liberalism*, *supra* note 18, at 398.

[118] *See* United States Department of Commerce, *FAQ Sheet on the AGOA*, *at* http://www.agoa.gov/FAQ/faq.html (last visited on Feb. 19, 2002).

[119] Trade and Development Act of 2000, *supra* note 17, at § 104(A).

[120] The idea of covert protectionism is that protected economies become corrupt systems that help only those with clout and/or affluence and therefore do not diffuse growth to those who need it most, namely the poor. *See generally* Seid, *supra* note 29, at 26.

[121] *See* discussion of UNCTAD recommendations for FDI in developing nations, *supra* Part II.C.

of East Asian Economies.[122] Further, such liberalization polices promote the idea that "the 'invisible hand' of market forces is the only viable and desirable path to development."[123] African nations need a "hands on" approach, not the invisible hand of private market forces.

The AGOA's demanding and fast-paced privatization requirements are linked with an even more sweeping amount of executive discretion. The freedom given to the executive is outlined in § 104. The President is in charge of determining which countries are eligible for benefits of the AGOA, monitoring and review of those selected countries, and terminating benefits given to countries who are not continuing in compliance.[124] The executive is given exclusive authority to make decisions on three levels with no Congressional or other checks and balances imposed on his discretion. Such a broad base of power is vulnerable to the pull of the political tide, which leaves all the nations of sub-Saharan Africa in a precarious position: not only are the nations vulnerable to oscillating markets, but also to radical shifts in executive decision making based in highly politicized environments.[125] Moreover, investors may be hesitant to put their capital in nations that are subject to radical changes in policy based on a swift, unchecked Presidential decision.[126]

Although determination of eligibility and benefits for sub-Saharan nations under the AGOA is left solely to the discretion of the executive, there are other provisions that advocate a collaborative effort on the part of Congress and the President. One of those areas most relevant to creating an environment for FDI is the focus on economic and development related issues. In § 121 of the AGOA Congress acknowledges the immense debt of

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[122] *See* Akech, *supra* note 15, at 693.

[123] *See id.* at 690.

[124] Trade and Development Act of 2000, *supra* note 17, § 104.

[125] To grasp the highly politicized nature of trade relations in Africa consider the title of President Bush's comments to the African Growth and Opportunity Forum: "U.S., Africa Strengthen Counter-Terrorism and Economic Ties, Remarks by the President to the African Growth and Opportunity Forum." The full text of President Bush's comments is *available at* http://www.whitehouse.gov/news/releases/2001/10/20011029-2.html (last visited Feb. 19, 2002).

[126] It should be noted that some scholars believe that unchecked Presidential authority is a benefit, rather than a detriment because the President is less susceptible to the influence of interest groups. *See* John O. McGinnis and Mark L. Movesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 539-540 (2000). McGinnis and Movesian, albeit with respect to free trade and not FDI, argue that members of Congress are susceptible to interest group pressures against trade, particularly because they work in small committees and may feel the concentrated pressure of voters in their districts. The President, on the other hand, has a "national constituency not tied to particular localities and their interest groups." With respect to FDI, I would assert that powerful TNCs are the very kind of national powerhouse interest groups with substantial influence over party funding that have a profound influence on campaign financing and therefore electoral urgency for the President. Indeed, I would assert that the President is more, not less, susceptible to interest group pressure with respect to FDI.

many nations in sub-Saharan Africa, then asserts the following two initiatives under the AGOA:

> (1) Congress and the President should work together, without undue delay and in concert with the international community, to make comprehensive debt relief available to the world's poorest countries in a manner that promotes economic growth and poverty alleviation;
>
> (2) this program of bilateral and multilateral debt relief should be designed to strengthen and expand the private sector, encourage increased trade and investment, support the development of free markets, and promote broad-scale economic growth in beneficiary countries.[127]

The Congressional intent to alleviate debt relief is certainly commendable, but an approach couched solely in the language of privatization is incorrect, especially knowing the history of failed debt relief programs under the auspices of structural adjustment initiated by the World Bank and IMF.[128] Debt relief and sustainable development cannot be achieved without "policies that actively seek to engage the people in the adjustment process and aim for the social advancement and economic transformation (empowerment) of the poor . . . as an explicit objective."[129] While it is essential to have a commitment from Washington to assist in the debt relief in sub-Saharan Africa, it is imperative that Washington not micro-manage the continent.[130] Congress needs to allow Africans to work through their own governments in order to seek their own solutions to their own problems.[131] History has shown that investors are attracted to developing countries that can offer a solid infrastructure to foreign firms.[132] Even if the infrastructure is initiated by private actors, the people of sub-Saharan Africa need to be educated and trained in order for such development to be sustained.

VI. CONCLUSION: AFRICA'S PROSPECTS FOR ATTRACTING SUSTAINABLE FDI UNDER THE AGOA

The nations of sub-Saharan Africa are so heavily in debt that it is critical for them to attract long-term capital flows from foreign investors.[133]

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[127] Trade and Development Act of 2000, *supra* note 17, § 121(b).

[128] *See generally supra* Part II.

[129] *See* BEYOND ECONOMIC LIBERALIZATION IN AFRICA, *supra* note 72, at 147.

[130] *See* Nyikuli, *supra* note 38, at 588.

[131] One of a number of reasons that has been noted for the shift in attitude of developing countries from confrontation to compromise with respect to foreign direct investment is that colonial history is less of an issue and "attitudes towards FDI have become more pragmatic in the former colonies." *See* Seid, *supra* note 29, at 17.

[132] *See* Dunning, *supra* note 103, at 37.

[133] *See* Nyikuli, *supra* note 38, at 629.

Foreign direct investment could potentially enable developing nations to increase the total flow of savings in their economies, and thereby begin to erode their debt and focus funds on social programs that could sustain development in the long term. FDI has numerous advantages for sub-Saharan Africa:

> ...it is more stable and less volatile than short-term foreign portfolio investment; it adds to a country's gross capital formation, and it brings further spin-off benefits in terms of transferring production technology, promoting material expertise, improving the quality of human resources, and increasing knowledge of and access to global markets.[134]

It is undeniable that Africa needs to eliminate its aura of uncertainty and become a region ripe for foreign direct investment. In the immediate sense, the AGOA is well designed to eliminate the mystique surrounding sub-Saharan Africa in such a way as to attract investors and make them feel "at home" in the region.[135] The broad discretion given to the executive, which this article critiqued for not having checks and balances, can be seen as a direct means of getting the benefits out to as many sub-Saharan nations as possible, with as little bureaucracy as possible. The Economic Cooperation Forum, trade representatives, and commercial service employees will all encourage dialogue between the nations of sub-Saharan Africa and the United States. Further, U.S. support for regional integration efforts will help nations in sub-Saharan Africa realize their autonomy and work together to gain ownership of their trade, development, and investment interests through a unified platform.

It has been noted that incoming FDI "will not be sustained either in small-export based economies or in large relatively protected markets, unless national policies ensure that the basis for international production and exchange is supported by improvements in infrastructure, skills, services and the political and business environment."[136] While privatization initiatives will likely help sub-Saharan African nations build infrastructures that will attract investment, this infrastructure will be futile unless Africans are educated and understand how to manage and sustain it. The private and public sectors need to work together in ways to help Africans. Government action cannot be construed as "interference" with privatization. In fact, the private sector will unlikely sustain itself in Africa unless governments are

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[134] *See* Akech, *supra* note 15, at 697.

[135] The U.S. Dept. of Commerce has established an informative and easily navigable website for the AGOA: http://www.agoa.gov/index.html (last visited Feb. 17, 2002). In addition to many other links, the site provides Q/A for both Sub-Saharan African countries and investors. .

[136] Dunning, *supra* note 103, at 183.

allowed to "interfere" with corruption, growing poverty, declining health care, and poor educational systems. The AGOA, though a step in the right direction, falls notably short of its goals when it imposes the "American experience" of quick, sweeping, neo-liberal trade policies on African nations that need gradual, selective intervention in order to sustain progress made through initial investments.