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THE ROLE OF NEPAD IN AFRICAN ECONOMIC REGULATION AND INTEGRATION

*Renee Ngamau**

I. INTRODUCTION

THE New Partnership for Africa's Development (NEPAD) has been widely lauded as a new, and more importantly an autochthonous, African strategy for the rejuvenation of the ailing African landscape.¹ The major objectives of NEPAD² encompass almost all spheres of continental integration with a view toward creating a new economic landscape.

This article provides an analytical discussion of the NEPAD strategy and its role in economic integration and regulation in Africa. It undertakes a critical overview of the agreement, focusing mainly on the aspects of economic growth and integration of the member states. The primary question posed is whether NEPAD can be a useful tool for the economic integration and sustained growth of Africa. If so, what are its powers, if any, to ensure compliance and to monitor growth?³

The first part of this article addresses NEPAD's place as an instrument of international law. This includes a discussion of the use of international law instruments and international organizations as tools for the surveillance of uniform economic growth among member states.

The NEPAD strategy sets out initiatives, which are directed toward rejuvenating the economies of African states.

The second part of this article focuses on economic governance and related initiatives. Drawing on earlier initiatives within the African continent and elsewhere, an argument may be presented that while the NEPAD strategy succeeds at redirecting attention to the African conti-

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1. See, e.g., Heads of State and Government of the eight major industrialized countries and representatives of the European Union, Statements at the G8 Africa Action Plan, Kananaskis Summit, Canada (June 26-27, 2002).
2. New Partnership for Africa's Development (NEPAD), Oct. 2001, available at http://www.uneca.org/eca_resources/Conference_Reports_and_Other_Documents/nepad/NEPAD.htm [hereinafter NEPAD].
3. This includes queries into what measures may be employed to achieve the stipulated economic growth without alienating the political regimes given the peculiar sensitivity of African political regimes to any perceived loss of sovereignty.

ment, it does not address underlying issues that have led to and perpetuate the current endemic problems within the continent.

It is trite to say that for any international framework such as NEPAD to be effective, a certain measure of accountability and measurability of its objectives is required. This presumes the parties subscribe to certain fundamental principles, namely an overall consciousness and respect of international principles. The article briefly addresses the implementation strategies required for integrated economic growth including the role of the African Union; the African Peer Review Mechanism (APRM); and other tools for economic supervision, surveillance, and integration.

It is argued that while the NEPAD strategy presently succeeds in redirecting attention to the need for African economic rejuvenation and integration, it fails to provide a framework for the effective translation of such attention into lasting action. It is argued that the goals of the NEPAD strategy can only be achieved if it is substantially modified; incorporated; and implemented by existing regional, sub-regional, and national frameworks. It is further suggested that the experience of previous and ongoing efforts at regional economic integration and regulation points to the need for a new commitment to the implementation of the proposed strategies.

II. THE NEW PARTNERSHIP FOR AFRICA'S DEVELOPMENT

A. GOALS AND OBJECTIVES

The stated primary objectives of NEPAD are articulated in the preamble of the NEPAD document and in the long-term objectives.⁴ These objectives include the eradication of poverty in Africa, the placement of African countries, both individually and collectively, on a path toward sustainable growth and development, the halting of the marginalization of Africa in the globalization process, and the promotion of the role of women in all activities. Article 68 sets out the following interim goals to be achieved by 2015:

- (1) to achieve and sustain an average GDP rate of above 7 percent per annum for the next fifteen years; and
- (2) to ensure that the continent achieves the agreed upon UN Millennium International Development Goals (IDGs).⁵

NEPAD focuses on the creation of conditions conducive to investment, growth, and development through the overhaul of present economic conditions and the institution of programs for accelerated development. It is premised on African states, and in particular their leaders, making commitments to economic growth, good governance, democracy, human rights, and the peaceful resolution of conflict and instability within the continent. NEPAD postulates that action must be undertaken in several critical sectors in order to achieve the objectives of African economic de-

4. NEPAD, *supra* note 2, ¶ 67.

5. See G.A. Res. 55/2, U.N. GAOR, 55th Sess., U.N. Doc. A156/326 (2000).

velopment. These critical sectors include infrastructure, education, health, agriculture, and information and communications technology.

In order to finance the development of these sectors, resources must be mobilized both within and outside the continent by different means including increased domestic savings, capital inflows, debt relief, increased targeted Overseas Development Assistance (ODA) flows, and private capital. There is also an emphasis on better management of public revenue and expenditure.

B. THE HISTORY AND FORMATION OF THE NEPAD

The NEPAD is a consolidation of two main papers, namely the Millennium Partnership for the African Recovery Program (MAP) and the Omega Plan for Action (Omega Plan).⁶

The MAP was developed primarily by Heads of State and Government from South Africa, Algeria, and Nigeria. They proposed a plan for sustainable development based on the implementation of strategic initiatives in four key areas: maintenance of peace, security and governance; diversification of Africa's production and exports; investment in infrastructure; and development of financial mechanisms. After extensive lobbying and debate, the MAP was revised a number of times to its final version, MAP draft 3b.

Concurrent with the development of the MAP, the Omega Plan was developed by President A. Wade of Senegal and first presented at the Franco-Africa Summit in Yaoundé, Cameroon in January 2001. It postulated that given Africa's difficulties, a new strategic vision based on a comprehensive and realistic program was vital for Africa's recovery. It detailed strategies for needs assessment, financing, and action in given priority sectors. These sectors were identified as basic infrastructures, education, health, and agriculture.⁷ It established a target for the alleviation of poverty of a mean annual growth rate exceeding 7 percent.⁸ A unique feature of the Omega Plan was its institutionalization through the creation of a board of directors comprising debtor and creditor representatives.⁹ The MAP draft 3b and the Omega Plan were subsequently consolidated and presented under the title "A New African Initiative: Merger of the Millennium Partnership for the African Recovery Program

6. *Millennium Partnership for the African Recovery (Map 3A and Map Draft 3B) (DATE)*; *Omega Plan* (Sept. 2001), available at <http://www.nepad.org.ng>; *Constitutive Act of the African Union*, OAU Doc. CAB/LEG/23.15 (May 26, 2001), available at <http://www.africa-union.org> [hereinafter *African Union*]; Treaty of the African Economic Community, June 3, 1991, 30 I.L.M. 1241, available at http://www.au2002.gov.za/docs/key_oau/aectreatl.htm.

7. *Omega Plan*, *supra* note 6, ¶ 29.

8. *Id.* ¶ 19. This plan primarily targeted economic growth and development. It argued strenuously for development within the five sub-regions under the OAU, UNECA, and the ADB.

9. This corporate style board was to include a representative from each of the African sub-regions as stipulated under the OAU Charter as well as representatives of the IMF, World Bank, European Union, Japan, the United States, and Canada.

and the Omega Plan for Action (NAI)". The NAI was adopted at the OAU/AU Summit of the Heads of State and Government in Lusaka, Zambia, and was subsequently renamed the New Partnership for Africa's Development.¹⁰

C. THE STRUCTURE OF THE NEPAD

The NEPAD operates within a three tier governing structure as follows:

- (1) The Heads of State and Government Implementation Committee (HSGIC) is comprised of twenty states, which meet three times per year.¹¹ Its mandate includes implementing the NEPAD and developing a strategic plan for marketing and communicating its objectives at the national, sub-regional, continental, and international levels. The Lusaka Summit designated NEPAD as a project of the OAU/AU and created procedures to reinforce this relationship.¹² These include ensuring that the Implementation Committee reports annually to the AU Assembly,¹³ the AU Chair and Secretary General are ex-officio members of the Implementation Committee, and the AU Secretariat participates at Steering Committee meetings;
- (2) The Program of Action Steering Committee is comprised of the personal representatives of the five initiating Presidents. Its mandate is to develop Terms of Reference for identified programs and projects as well as overseeing the Secretariat; and
- (3) The Secretariat is the operational arm of NEPAD. It comprises a small, full-time core staff based in South Africa. It has several functions including liaison and coordination as well as administrative and logistical outsourcing of work on technical detail to lead agencies or consultants.

10. Declaration on the New African Initiative, July 4, 2001, AHG/Decl. 1 (XXXVII), available at http://www.africa-union.org/Official_documents/Heads%20of%20state%20Summits/Hog/HogAssembly2001.pdf [hereinafter AHG/Decl. 1]; *Communiqué of the Meeting of the Implementation Committee of the Heads of State and Government of the NEPAD* (Oct. 23, 2001), available at <http://www.uneca.org/nepad/Communique/htm>.

11. These include the five initiating states, including South Africa, Nigeria, Algeria, Senegal, and Egypt. The other fifteen states are drawn from the five regions of Africa including North Africa, West Africa, Central Africa, East Africa, and Southern Africa.

12. AHG/Decl. 1, *supra* note 10, at 27-30, paras. 9-10. Prior to this, the OAU/AU featured in the NEPAD only as a resource organization to support NEPAD in the implementation of its initiatives. See NEPAD, *supra* note 2, art. 201. Likewise the Constitutive Act of the AU does not mention NEPAD. A perusal of the MAP and Omega suggest that the intention of the parties was to create a separate plan for the fast track development of member states under a program outside of the OAU/AU structure. See, e.g., MAP, *supra* note 6, art. 104; Omega Plan, *supra* note 6, ch. V.

13. It is not clear what if any, effective control the AU Assembly exercises over NEPAD. Given the challenge of decision-making within the AU, which requires consensus or consent by two-thirds of the membership, the subservience of NEPAD thereto may hinder swift decision making required for the implementation of NEPAD initiatives.

In addition to the structures identified above, a number of Task Teams were established. The purpose of these teams was to develop specific, detailed, and practical projects and programs—in conjunction with the agencies identified as lead agencies—for the subsequent HSGIC meetings to consider in the priority areas identified. These projects include capacity building on peace and security; agriculture and market access with the OAU/AU; economic and corporate governance with UNECA; and infrastructure, central bank regulation, and the creation of financial standards with the ADB.¹⁴ A Sub-Committee on peace and security headed by the South African President was established for addressing conflict prevention, management, and resolution issues.¹⁵

The leaders also agreed to establish parameters for good political and economic governance and to consider an appropriate mechanism for peer review. This, as we shall see later, is a key feature of the NEPAD strategy.

D. THE NEPAD INITIATIVES

The NEPAD can be broadly separated into two distinct parts. In the preamble, the history and present status of Africa's economy is analyzed. The authors attempt a critical analysis of the issues that have contributed to the underdevelopment of Africa. It also points to the need for any initiative seeking to reverse Africa's underdevelopment to be African initiated, led, and controlled. In the second substantive part, various initiatives are set out for the realization of the goal of African economic integration and development. These are categorized into various initiatives and key themes as follows: (1) Peace and Security Initiative; (2) Democracy and Political Governance Initiative; (3) Economic and Corporate Governance Initiative; (4) Sub-regional and Regional Approaches to Development; (5) Human Resource Development Initiative; (6) Environment Initiative; (7) Capital Flows Initiative; and (8) Market Access Initiative.

Each initiative includes a statement of objectives and a plan of action. They are interspersed with statements of priority and methods of achieving the stated objectives. Thus, for example, under the human resource development initiative, NEPAD lists poverty reduction, the education gap, the brain drain, and health as primary areas. These initiatives mark the critical areas identified by the authors of the document as being vital to the development of Africa's economies. The economic initiatives are discussed later in chapter 3.

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14. From a perusal of the purposes of the task forces, the NEPAD strategy appears more as a co-ordinator of already existing programs under various bodies, rather than a new initiative. The value added by such co-ordination, if any, is questioned.
 15. *Cf.*, CHARTER OF THE ORGANISATION OF AFRICAN UNITY art. III(f), VIII(a), 479 U.N.T.S. 39 [hereinafter CHARTER]. Articles III(f) and VIII(a) adopted the Conference on Security, Stability, Development and Co-operation In Africa (CSSDCA). Additionally, the subsequent creation of the CSSDCA unit implemented the objectives of promoting peace, security and good governance in Africa.

It is imperative however at this stage to address the status of NEPAD as an instrument of international law capable of generating compliance and implementation. The attainment of NEPAD's objectives is inextricably bound to its qualitative nature as a binding instrument. In order to determine the latter, one must peruse the document's position as an instrument of international law.

E. THE NEPAD AS AN INSTRUMENT OF INTERNATIONAL LAW

The NEPAD strategy moves away from the traditional hard law¹⁶ binds of treaties encapsulated in the RECs and other economic initiatives, towards a soft law mechanism. An examination of the reasons behind this shift, which reflects current legal thinking on the best mode of articulating international economic law instruments, reveals that the purpose thereof is not conventional and itself leads to the question of implementation and enforceability of the NEPAD.

Nations approach international economic relations in what may appear to be a contradictory fashion. While affirming their desire to confront economic challenges collectively, they simultaneously limit their obligations to take remedial action by retaining discretion over the scope of such duties and avoiding legally binding norms.¹⁷ Proponents of economic soft law instruments argue that such instruments create a regulatory framework while retaining the necessary flexibility to allow countries to manoeuvre or manipulate their local circumstances to achieve these goals.¹⁸ These instruments of political expression articulate urgent matters in an acceptable form for all signatories with the expectation that they will lead to economic activities.¹⁹

Scholars generally classify soft law instruments into three broad categories. R. R. Baxter lists these categories as:

- (1) International agreements, which state only generalized and non-specific hopes and wishes for the continuing relationships among the parties. These agreements are characterized by vague language and a failure to set specific goals. Signatories are aware that these agreements stand only *rebus sic stantibus*. If any circumstances change, there is no obligation to fulfil the terms of the agreements. These agreements survive largely by the perception of signatory states concerning mutual advan-

16. For a comparative discussion on the distinctions between hard law and soft law, see R. R. Baxter, *International Law in Her "Infinite Variety,"* 29 I. C. L. Q. 549, (1980); Arnold D. McNair, *The Functions and Differing Character of Treaties*, 11 B. Y. B. I. L. 100, (1930).

17. Tadeusz Gruchalla-Wesierski, *A Framework for Understanding "Soft Law,"* 30 McGill L. J. 37, 40-42 (1984).

18. Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 I. C. L. Q. 850, 866 (1989).

19. Such instruments or declarations may lead to the subsequent adoption of hard law instruments as the Establishment of a New Economic Order and the subsequent Charter of Economic Rights and Duties of States, which arose there from or remain as hortatory statements.

tages derived there from, political expediency, or economic reward. They are subjective and dependent wholly on goodwill rather than on enforceability.²⁰

- (2) International agreements that include statements intending to bind parties to specific obligations expressed within a non-binding framework. Examples of such agreements include the Treaty establishing the European Economic Community (Treaty of Rome),²¹ which adopts certain regulations and directives for immediate implementation,²² as well as exhortations to create new institutions or further research and drafting of agreements. These are the so called *pactum de contrahendo*.
- (3) Hortatory provisions are those that carry no legal sanction but are rich in intent and content of the parties. These provisions in an agreement are more than empty expressions of desired relations, but rather create expectations of nations to undertake certain activities. However, the lack of enforcement mechanisms, whether institutional or ad hoc, reduces these provisions to the status of hortatory provisions.²³

Most arguments against the use of treaties to determine state obligations rest on the premise that states themselves will shy away from being bound to specific, enforceable legal norms. It is perceived that the preferred instrument for the articulation of international economic norms is soft law agreements.²⁴ The creation of NEPAD as soft law appears in line with this rationale. It is not clear whether a hard law instrument would perforce generate compliance within the African states. The Treaty for African Economic Community (AEC Treaty) for example, provided very specific and ambitious plans, which were not fulfilled within the given period. In a bid to avoid this pitfall, the NEPAD strategy was drafted as a broad based generalized agreement.²⁵

This argument raises a number of issues. The first is the question of the efficacy of NEPAD in the face of the limited success of existing hard law instruments such as the Treaty establishing the AEC and the various Regional Economic Communities and arrangements.²⁶ The simple creation

20. These have been referred to as political treaties. See McNair, *supra* note 16, at 100; AUST, *LAW OF TREATIES* 501-02, 13 (1961). These include such instruments as the Atlantic Charter or the Yalta Agreement, which clearly do not create any legal obligations for the signatories.

21. Treaty of Rome, Mar. 25, 1957, 294 U.N.T.S. 17, available at <http://www.hri.org/docs/Rome57/>.

22. *Id.* arts. 85-86. Examples include articles 85 and 86 dealing with rules on competition in the European common market.

23. See Baxter, *supra* note 16, at 552-556. The characterization of the above agreements should not in any way be seen to undermine the far reaching non-legal effects of enforcement of soft law instruments. The above merely provides a guideline for the perusal of the NEPAD strategy and for its provisions.

24. See generally, Chinkin, *supra* note 18, at 854; Baxter, *supra* note 16, at 556.

25. See, e.g., Ravi Kanbur, *The New Partnership for Africa's Development (NEPAD): an Initial Commentary*, Cornell University, available at <http://www.people.cornell.edu/poverty/Kanbur/POVNEPAD.pdf> (last visited Aug. 31, 2004).

26. See chapter two of this article for an outline of the existing RECs and their role in economic integration.

of a soft law instrument without addressing the issue of the endemic non-compliance with earlier initiatives raises the contention that the purpose of the earlier treaties may be seen not as frameworks for action, but rather as political statements to which parties do not intend to adhere or to be bound. If so, then the implementation of the NEPAD and compliance thereto may be questioned.

Second, the recent history of African economic development is littered with numerous initiatives similar to the NEPAD strategy. However, these have been slow to fulfil their mandates within the continent. The failure by the proponents of NEPAD to critically analyze and redress the factors that led to the failure of these initiatives may lead to the recurrence of these factors to the detriment of NEPAD.²⁷ The success of NEPAD hinges strongly on its avoidance of the pitfalls of earlier strategies in addition to the incorporation of its objectives into the regional communities and exiting efforts at integration.

III. INTEGRATION IN AFRICA

The traditional concept of the nation state as an independent, autonomous entity has been eroded in the past twenty years with globalization and its attendant effects on the domestic and international trading systems.²⁸ Technological advances, complex cross-border private interactions by enterprises, and increased interdependence of markets have created new opportunities and challenges for national entities.²⁹ Nations adapt to these new economic challenges through the strategic devolution of some existing powers in order to preserve their territorial integrity and national sovereignty from the threat of possible implosion.³⁰ In recent

27. Cf. *United Nations Program of Action for Africa's Economic Recovery and Development*, U.N. GAOR, 44th Sess., 77th mtg., U.N. Doc. A/RES/46/151 (1991); *United Nations New Agenda for the Development of Africa in the 1990s*, U.N. GAOR, 48th Sess., U.N. Doc. A/48/334 (1993) (both of which bear strong similarities to the NEPAD in scope, intention and goals, but were not successful for reasons including the duplication of activities at the continental and regional levels).

28. For example, the demise of communism, the development of market economies replacing state controlled markets, the advent of globalization, and the increased interdependence of nations through trade in goods and services have led to the increased focus on international trade and external markets.

29. Such challenges are not peculiar to developing or emerging economies. Increased efficiency in communications has affected labour markets in developed countries by enhancing access to cheaper service provision in developing countries. Conversely the removal of barriers to trade and investment has opened hitherto closed economies to the challenges of foreign enterprises. See generally KENICHI OHMAE, *THE END OF THE NATION-STATE: THE RISE OF REGIONAL ECONOMICS* 7 (Harper Collins 1995); WILLIAM GREIDER, *ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM* 11 (Penguin Books 1998).

30. An example of this adaptation is the voluntary cessation of certain powers to a supra-national entity as exemplified by the European Union and the creation of regional bodies to enhance trade and commerce within regions. Nations unable to manage the internal and external pressures have in extreme cases collapsed and continue to exist only by territorial definition, for example, Somalia. See, e.g., RUMU SARKAR, *DEVELOPMENT LAW AND INTERNATIONAL FINANCE* 13-32 (Kluwer Law International, 2d ed. 2002).

years, this has led to the revival of regional economic bodies and regulation of international activity. This, in turn, has brought to focus the role of international economic law.

International economic law covers a very broad range of matters.³¹ It has been divided broadly into transactional and regulatory categories. Transactional international economic law relates primarily to transactions by private parties and focuses on informing and aiding trans-national economic activity by private actors.³² Regulatory international economic law emphasizes the role of government and public bodies in creating and enabling an environment for transactions, the regulation of such transactions, and the engagement with other public bodies and governments in harmonization of rules of engagement in international transactions. It therefore acts as a basis on which transactional international economic activities may proceed.³³ The latter form of international economic law is the focus of the NEPAD, and is largely in response to increased regional integration and the prevalence of global and regional economic communities.

A. REGIONAL INTEGRATION WITHIN THE AFRICAN CONTEXT

There are two main schools of thought with regard to integration. The first is the federalist school. This is a politically oriented theory that promotes the adoption of common constitutions, the creation of joint institutions of local or central government. The second is the functionalist school, which places emphasis on the predominance of economies over politics and advocates gradual economic integration, which may lead to political integration through request by and predominantly for the benefit of economic powers.³⁴

Economic integration *strictu sensu* relates to the production, distribution, consumption, and the facilitation of economic activity across borders. Economic integration may vary between free trade areas, customs unions, common markets, and economic union to total economic integration.³⁵ Developing countries have pursued economic integration for the primary purposes of economic growth and development, the pooling of

31. These may range from the private international economic transactions including trade, financial services and the attendant issues of property, accruing party rights and obligations, to government regulation of financial and economic matters, and related dispute settlement. See generally John J. Jackson, *Global Economics and International Economic Law*, 1 J. INT'L ECON. L. 1, (1998).

32. Some writers emphasize the dominance of the transactional aspect of international economic law as the proper domain of international law. See, e.g., RONALD H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 119-85 (University of Chicago Press 1988); C.A.E. Goodhart, *Economics and the Law: Too Much One-Way Traffic?*, 60 MODERN L.R. 1, 1-7 (1997).

33. See, e.g., JOHN J. JACKSON, *THE JURISPRUDENCE OF THE GATT AND THE WTO* 10-16 (Cambridge University Press 2000).

34. See generally AFRICAN REGIONAL ORGANIZATIONS (Domenico Mazzeo ed., Cambridge University Press 1984).

35. See, e.g., BELA BALASSA, *THE THEORY OF ECONOMIC INTEGRATION* 2-4 (Greenwood Press 1961).

common resources, increased economies of scale and scope, and ease of cross-border mobility including technology and access to markets.

Integration in Africa can be traced to the prevalence of colonial administration of protectorates or spheres of influence through common administrative bodies, laws, finance, and currency among other areas.³⁶ After decolonization, integration was pursued largely for federalist purposes and later, with increasing desire for economic growth and development.³⁷

B. EFFORTS TOWARD CONTINENTAL AND REGIONAL INTEGRATION

The African economic landscape has a plethora of overlapping regional economic communities. On a continental basis, there have been two main participants, namely the United Nations Economic Commission for Africa (UNECA) and the African Union, which was formerly known as the Organization for African Unity (OAU).

UNECA's mandate is to support the economic and social development of African states, foster regional integration, encourage beneficial exploitation of natural resources, and promote international cooperation for Africa's development.³⁸ In 1963, the OAU was formed as a supra-national African body to foster cooperation and some form of federal integration. Its mandate was to promote unity and to coordinate African economic, diplomatic, defence, education, and health policies.³⁹ Integration was to be pursued at regional levels through five main Regional Economic Communities (RECs) set within geographical proximity. The OAU was replaced by the African Union (AU) through the adoption of the Constitutive Act of the African Union dated July 2001.⁴⁰ However, the concept of economic development through the RECs was maintained within the AU.

C. REGIONAL AND SUB-REGIONAL ECONOMIC COMMUNITIES

Regional cooperation received favour because it was viewed as most competent to address problems specific to the different regions. Through the RECs, regions could pursue such trade, industrial, and economic growth as best suited their situations. In turn, this would enhance conti-

36. For example, British East African colonies shared a single currency and had service sharing arrangements; Central African territories permitted the free movement of factors of production within their boundaries as did the British West Africa. For a more detailed discussion on the colonial administrative integration within Africa, see Satish C. Mehta, *African Unification: Past Experience and Future Promise*, 41 *AFRICA Q.* 89 (2001). Indian Council for Cultural Relations, Delhi at page 90.

37. These range from the OAU to the regional economic communities the latter of which have continued largely on the basis of historical, geographical and political lines but motivated by enhancement of intra-regional trade such as the membership of ECOWAS and the EAC.

38. Established in 1958 as a UN body for regional growth in Africa.

39. CHARTER, *supra* note 15, art. II, §§ 1-2.

40. The Constitutive Act of the African Union was adopted by the 36th Ordinary Session of the Assembly of Heads of State and Government July 10-12, 2001, in Lome, Togo.

mental growth thus achieving the objectives set out by the OAU.⁴¹

There are currently fourteen RECs within Africa, seven of which are considered larger communities with the other seven serving as subsets of these larger ones. The seven major RECs include: (1) AMU – Arab Maghreb Union (five members); (2) COMESA – Common Market for Eastern and Southern Africa (twenty members); (3) ECCAS – Economic Community of Central African States (ten members); (4) ECOWAS – Economic Community of West Africa States (fifteen members); (5) CEN-SAD – Community of Sahel-Saharan States (eighteen members); (6) IGAD – Inter-Governmental Authority on Development (seven members); and (7) SADC – Southern African Development Community (fourteen members).

The other seven are largely sub-regional communities within the above seven RECs, including: (1) CEMAC – Central African Economic and Monetary Community with six members all belonging to ECCAS; (2) CEPGL – Economic Community of the Great Lakes Countries with three members also belonging to the ECCAS; (3) EAC – East African Community with three members, two belonging to COMESA and one to SADC; (4) IOC – Indian Ocean Commission with five members, four belonging to COMESA and one to SADC; (5) MRU – Mano River Union with three members belonging to ECOWAS; (6) SACU – Southern African Customs Union with seven members, five belonging to SADC and two to COMESA; and (7) UEMOA – Western African Economic and Monetary Union with eight members all belonging to ECOWAS.

Of the fifty-three African countries, seven are members of one REC, twenty-seven are members of two RECs, eighteen are members of three RECs, and one is a member of four RECs.⁴²

The duplication of objectives and activities of the RECs became clear as member states pursued activities within overlapping regions.⁴³ In recognition of the overlap, the treaty establishing the African Economic Community (AEC) set out an objective of rationalizing and harmonizing the RECs to attain the objectives of economic growth.⁴⁴

41. AFRICAN REGIONAL ORGANIZATIONS, *supra* note 34, at 7.

42. Information obtained from the UNECA, *Annual Report on Integration in Africa 2002 Overview*, Addis Ababa, Economic Commission for Africa, a full report may be obtained from the UNECA website, at www.uneca.org (last visited Aug. 31, 2004).

43. The Treaty Establishing the East Africa Community, Nov. 30, 1999, art. 5, §§ 1–2, states that the Partner States undertake to establish a customs union, a common market and subsequently a monetary union with the ultimate objective of a political federation. Two of the signatories to the EAC are also in the COMESA, while one is a member of the SADC. Both treaties have similar objectives to that of the EAC. *Cf.* COMESA Treaty, [DATE], art. 4, §§ 1, 4, *available at* www.comesa.int/about/treaty/view; Southern African Development Community Declaration and Treaty (SADC), Aug. 17, 1992, art. 5, §§ 1(d)-f, *available at* www.sadc.int/index.php?action=A1001&page_id=declaration_and_treaty_of_sadc.

44. Treaty Establishing the AEC, *supra* note 6, ch. IV.

While the objective of economic development has now become the focus within African RECs, the influences of both functionalist and federalist integration theories is apparent within the NEPAD.

D. THE NEPAD AND THE AFRICAN UNION

NEPAD has been categorized as a project for the realization of the AU's goals.⁴⁵ The objectives of the AU as stipulated in article 3 of its Constitutive Act include the acceleration of political as well as economic integration, thus bringing to focus the concurrent prevalence of both federalist and functionalist integration themes.⁴⁶ Both the AU and NEPAD are charged with the articulation of African aspirations for integration both within the continent and on a global level⁴⁷ and the pursuit of economic development within the continent.

The AU has the capacity to create specialized technical committees to undertake any function of the Executive Council. Such functions include foreign trade, agricultural and agro-forestry production, education, and health and human resource development. Pursuant to this power, the AU created specialized technical committees for, among others, monetary and financial affairs, transport, communication and tourism, and rural economy and agricultural matters. These committees are composed of ministers or senior officials competent in their respective fields and instructed to prepare, submit, and where approved, implement projects within their particular fields of competence. In addition, the committees serve to coordinate and harmonize projects and programs of the AU.⁴⁸

A number of observations may be made from the foregoing. First, inconsistency in reporting structures makes unclear the mandate of the AU to oversee activities of the NEPAD. It may be argued that these AU committees composed of government officials would have the power to censure and oversee the activities of NEPAD. However, the reality may be that given the political seniority of the NEPAD HSGIC, mandated to implement the NEPAD objectives, any attempt to regulate the latter's activities may be met with hostility or simply ignored. This reporting inconsistency is particularly disturbing given that the heads of state and government who ratified the AU also established an initiative based on the very mandate of the AU committees. This may further underscore the observation that the NEPAD was not originally perceived as a program of the AU and was instead viewed as a separate initiative.

Second, this duplication of mandates between the AU and the NEPAD programs has a number of consequences on both the implementing body

45. AHG/Decl. 1, *supra* note 10.

46. *African Union*, *supra* note 6, art. 3, §§ (c), (d) & (j).

47. *See id.* art. 3(d); *cf.* NEPAD, *supra* note 2, art.152, which mandates the respective representatives to articulate the common position of the African people and with the OECD/DAC respectively. It may be assumed from a reading thereof that the AU delegates its mandate to articulate the latter position to the NEPAD although there is no clear resolution in support of such assumption.

48. Compare the NEPAD reporting structure to the Assembly above.

and the participating state. There is wastage of human and economic resources through the creation of separate bodies tasked with pursuing the same or similar objectives. The resulting effect is the removal of two main factors of economic development from already weak African economies namely education and specialized human and financial resources. Further, implementation of parallel programs within member states is costly for participating countries both in terms of financial and capacity resource mobilization. These and other concerns on value added by NEPAD detract from its objective as an initiative to redress the ailing African economic health.⁴⁹

IV. ECONOMIC INITIATIVES OF THE NEPAD

While the eight core NEPAD initiatives⁵⁰ borrow heavily from earlier strategic plans for Africa, they also introduce a number of issues on African economic development. These include domestic resource mobilization and capital flows in Africa as well as a number of points on the search for markets. However, the NEPAD strategy does not appear to address either the causes of the failures of earlier programs with a view to avoiding the same pitfalls or the need to bring to the forefront much needed novelty in tackling the issues raised or the broader concerns of economic growth and integration in Africa. A short discussion follows concentrating on the three core initiatives of economic and corporate governance, market access, and capital flows initiatives.

A. ECONOMIC AND CORPORATE GOVERNANCE INITIATIVE

The economic and corporate governance initiative⁵¹ seeks to promote a set of concrete and time bound programs aimed at enhancing economic and public financial management as well as corporate governance. The steps to achieve this include: (1) a review of economic and corporate governance practices in various countries and regions with recommendations on appropriate standards and codes of good practice for implementation by African states; and (2) the development by member countries of a program for improving public financial management and targets, with self assessment mechanisms.

The initiative looks to regional and sub-regional economic groups for the activation of economic growth through pooling of resources and in-

49. NEPAD argues that while the issues affecting Africa have continued to persist, its contribution is the creation of a novel and innovative approach to tackling the same. However, the novelty of the NEPAD approach has been questioned by a cross-section of African scholars, politicians, and others. See, e.g., Henning Melber et al., *The NEPAD – African Perspectives* 14-22 (2002); Ronald Hope Kempe, *From Crisis to Renewal: Towards a Successful Implementation of the NEPAD*, 101 *AFRICAN AFF.* 387 (2002); P. Anyang' Nyong'o, *Democracy and Political Leadership in Africa in the Context of NEPAD* (Aug. 31, 2002), available at http://www.jiia.or.jp/pdf/conference/020831_nyongo.pdf.

50. NEPAD, *supra* note 2, ¶¶ 86-98.

51. *Id.* ¶ 94.

tra-regional trade through promotion of common projects, rationalization, and harmonization of economic and investment policies and practices. It identifies five priority areas including infrastructure, human resources, health, agriculture, and access to the markets of developed countries for African exports.⁵²

The underlying objectives of NEPAD appear to be to encompass the promotion of Western-style market economies in Africa.⁵³ Herein rests one of the main pitfalls of Africa's development theories. Rather than defining development in relation to Africa, the leadership places it on a development path, which has so far failed its people by maintaining structures that support its underdevelopment. By maintaining this inconsistency, the NEPAD drafters failed to recognize two things; first, that developed countries passed through centuries of development including social or welfare states to attain their present status; and second, that developed countries created the legal, regulatory, and other structures that enabled them to harness the resources available for them to accelerate their particular form of development.⁵⁴ The transplantation of economic goals and strategies not suitable for the continent has proven unsuccessful in the past. By reintroducing them, NEPAD drafters make a spirited but imprudent attempt at 'new' African development with old unsuccessful means.

The initiative addresses the issue of corporate governance as though it is neutral. Corporate governance is a reflection of both public policy considerations and private institutional, legal, and commercial relationships.⁵⁵ The function of corporate governance within an integrated region is to harmonize corporate practices. This presumes the presence of a willingness to harmonize laws relating to corporate practices and business generally. While there is no single set of international principles, various bodies have set out guidelines on corporate practices.

Presently, international standard setting is largely undertaken by international professional or specialized institutions within the developed economies.⁵⁶ It is also noteworthy that there is a high presence of MNCs within the African economies. These are, for the most part, subject to the corporate governance rules of their regions of origin or principal places of business. It is not clear whether the NEPAD foresees the creation of a separate set of rules for local firms, or the adoption of existing interna-

52. *Id.* ¶ 98.

53. *Id.* ¶ 185.

54. *See generally* HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 109-59 (Basic Books 2000).

55. Corporate governance rules guide investors in the particular region of operation on the banking, securities, accounting structures, relationships and the attendant risks.

56. *See, e. g.*, The Basle Committee and IOSCO for Capital markets, at www.iosco.org the IAIS on insurance and the IASC on accounting. The financial stability forum was formed to oversee, collate and coordinate institutional, corporation and exchange of information.

tional standards. The foregoing suggests that the issues of corporate governance are not suited for an initiative such as NEPAD but rather a body such as the ADB, the African Capacity Building Forum and other regional bodies. Such a body would be best suited to assess and adapt to the existing corporate realities within Africa and continually address these over time while coordinating and advising them on the effects of certain practices on the African economies.⁵⁷

NEPAD does not address the endemic problem underlying economic stagnation in Africa—corruption and economic spoliation. Economic spoliation has been defined as an illegal act of depredation for private means by constitutional rulers, public officials, and their close associates in the private sector.⁵⁸ The effects of economic spoliation on the African economy have been devastating. There are vast amounts of capital hidden in safe havens in Western Europe and North America that serve to devastate the local economies.⁵⁹ The gaping hole left in the economies must be buttressed by debt. However, the borrowed funds are then themselves available for plunder. The result is that funds set aside for economic growth and development are diverted to loan repayment and graft. In order to obtain funds, governments look toward increased taxation and decreased public expenditure, which drives away investments in services and goods.

The NEPAD addresses public financial management by providing a program for its improvement,⁶⁰ but it does not address the indigenous elite and the safe haven nations, two primary players in economic spoliation. While the local elite commits the misappropriation, the handling has often been conducted through the tacit or express assistance of the international financial community.⁶¹

This strategy does not provide for the prevention of corruption and economic spoliation nor does it address the repatriation of stolen or expropriated funds. Given the vast sums of money involved and the fact that the funds are often expropriated with the collusion of government authorities, this would constitute a logical area to address. The pledge by

57. Issues such as privatization of State Operated Enterprises (SOEs) may be best addressed by such a body. This may also provide a forum to address these issues and to engage collectively with the IFIs in the articulation of the salient issues arising from donor instigated corporate reforms.

58. Ndiva Kofele-Kale, *A Submerged Challenge for IFIs: A Prescription of Economic Spoliation*, in *EMERGING FINANCIAL MARKETS* at 72. Please contact the author of this article for specific publication information.

59. Examples include Mobutu and the systematic robbery of Zaire; Nigeria and the rule of Abacha where he was alleged to have looted over UK£ 3.4 billion. See Ndiva Kofele - Kale, *The Right to a Corruption-Free Society as an Individual & Collective Human Right: Elevating Official Corruption to a Crime Under International Law*, in *A NEW INTERNATIONAL FINANCIAL ARCHITECTURE: A VIABLE APPROACH?* 293 - 331 (John B. Attanasio & Joseph J. Norton eds., 2001).

60. NEPAD, *supra* note 2, ¶ 61.

61. It is contended that through the provision of safe havens and a reluctance to prosecute and repatriate persons and funds, the international community acts as a co-conspirator in this looting.

the African heads of state and government to take responsibility, collectively and individually, for the accomplishment of certain goals of NEPAD provides a unique opportunity for the leaders to pledge their commitment to the eradication of corrupt practices. While the nature and significance of this pledge is discussed in chapter four, it is clear that a statement to this effect would serve as a very powerful expression of the will of the leaders to address the problem.

In addition to the foregoing, other methods are available to address the issue of economic spoliation. A declaration that economic spoliation constitutes an international crime and strong recommendations for the adoption of domestic legal and regulatory measures for the prevention or reduction of corruption would serve as a strong step toward the eradication of such economic spoliation. The latter could be included in the APRM.⁶² The envisaged partnerships with developed countries should address the issue of the safe havens.⁶³ Economic growth may itself provide more opportunities for corruption or spoliation as it expands both the incentives and the opportunities. Privatization, for example, has been seen as an opportunity for large-scale bribery, suggesting that in the absence of very stringent regulation, corrupt practices would inevitably persist, thereby negating the efforts placed on development. The economic and corporate governance initiative thus leaves unaddressed many of the prominent issues while promoting what appears to be a collage of different ideas, which although vital, fall short of providing a holistic approach to the challenges of African economic growth.

B. THE CAPITAL FLOWS INITIATIVE

NEPAD aims to achieve and sustain an average gross domestic product (GDP) of more than 7 percent per annum for the next fifteen years. In order to achieve its goal to reduce the percentage of people living in extreme poverty by one-half, NEPAD estimates that there is a need to fill an annual resource gap of 12 percent of its GDP or sixty-four billion dollars. It postulates that this can be achieved through a number of activities resulting from the capital flows initiative. These include: increasing domestic resource mobilization; debt relief; and ODA reforms and encouraging private capital to enable Least Developed Countries (LDCs) to

62. See, e.g., Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INTL. L. 470, (1999); Duane Windsor and Kathleen A. Getz, *Multilateral Cooperation to Combat Corruption: Normative Regimes Despite Mixed Motives and Diverse Values*, 33 CORNELL INT. L.J. 731, (2000) (discussing the use of peer review to uphold anti-corruption measures in the United States).

63. Evidence within the international environmental law regime suggests strongly that developing nations have the capability to generate the requisite consensus for the promotion of their concerns into instruments of international law. See generally COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 121-45 (Dinch Shelton, ed., Oxford University Press 2000).

achieve the international development goals.⁶⁴

The above initiative is proposed as a common action plan by all African countries that participate in NEPAD. The strong underlying theme of integration or combined action through the singular negotiation platform, for example, the ODA forum and the Financial Market Integration task Force, clearly points to a desire to pool together and act in accord. Once again, the initiative repeats the action plans of earlier development modules. Two issues that deserve noting are the domestic resource mobilization and the ODA and private capital flows initiatives.

1. *Domestic Resource Mobilization and the 'Capital Conundrum'*

The Capital Flows initiative addresses public funding and methods to increase the resources available to governments for public expenditure. However, it fails to address a number of underlying presumptions.

In particular, the call to increase national savings appears to be inconsistent with earlier statements within the NEPAD strategy. The agreement makes reference to the fact that over half of the African populace live on less than two dollars per day. If so, then any call for savings must presume either that the call for more savings is superfluous or that there is an underlying recognition of informal wealth within African societies.

Studies show that in many developing countries, a majority of the wealth held by so-called poor people is not recognized by the existing national laws and administrative systems. The effect is that the holders of such assets are marginalized from the benefits of formal legal and administrative recognition. Citing examples in the Middle East, North Africa, and South America, De Soto⁶⁵ shows how the majority of the wealth in these countries is locked out of the formal sector primarily through the inadequacy of legal and regulatory systems to appreciate the local business environment.

The legal systems, largely inherited through colonial importation, are cumbersome, complex, and relatively expensive. These factors serve as a hindrance rather than as a facilitator of economic activity. The result is that it is nearly impossible for the holders of such informal wealth to obtain credit, or to enforce rights under the formal legal systems. This has a two-fold effect. First, on the individual persons, it increases the cost of transactions and forces the individual to operate in a dual system, intra- and extra-legal. Second, the state is deprived of accessing the wealth. Therefore, the tax base is reduced to that which is held in the formal and invariably urban quarters. These include urban populations of workers, formal businesses, and what little capital and property is registered in the legal infrastructure.

The taxation of these groups is very high to provide service to a very large, non-contributing population. This situation is exacerbated when

64. Specific goals of the NEPAD initiative are based on the Millennium Development Goals of the United Nations.

65. DE SOTO, *supra* note 54, at 168-172.

the economies of these countries fall into recession. Job losses and falling production in main areas such as manufacturing, mining, and cash crop production leave governments with only two options—higher taxation of a shrinking tax base and external borrowing. Any call to mobilize domestic savings must address the issue of fully recognizing and assimilating informal wealth⁶⁶ into the domestic legal structures.

It is not necessary here to ‘reinvent the wheel’ as there are several fundamental pillars for the creation of the requisite environment for recognition and regulation of informal wealth into the formal sector. These include, among others: (1) clear and defined property rights (the issue here is often the recognition of existing property rights as well as the creation of simple, efficient, and effective processes for the registration of such rights. In the absence of recognized property rights, development is often cumbersome, costly and unplanned); (2) a legal and regulatory framework for the recognition and enforcement of agreements;⁶⁷ (3) adequate, accessible, and affordable financial infrastructure to support savings and borrowing by small scale business; (4) clear, reliable, and comprehensive public records with the concomitant structures to enable efficient issuing and updating of land titles; (5) regulation of trade through education, standard setting, artisan unions, legislative recognition of rights and obligations thereof⁶⁸; and (6) widening the tax base to include the vast majority of informal property and business related activities.⁶⁹

While these are not exhaustive, and are largely domestic, the creation of such frameworks or structures and standards to which the signatories of NEPAD may accede would enable the latter’s objectives to find grounding in reality and not remain rhetoric. Unfortunately, NEPAD capital flows initiative does not address this. By continuing to insist on enhancing the current modes of national savings and tax collection, NEPAD further disenfranchises the majority of the target population. It

66. The term informal here is used not to mean illegal wealth such as that obtained through criminal activity, but rather the capital held outside of existing legal and regulatory frameworks. Examples may include the largely unregistered housing and other properties in slum areas.

67. RUMU SARKAR, *DEVELOPMENT LAW AND INTERNATIONAL FINANCE* 18 (Kluwer Law International 1999), argues that strictly Lockean formalisation notions may should be softened and relax to permit a new Rousseauian social contract based on the established societal lines. The effect may be that the new face of the developing world may not culminate in the image of OECD countries but may take on a different and perhaps more relevant natural and uninhibited persona.

68. *See generally id.*; DE SOTO, *supra* note 64; JOSEPH J. NORTON, *FINANCIAL SECTOR LAW REFORM IN EMERGING ECONOMIES* (British Institute of International and Comparative Law and London Institute of International Banking, Finance and Development Law 2000); *THE ROLE OF THE STATE IN THE ECONOMY* (J. Stiglitz ed. 1990).

69. For an assessment on the impact of informal trade on national revenue loss, *see, e.g.*, Sam Katabaazi, *The Impact of Informal Cross-Border Trade on Food Security and Revenue: The Situation Uganda/Kenya Border* 2 (1995); SAM K. KALLUNGIA, *IMPACT OF INFORMAL CROSS-BORDER TRADE IN EASTERN AND SOUTHERN AFRICA* 1 (2001).

is not practical to suggest that there can be any increase in ODA to the levels hoped under the NEPAD strategy. Therefore, it is critical that the mobilization debate be expanded to involve the recognition of the informal wealth held outside of the existing legal and economic spheres of African countries.

2. ODA and Private Capital Flows

Traditionally, African countries have relied on ODA for domestic and regional development. However, it is clear that ODA is in decline.⁷⁰ This decline has been attributed to several causes including large government deficits in donor countries and the increasing debate on the politics and benefits of foreign aid. The prevalent use of conditionality-based loans has not yielded the expected tangible economic development in the recipient countries while the social devastation wreaked by the conditions has considerably weakened countries.⁷¹ While ODA has its advantages⁷² and its place in the process of development, Africa cannot expect to continue to rely on ODA for its development, let alone expect an increase thereof.

The development of a charter to govern the conditions for the disbursement of any ODA may serve to articulate a common African response to ODA conditionality and revise the current trends in ODA disbursement. Further, the proposed independent assessment mechanism, if accepted by creditors and debtors alike, may provide a forum for more favourable and immediate response to issues arising from ODA. However, such a charter and mechanism, if poorly negotiated, may have the adverse effect of creating yet another cumbersome assessment mechanism in addition to the existing ones without a clear benefit. While this avenue may be pursued, it appears more practical to move away from heavy reliance on ODA to the mobilization of domestic wealth and private capital flows, particularly FDI.

The NEPAD advocates the increase of private capital flows to Africa by arguing that these are an essential component of filling the resource gap. Several proposals to increase capital flows have been suggested including revising the perception of Africa as a "high-risk continent" through the promotion of peace and security; improving governance, infrastructure development, poverty reduction, and interim risk mitigation measures, which include credit guarantee schemes; and strengthening regulatory and legislative frameworks. Public Private Partnerships (PPPs) and harmonization of regional financial markets are also advanced in furtherance of this initiative.

70. Quoting WB reports, SARKAR, *supra* note 67, points out that ODA has tended to favor developing regimes of Latin America and East Asia bypassing sub-Saharan Africa.

71. See generally DAVID DOLLAR & WILLIAM R. EASTERLY, *THE SEARCH FOR THE KEY: AID, INVESTMENT AND POLITICS IN AFRICA* 546-68 (World Bank 1999).

72. SARKAR, *supra* note 67, at 76-106 (arguing that ODA based conditionality part by training and policy reform make the use of ODA to support long term macroeconomic policy, institutional and judicial reforms more viable).

The potential benefit of increased private capital flows is clear. Such investments enable importation of new technologies and create access to export markets. Foreign portfolio investment also imposes some fiscal discipline by forcing local markets to conform to practices and rules of international capital markets.⁷³ Where invested for long-term assets or infrastructure, such funds can act as agents for economic development. However, it cannot be expected, given the present risk and conditions of the region, that a heavy influx of long-term funds in the short term will exist. The majority of capital flows are likely to continue to be speculative and short term as investors continue to reassess risk and return.

The potential benefit of such short-term capital flows has been questioned following the Asian financial crisis of the 1990s. Some economists argue that short-term capital flows may increase the vulnerability of economies and damage fragile financial structures in the event of crises.⁷⁴ There is a need to ensure that such potential damage is mitigated or in some way buttressed.

Regional integration can provide some relief in this area. First, nations within the region may be able to monitor others' activities.⁷⁵ Second, these nations may have the greatest interest in intervening as the contagion effects are likely to be most virulent in the region of the country immediately affected. If this system intends to be effective, domestic, national, legal, and institutional structures must be established with the involvement of governments, central banks, deposit protection funds, and other public institutions such as pension or social security funds as well as private institutions. These legal and institutional structures must have well-defined functions and maintain an unfettered direction towards its fulfilment. Further, they must be harmonized within the regional framework. As argued later, the APRM can be very effective in this area if properly deployed.

C. THE MARKET ACCESS INITIATIVE (MAI)

The Market Access Initiative comprises eight components, which include the diversification of production, mining, manufacturing, tourism, services, private sector promotion, promotion of African exports, and the removal of non-tariff barriers.

For each of these, there are action points at the African and international level. Once again, this underscores the view of the NEPAD as an

73. According to World Bank reports private capital inflows to developing countries in the decade 1990 -1999 have comprised increase in FDI from \$24.1 billion in 1990, to \$192.0 billion in 1999, against fairly stable equity flows and declining debt thus underscoring the significance of private capital flows generally and FDI in particular. 1 WORLD BANK, GLOBAL DEVELOPMENT FINANCE 2000 36 (2000), available at www.worldbank.org/prospects/gdf2000/index.htm (last visited Aug. 31, 2004).

74. Koefele-Kale, *supra* note 59, at 33.

75. Monitoring could be through surveillance tools such as the African Peer Review Mechanism. The emergency activation techniques would serve as advance warning in the event of a likely or foreseeable financial/economic/political crisis.

instrument for integration. From a review of the action points, there is little new that has been added in the sphere of actions to achieve the set goals. The stated components have long been a part of the African agenda and the points of action generally pursued with limited success to promote the achievement thereof.

The Lagos Plan of Action highlighted attempts to diversify Africa's exports from primary goods to secondary or manufactured goods and services.⁷⁶ However, two decades later, the progress has not been as envisaged. The inclusion of this objective leads to a query into the methods perceived by the drafters of NEPAD as capable of overcoming past failures. The opportunity exists for NEPAD to bring about a new focus on innovative methods to achieve these goals that, in the end, may prove to be its greatest strength. Because the NEPAD strategy is non-specific about many of these actions,⁷⁷ it is not clear how they will be achieved and how funding for their operation is to be obtained.

NEPAD places heavy reliance on foreign funding and foreign markets as a panacea for the challenges to continental development. The weakness with this strategy is two fold. First, the funding may not be forthcoming. Second, there is a presumption that hitherto protected markets of developed countries will be opened to African products. Through the WTO process, Africa can negotiate, as a single block, for concessions enabling increased flow into markets of developed countries. If NEPAD intends to adopt this strategy, it must create specific targets, including the education and dissemination of information concerning the WTO. Special consideration is also warranted with respect to other relevant issues such as the mobilization of suitable advocates within the delegations to the WTO negotiations to ensure that African views are not only properly articulated but are reflected in the final agreement.⁷⁸ As an alternative and even more viable market base, NEPAD should consider the development of new markets to the south, an area populated with other developing countries.

While the foregoing is by no means a comprehensive assessment of NEPAD's economic and corporate governance and related initiatives, it highlights some inherent issues that require urgent attention to ensure NEPAD's effectiveness. In the absence of a resolution of these and other gaps within NEPAD at the African and international level, NEPAD risks becoming yet another well-intentioned strategy in the perilous landscape of African economic development.

76. Indeed this was envisaged in the Lagos Plan of Action, the Final Plan, the AEC Treaty and the OAU. See, e.g., *The Lagos Plan of Action*, ch. 13, (Apr. 28-29, 1980), available at www.uneca.org/adfiii/riefforts/ref/other2.htm.

77. Examples include the petition to developing countries to assist Africa in carrying out and developing its research and development capabilities in agriculture, which do not lay out any specific action plan thereby rendering them ineffectual.

78. Preliminary observations of the ongoing EU-SADC negotiations suggest that there is a clear advantage of regional negotiations particularly for smaller economies within the region.

V. IMPLEMENTATION AND ENFORCEMENT

As noted in chapter one, the distinguishing nature of international soft law instruments is their non-binding character. This characteristic does not preclude the potential effect of a soft law instrument in ensuring adherence to the agreed norms therein. A perusal of the African international law landscape suggests that soft law instruments have rarely been enforced. This may be attributed to a number of reasons, particularly member states' adherence to international law instruments.

A. MEMBER STATES APPROACH TO INTERNATIONAL LAW

By entering into regional arrangements, states willingly concede to the subrogation of some level of sovereignty in return for perceived benefits. In the absence of fraud, coercion, or corruption,⁷⁹ it may be assumed that signatory states have an interest in observing its provisions. There are various issues affecting implementation of international law by African states.

- First, the agreements, although formulated at the international arena, are often not translated into the national sphere. Consequently, the state cannot exercise jurisdiction, and the electorate cannot hold them accountable. This problem of dualism serves, in part, to keep international law outside the reach of domestic jurisdictions and also to maintain a clear demarcation between the individual and the enforcement of any rights or obligations that may arise thereof. Where the agreements are incorporated into national law, enforcement can be pursued through judicial or administrative means, which allow for inter-state complaints, individual or class action suits.⁸⁰
- Second, the agreements may not include clear, precise, and unambiguous terms. Where a state is willing to undertake its responsibility under the international instrument, ambiguity in the language and intent of the agreements can lead to varying interpretation and inconsistent implementation at national and regional levels.
- Third, issues arise with regard to the determination of the cost/benefit of adherence. While an international soft law instrument may appear to be hortatory, the presence of a powerful member state or the articulation of a clear interest or benefit, which may accrue not just to the nations, but also that appeals to its leaders, may influence other member states to comply with the agreement. The diplomatic or moral pressure to comply with the instrument,⁸¹ or the economic or other sanctions may be influential

79. See Vienna Convention on the Law of Treaties, May 23, 1969, arts. 46-53, 1155 U.N.T.S. 331, available at <http://www.un.org/law/ilc/texts/treaties.htm> [hereinafter Vienna Convention].

80. See, e.g., AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS arts. 47-49, 55-57, 21 I.L.M. 58.

81. See Chinkin, *supra* note 18, at 853-57. It is perhaps this moral pressure that has been exerted upon the President of Zimbabwe as he was seen as an obstacle to the

in adherence to such arrangements. South Africa and Nigeria represent strong African states that possess some capacity to influence member states through extensive lobbying for NEPAD. However, such influence must be coupled with the perception of a clear benefit of adhering to NEPAD. Such self-interest or benefit is not always apparent in past treaties, strategies, and agreements within Africa. This has led to no or partial adherence to international instruments.

Because of the foregoing and other considerations, African member states' adherence to international law has been haphazard and incomplete.⁸² While the causes of partial adherence may be numerous, three issues are addressed herein. These are sovereignty, institutions for implementation including the OAU/AU system, and the role of individuals in the promotion of international instruments and particularly NEPAD.

1. *Sovereignty and the NEPAD*

The right to economic development⁸³ requires more than the negative action of restraint, calling instead for the proactive resolution of claims to property, the instruments of production and the beneficiaries of resources. This in turn requires attention to the issues of prevailing trade practices, investment policies, sales and marketing of products, and technology transfer. Such matters, previously held to be the exclusive domain of states, are now being resolved in the very public regional, continental, and global arenas.⁸⁴ While African states have traditionally held onto the doctrine of state sovereignty to resist intrusion into domestic economic affairs,⁸⁵ the acceptance of NEPAD points to a shift in their adherence to that doctrine in favour of economic growth.⁸⁶

By acceding to NEPAD and particularly to the APRM, member states confirm their submission to a supra-national body for the implementation

promotion of NEPAD within the international community. Ian Taylor, *Change in Africa: NEPAD, Zimbabwe, and Eliés*, Foreign Policy in Focus, available at http://www.fpiif.org/outside/commentary/2002/0204nepad_body.html (Apr. 22, 2002).

82. 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*, World Summit 2002, available at <http://www.worldsummit2002.org/texts/shadrockgutto2.pdf> (Apr. 26-29, 2002).

83. While historically there has been some debate as to the existence of a right to development and the components of any such right, it is generally agreed in international spheres that there is a legitimate expectation of peoples to delivery of some form of development. See, e.g., *Declaration on the Right to Development*, U.N. GAOR, 41st Sess., U.N. Doc. A/RES/41/28 (1986), available at <http://www.unhchr.ch/html/menu3/b/74.htm>.

84. While failure of the International Trade Organization to take off together with other 1940s Bretton Woods institutions could be partly traced to the overwhelming political considerations that economic matters were strictly within the sphere of nations, the creation of bodies including the regional COMESA, continental NAFTA and the global WTO attest to this fundamental shift in political considerations of sovereignty of the state in favour of economic expediency.

85. See, e.g., OAU CHARTER arts. III(1) & (V); *African Union*, *supra* note 6, art. 4(a).

86. See, e.g., Gruchalla-Wesierski, *supra* note 17, at 70-75.

and monitoring of NEPAD objectives.⁸⁷ As earlier stated, the purpose of soft law is to assuage a nation's desire to undertake collective regulation in economic transactions while maintaining the freedom to alter their positions in accordance with prevailing circumstances. There is a level of agreed performance whether tacit or stated, outside of which parties are viewed as not conforming to the agreed norms⁸⁸ and may attract the mechanisms for compliance. Nations will accede to such instruments when they know, or can determine, the parameters of the minimum acceptable behaviour within the context of that arrangement and the perceived 'costs' of non-adherence. The NEPAD falls within the AU and provides an indication of the expected standards of compliance as well as the nature of sanctions, if any, that may accrue from non-compliance. However, these sanctions are few, subject to consensus, and mainly confined to issues that relate to the efficient functioning of the AU.⁸⁹ Similar ambiguities, such as those highlighted in chapter three relating to the economic initiatives, tend to blur the parameters of action under the NEPAD.

2. *The OAU/AU and Enforcement of International Law*

Dispute resolution within the African context portrays a clear penchant for consensus building, political resolutions, and an avoidance of the international judicial system. Several reasons are advanced for the latter point, namely that there is a lack of confidence in the international judicial system, which is viewed as largely based on and reflective of European legal custom and origin. Arguably, there is a distrust of the forum to deliver unbiased judgments and a concomitant view of the forum as advancing colonialism or neo-colonialism.⁹⁰ However, the relatively limited use by the African states of their own institutions such as the Commission of Conciliation, Mediation and Arbitration⁹¹ and the African Court of Human Rights⁹² appears to highlight the African states' preference for negotiated political resolution to disputes.

87. The view that state consent to be bound by an international agreement amounts to an erosion of its sovereignty has been challenged by various authors. See, e.g., Jose Alvarez, *The New Treaty Makers*, 25 B.C. INT'L COMP. L. REV. 213, (2002) (arguing that by concluding international agreements, states in fact enforce their sovereignty and safeguard it against possible erosion by international organizations).

88. This is referred to as the "standard of acceptable compliance." ABRAM CHAYES & ANTONIO HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 17 (Harvard University Press 1998).

89. See OAU CHARTER art. 23.

90. It is argued that the 1966 ICJ judgment in the South West Africa/Namibia cases generated great mistrust by African countries of the International Court of Justice. See D.W. BOWETT, *CONTEMPORARY DEVELOPMENTS IN LEGAL TECHNIQUES IN THE SETTLEMENT OF DISPUTES* 11 (1984); I. Shihata, *The Attitude of New States Towards the International Court of Justice*, 19 INT. ORG. 203, (1965).

91. See OAU CHARTER art. vii.

92. For an analysis of African regional judicial bodies generally and the African Court of Human Rights in particular, see Nsongurua J. Udombana, *Can the Leopard Change Its Spots? The African Union Treaty and Human Rights*, 17 AM. U. INT'L REV. 1177 (2002).

The AU promulgates a consensus based dispute settlement mechanism in its articles, suggesting that mediation and political consensus remains the most preferred mode of dispute settlement.⁹³

As a project of the AU, the NEPAD strategy finds itself subject to such conciliation methods. This method of dispute resolution may not be suitable for obtaining the speedy resolution of conflicts, particularly where the party in violation may be entitled to vote on any action or sanctions that may result upon its breach. The GATT system clearly showed that such a provision hampers the development of jurisprudence or the effective conclusion of disputes.⁹⁴ The AU/NEPAD may consider that given the experiences of the GATT/WTO dispute settlement mechanism, consensus may not ensure the effective implementation and enforcement of any proposed schemes under the AU or NEPAD. In fact, it may serve as an active hindrance to the process of the peer review mechanism.

3. *The Role of the Individual in the NEPAD*

While persons are usually the subject of international law, they are not traditionally regarded as capable of serving as parties to such instruments.⁹⁵ NEPAD departs from this notion by including a statement of the new political will of the African leaders. The African leaders take joint responsibility for the achievement of the eight stated targets, including the development of appropriate standards and targets for fiscal and monetary policies, transparent legal and regulatory frameworks for financial markets, and auditing of private and public sector organizations. By including such a pledge, NEPAD expands the scope of the obligations, and perhaps the rights of the parties to international law instruments, to individuals as well as nations, thus extending the scope of parties under traditional instruments of international law.

The inclusion of a personal pledge by African leaders is not unique to the NEPAD strategy.⁹⁶ However, while such pledges appear to act as a form of personal undertaking within commercial law, the lack of accountability or enforcement poses a challenge in the implementation of any African economic initiative. They also denigrate the value attributable to

93. For a concise discussion on the preference for ad hoc and consensus based settlement to African disputes, see T. Maulana, *Settlement of African States' Disputes*, 39 I.C.L.Q. 299-317 (1989).

94. See generally JOHN HOWARD JACKSON, *THE JURISPRUDENCE OF THE GATT AND THE WTO* 123 (2000).

95. See Vienna Convention, *supra* note 79, art. 1; Gruchalla-Wesierski, *supra* note 17, at 65.

96. It is however noteworthy that the language of such commitment is 'softer' than earlier pledges by African leaders. Cf. OAU Monrovia Declaration of Commitment of the Heads of State and Government of the OAU on the Guidelines and Measures for National and Collective Self-Reliance in Economic and Social Development for the Establishment of a New International Economic Order (Monrovia Declaration), July 17-20, 1979, Res. No. AHG/ST.3(XVI)Rev.1, available at http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/oau/hog/pHoGAssembly1979.pdf; *Lagos Plan of Action*, *supra* note 76. The OAU 16th Ordinary Session in Monrovia, Liberia, held July 1979 is now incorporated into the Lagos Plan of Action, preamble article 3.

such 'collective and individual' pledges by African leaders within the context of international instruments, thus suggesting that such pledges do little to represent any real commitment to the goals stated therein.

It is not clear when this joint responsibility accrues, or whether it is a commitment to the present leaders or to all African leaders by virtue of their leadership position. There is also an appeal to the people of Africa to support NEPAD, which to be a response to criticism that earlier African initiatives failed to include the majority of African people. However, this call is predicated on the following two issues: that the peoples in question are aware of and included in the process of NEPAD; and that there is an established mechanism within individual countries to incorporate such international instruments into national legislative and administrative processes. Where countries have a dualistic approach to international law, such a presumption cannot be made. Given the original nature of NEPAD as a program to boost Africa's development, it is noteworthy that no provisions were made for the rapid absorption of NEPAD in its entirety into national development plans, legislative and regulatory spheres, or the administrative processes of the members. Arguably, through the APRM, NEPAD attempts to introduce adherence to the economic initiatives at national levels.

Because these two issues have not been addressed adequately within NEPAD, the effectiveness of any supportive action by the African people as envisioned in NEPAD, including holding governments accountable to their people, is severely hampered. NEPAD does introduce the APRM, which has been viewed as a successful aspect of NEPAD and is seen as the most likely method of ensuring compliance by monitoring the member states' implementation.

B. SOME OBSERVATIONS ON THE PEER REVIEW MECHANISM

Peer review has its origins in professional bodies. The medical profession in particular has long advocated this practice to oversee its members. Peer review involves two broad areas, namely the evaluation of proposals and projects by experts, and monitoring state compliance with the provisions of a treaty.⁹⁷ While the use of the peer review mechanism has not been widespread, the concept is not new. For example, the African Commission on Human and People's Rights established three independent special reporters to monitor the implementation of the above Charter with limited success. NEPAD has formalized this model through the creation of the APRM.

The APRM is an instrument voluntarily acceded to by Member States of the AU as an African self-monitoring mechanism. Participation in the

97. For a discussion on the function of peer review mechanisms see, e.g., Effie J. Chan, *The Brave New World of Daubert: True Peer Review, Editorial Review and Scientific Validity*, 70 NYU L. REV. 100, 113 (1995); Monica Washington, *The Practice of Peer Review in the International Nuclear Safety Regime*, 72 NYU L. REV. 430, 438 (1997).

process is open to all member states of the AU. Countries wishing to participate in the APRM notify the Chairman of the NEPAD Heads of State and Government Implementation Committee. At the point of formally acceding to the peer review process, each State must clearly define a time-bound Program of Action for implementing the Declaration on Democracy, Political, Economic, and Corporate Governance, including periodic reviews.

There are different types of reviews:

- The first review is a base review that is carried out within eighteen months of a country becoming a member of the APRM process;
- Then there is a periodic review that takes place every two to four years;
- A member country can, for its own reasons, ask for a review that is not part of the periodically mandated reviews; and
- Early signs of impending political or economic crisis in a member country would also be sufficient cause for instituting a review. Such a review can be called for by participating Heads of State and Government in a spirit of helpfulness to the country concerned.

The base review process entails periodic reviews of the policies and practices of participating states to ascertain the progress being made towards achieving mutually agreed upon goals and compliance with agreed political, economic, and corporate governance values, codes, and standards as outlined in the Declaration on Democracy, Political, Economic, and Corporate Governance.

The peer review process considers the impact of domestic policies, not only on internal political stability and economic growth, but also on neighbouring countries. The stages involved therein include:

- Stage One will involve a study of the political, economic and corporate governance and development environment in the country to be reviewed, based principally on up-to-date background documentation prepared by the APRM Secretariat and material provided by national, sub-regional, regional, and international institutions.
- Stage Two calls for the Review Team to visit the country concerned where its priority objective will be to carry out the widest possible range of consultations with the Government, officials, political parties, parliamentarians, and representatives of civil society organizations (including the media, academia, trade unions, business, and professional bodies).
- Stage Three is the preparation of the Team's report. The report must be measured against the applicable political, economic, and corporate governance commitments made as well as the Program of Action. The Team's draft report is first discussed with the Government concerned.
- Stage Four begins when the Team's report is submitted to the participating Heads of State and Government through the

APRM Secretariat. If the Government of the country in question shows a demonstrable intent to rectify the identified shortcomings, then it will be incumbent upon participating Governments to provide what assistance they can, as well as to urge donor governments and agencies to come to the assistance of the country reviewed. If dialogue proves inadequate, the participating Heads of State and Government may wish to put the Government on notice of their collective intention to proceed with appropriate measures by a given date.⁹⁸

According to the best information available as of March 30, 2003, ten African countries signed the Memorandum of Understanding⁹⁹ during the sixth HSGIC meeting. These countries include Kenya, Uganda, Algeria, Republic of Congo, Ethiopia, Ghana, Mozambique, Nigeria, Rwanda, and South Africa.

The APRM is the strongest tool for the implementation of NEPAD. Through it, NEPAD HGSIC can ensure compliance with the strategy at the pain of recommending that donor funding be withheld from the member state. This withholding of funds is in addition to the economic sanctions available under the AU mechanism.¹⁰⁰ However, some issues arise out of the design and the enforceability of the APRM.

By requiring that countries accede to the APRM in addition to their accession to NEPAD, there is a gap created whereby member states of the NEPAD may not participate in the APRM. Given the nature of NEPAD as an initiative for economic development, and the regulation and integration thereof within the region, this arrangement creates a dual system whereby the implementation of NEPAD cannot be monitored across the board, but rather, only among member states. The effect of such a structure is not clear on the efficacy of NEPAD. However, given that the signatories to NEPAD far outnumber those to APRM itself, there is a need to increase the membership to the APRM in order to empower it as a tool for monitoring the development of NEPAD programs.

The other issue relates to the enforceability of the APRM and corresponds to the earlier argument of the enforceability of NEPAD itself. Given the requirement for consensus at the AU level and the traditional reluctance to interfere with what may be considered the internal matters of a member state, the implementation of the peer review mechanism, and any sanctions there under, may be limited. Where recommendations by the APRM team are perceived undesirable or contrary in some form

98. 38th Ordinary Session of the Assembly of Heads of State and Government of the OAU, July 8, 2002, AHG/235 (XXXVIII) Annex II, available at http://www.au2002.gov.za/docs/summit_council/aprm.htm (last visited Sept. 16, 2004).

99. *Memorandum Of Understanding On The African Peer Review Mechanism*, Mar. 9, 2003, available at http://www.avmedia.at/cgi-script/csNews/news_upload/NEPAD_2dCORE_2dDOCUMENTS_2edb.Final-MOU-APRM-090303.pdf.

100. It may be argued that the economic sanctions under the AU can only be affected if a member defaults on payment of contributions to the Union or where it fails to comply with the decisions of the AU. OAU CHARTER art. 23.

to the will of the participating country, it would be too easy for that country to revert to an argument based on sovereignty, and interference thereof in a bid to avoid addressing the issues raised.¹⁰¹ This loophole could seriously erode the APRM's potential to act effectively as a regulatory mechanism, an area that must be addressed.

While these are only some areas where there may be a challenge to the APRM, further research may reveal more issues that, if not addressed, may impede the implementation of the APRM and thwart the intentions of NEPAD.

The APRM has been initiated only recently with the appointment of its first panel by NEPAD HSGIC on May 28, 2003.¹⁰² This latter body shall be watched closely as it begins to implement the peer review mechanisms within the signatory states.

VI. CONCLUSION

NEPAD is:

[A] pledge by African leaders, based on a common vision and a firm and shared conviction that they have a pressing duty to eradicate poverty and to place their countries, both individually and collectively, on a path of sustainable growth and development and, at the same time, to participate actively in the world economy and body politic.¹⁰³

NEPAD succeeds in refocusing attention to the issues of development and regional integration in Africa. However, several critical areas must be addressed and resolved.

NEPAD must determine its precise nature and relationship to the AU and to other regional and sub-regional initiatives. This includes harmonizing existing overlaps and creating concise parameters for action and interaction with other institutions and initiatives. However, NEPAD must first clarify its specific intent as a program for the implementation of the AU, and also its endeavour to promote fast-track project development in key areas. This clarification should take into consideration the existing socio-economic and political dimensions of the program. As argued in chapter three, by highlighting the issues of economic and corporate governance, capital flows, and market access, NEPAD raises to the forefront a number of fundamental issues underlying the economic development patterns in Africa. These issues include domestic resource mobilization, the interface between ODA and private capital flows, and the production and distribution of goods and services. It is clear from a peru-

101. This tactic has often been raised in relation to allegations of human rights abuse by such bodies as Transparency International. See Gutto, *supra* note 82; Udombana, *supra* note 92, at 1180.

102. *Communiqué Issued at the end of the Seventh Summit of the Heads of State and Government Implementation Committee of the NEPAD* (May 28, 2003), available at <http://www.nigeriahighcommottawa.com/7hsgic.htm>.

103. NEPAD, *supra* note 2, ¶ 1.

sal of NEPAD that there remain many unanswered questions in relation to these issues including the reality of the expectation of increased ODA in the face of current trends towards its reduction; the important issues of domestic resource mobilization including arresting economic spoliation and inclusion of informal wealth into the formal legal and regulatory spheres; the development of new markets for African goods and services both within the continent and outside; and the interface with the WTO. These concerns must all be addressed within the context of a regional approach to enhance integration and promote development of the member states.

NEPAD, like any other strategy for development and integration, can only be effective if it is implemented. Implementation and enforcement of international law instruments has increasingly come under scrutiny. It matters little that the ideals within an international agreement are powerful, in the absence of a proper strategy for the implementation thereof, the ideals remain lofty principle found only on paper. As highlighted above, there are several impediments to the implementation of NEPAD. Some of these relate to the nature of the document itself. These include its ambiguity in key areas, and the setting of goals, which may not reflect the existing global and regional economic and political realities. Examples include the achievement and sustaining of an average GDP above 7 percent per annum and the expectations regarding private capital flows and ODA. Other impediments relate to the member state approach to international law. This includes the partial adherence by signatory states, the use of the concept of sovereignty as a shield to avoid perceived interference with internal matters and the penchant for consensus within African states. These may prove a hindrance to the implementation of NEPAD. Through the APRM procedure, some of these issues can be effectively addressed because the APRM includes, by its very nature, the waiver of absolute sovereignty of the member to provide for APRM implementation of the mechanism at a national level.

This research of NEPAD is by no means conclusive. There exist a number of areas where further research would prove valuable. In particular, the issues of implementation and enforcement of this and other soft law instruments in Africa, the operation of the APRM, and the use of tools such as peer review mechanisms to influence the implementation of regional attempts at economic development, regulation, and regional integration deserve further exploration.

It is clear that Africa is in dire need of a program for economic recovery. The political mindset exists among the present leaders to translate the ideals of NEPAD into concrete strategies for implementation. By drawing on past experiences within and outside the continent, and through a process of inclusion of the various stakeholders in Africa, NEPAD can, if implemented properly, serve as a powerful tool for economic development and regional integration for the benefit of the people who matter the most –Africans.