UNIVERSITY OF PRETORIA

FACULTY OF LAW

GEARING FDI TOWARDS SUSTAINABLE DEVELOPMENT IN NIGERIA - THE ROLE OF THE WTO TRIMS AGREEMENT

STUDENT NAME: BABATUNDE OLUWAGBEMIGA AJALA

STUDENT NO: 29723419

DEGREE: LL.M. (INTERNATIONAL TRADE AND INVESTMENT LAW IN AFRICA)

SUPERVISOR: PROF. DANNY BRADLOW

DATE: 31 MAY 2010

A mini thesis submitted in partial fulfilment of the requirements for the LL.M Degree, University of Pretoria, South Africa

LIST OF ABBREVIATIONS

ATC	Agreement on Textiles and Clothing
AU	African Union
BATNA	Best Alternative to Negotiated Agreement
BIT	Bilateral Investment Treaties
DDA	Doha Development Agenda
DSU	Dispute Settlement Understanding
EC	European Community
ECOWAS	Economic Community for West African States
EITI	Extractive Industries Transparency Initiative
EPA	Economic Partnership Agreement
EPZ	Export Processing Zone
EU	European Union
FDI	Foreign Direct Investment
FIRA	Foreign Investment Review Act
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services

GATT	General Agreement on Tariffs and Trade
GPA	Agreement on Government Procurement
GRI	Global Reporting Initiative
ILO	International Labour Organization
IMF	International Monetary Fund
LDC	Least Developed Countries
LFN	Laws of the Federation of Nigeria
MAI	Multilateral Agreement on Investment
MDG	Millennium Development Goals
MNE	Multinational Enterprise
NAFTA	North American Free Trade Agreement
NEEDS	National Economic Empowerment and Development Strategy
NEPAD	New Economic Partnership for African Development
NEPZA	Nigerian Export Processing Zones Authority
NIPC	Nigerian Investment Promotion Commission
ODA	Official Development Assistance
OECD	Organization for Economic Cooperation and Development
OPEC	Organization of Petroleum Exporting Countries

RTA	Regional Trade Agreement
SADC	Southern African Development Community
SCM	Agreement on Subsidies and Countervailing Measures
SDT	Special and Differential Treatment
TRIMS	Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
VCLT	Vienna Convention on the Law of Treaties
WATNA	Worst Alternative to Negotiated Agreement
WTO	World Trade Organisation

DECLARATION

I, BABATUNDE OLUWAGBEMIGA AJALA, declare that work presented in this dissertation is original. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfillment of the requirements of the award of the degree LLM in International Trade and Investment Law.

Signed ……..….

Babatunde Oluwagbemiga Ajala

(Student)

Dated on this ..... day of May, 2010

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

CERTIFICATION

I certify that I have read, and hereby recommend for acceptance by the University of the Pretoria, the thesis entitled "Gearing FDI towards sustainable development in Nigeria : The Role of the WTO TRIMs Agreement", submitted in partial fulfillment of the requirements of an LL.M. Degree in International Trade and Investment Law in Africa of the University of Pretoria.

Signed .....

Professor Danny Bradlow

(Supervisor)

Dated on this ..... day of May, 2010

COPYRIGHT

DEDICATION

I dedicate this work to my Heavenly Father, who works all things after the counsel of His will (Eph 1:11). To Jesus Christ, my Saviour who died for me at Calvary and gave unto me eternal life, an everlasting consolation and good hope, by grace, through faith alone in His death and resurrection (1 Jn 5:9-13, 2 Thes 2:16, Rom 10:8-10, Eph 2:8-10). To God the Holy Spirit, a Friend that sticks closer than a brother (Jn 14:16).Unto the King eternal be glory forever and ever.

I also dedicate this to the memory of my late father, Chief O.O. Ajala; my late sister, Sola Oyekan (Nee Ajala); and to my late cousins, Tokunbo Ukpoma (Nee Owolabi); and Bukola Akinyoola.

Finally, I dedicate this work to all the scores of people, friends who believed in me and contributed their widow's mite to sponsor my LLM programme - my mother, Mrs. O.O. Ajala; all the kind-hearted saints in my church in Lagos, The Grace Community Church; Professor Folarin Shyllon; my former colleagues at the Lagos Multi-door Courthouse; and several wonderful friends. This is your accomplishment. I had absolutely nothing and it seemed for the third time another admission was going to slip by. But God found you worthy vessels to be a blessing in my life by making my dream a reality. I love you all and owe you a debt of gratitude. God is not unrighteous. He will repay (Heb 6:9)

ACKNOWLEDGEMENT

I would like to thank Professor Danny Bradlow, Professor Riekie Wandrag, and Rafia De Gama for their guidance and helpful comments which helped in giving clear sense of direction for this work. I also thank Dr. Rosalind Thomas, for your willingness, cheerfulness and helpful comments. I thank Emily Laubscher for being a mother and seeing to all our issues. Many thanks also to Berita Bokpolo and Stephanie Van de Walt for being there for their contributions towards the running of the programme.

I thank my mum for her "widow's mite" – and this time the phrase is not figurative. I thank my brothers; Segun and Femi Ajala, your support in prayers, cash and kind is appreciated. Also, I thank my dearest younger sister, Kemi, for pulling the strings behind the scene and your countless calls. I thank my little and increasing army of nieces and nephews, Lekan, Oyindamola, Durotoluwa, Ifeoluwa, Tunde, and Victory, you provide more than enough impetus to succeed. I have missed you all. Marshall Ukpoma, thanks for being strong enough to still help out during the course of the programme despite our shared personal tragedy.

Further, I thank Professor Folarin Shyllon and Mama Shyllon for their love, care and contributions over the years in shaping my career path. I thank Professor Ademola T. Oyejide for the documents which he assisted me in obtaining from the Nigerian Federal Ministry of Commerce and Trade. Oyin Shyllon, thank you for pointing me in the right direction when I needed it. I thank Lolade Adeyeoluwa, for allowing me to once again repeat my university experience by writing my thesis in her house, and for all your help through the years. Doja Adeyeoluwa, thanks for your support and seeing that I never went hungry while working at your place. Jumoke Caxton-Martins, thank you for all the insights and assistance throughout the programme and even before.

To all the members of my little, but great church in Lagos, thank you for love displayed through your "scholarships" which ultimately culminated in making the dream a reality. In bits and pieces you gave what you could from your heart and what a difference that made! Pastor Sammy and Biola Nwanze for paying for my flight ticket, facilitating payment of the school fees, and several other wonderful things you have done for me. Bimbola Ajose, I appreciate you greatly for your kindness in giving me your laptop without which things would have been difficult with all the assignment we had to type. I thank Pastor Teju and Efe Fagbeja, Pastor Yinka Olowojolu, Yemisi (Nee Tayo), Tosin Daramola, Dapo Oloyede, Emilola Sosami, Bimpe (Nee Adeniran) Jonathan and Tayo Ebbah, Jide Lawal, Danjuma Audu, Dike and Chika Obi, Arinade Omotosho, Seun Oyawale, Fola Awonusi . I would like to thank Brother Femi and Gbemi Akinola for assisting with the funds for dispatch of my application forms, in addition to making a contribution towards offsetting the cost of the programme.

Apart from church members, I thank all the other great friends who also supported my cause in cash and in kind – Toke Adigun, Nike Amosu, Moji Daniels, Chike Obiora, Ladun Akintola, Tomi Ikotun, Tope and Busola Aladenusi, Yemisi Bankole-Odole, Titi Osunkojo, Debo Boyejo, Bola (Nee Odepe), Dupe Ladele, Wunmi Oyeniran., Remi Fakunmoju, Doyin Orebanwo, Fisayo and Yinka Adesanmi, Tolu Edunjobi, Tunji

Agbaje, Gbenga Ojoshipe, Jude, Yemi Akintola, Tunde and Jumoke Caxton-Martins, Busayo Kusimo, Chinelo Agbala, Bunmi Ayo, Bankole Bamidele, Tolu Fatubarin, and Mama. Femi Olugbemiro, you deserve special mention for spiriting me out of my house to ensure I just barely made the plane to South Africa.

I also appreciate the contributions of my former bosses and colleagues at my workplace - Mrs Caroline Etuk, Mrs Yinka Aroyewun, Ms. Paulette Adokpaye, Oyindamola Alonge, Abi Baiyewu, Demola Jegede, Gboye Adeboyega, Ben, Charles,Toyin, Seun Badejo, Korede Akinduro, Chioma Okoye, and Ruro Onayemi. Thank you for believing in me.

I thank all my classmates - it has been a great privilege being in this class with you. I appreciate my commune mates Palesa, Naledi, Mpho; Bontlee, Lebo, and Khuti. I also thank members of the Cornerstone Assembly of God, Pretoria in South Africa who have showed interest, provided support in various ways, and ensured that there were no dull moments, I thank you. I thank my Connect Group leader, Innocent Matepo and his wonderful family. Thanks for being there and for your understanding. Now you finally have me fully so we can move the work forward.

For all those I never mentioned, my brain may be playing tricks on me, but know from my heart I appreciate your contribution towards my progress in life.

Once again to God my Father, my Lord Jesus and my Helper, dear Holy Spirit – I simply do not deserve all your kindness, tender mercies and manifold blessings which you have showered on me. Thank you for your grace. It is because of you that I can say these three words – I CAME, I SAW and I CONQUERED!

TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION

1.1 Background to the research

In recent years, the Nigerian Government embarked on a comprehensive review of its investment Policy Framework.[1] The expected output of the project was to explore how FDI inflows into Nigeria can be increased and geared towards broad-based growth, employment creation, human development, poverty alleviation and sustainable development.[2] A careful analysis of the above project would reveal its emphasis. It is not just about the attraction of Foreign Direct Investment, but more importantly it is about ensuring it contributes to a variety of goals national goals. These goals can be subsumed in the word, 'sustainable development'.

One of the earliest attempts at defining the term 'sustainable development' can be found in the statement of the World Conservation Strategy (WCS) in 1980.[3] The WCS' definition incorporated the consideration of economic, social and ecological factors.[4] The definition further stressed the need to take into account, not just economic factors, but also social and ecological factors of living and non-living resource base. In addition, it stressed the importance of evaluating short and long term benefits of alternative courses of action.[5]

The shortcoming of this definition is its ecological slant. Nevertheless, it gives some valuable insights into the nature of the term. For example it reveals that its scope is not limited to mere economic considerations. Moreover, it also emphasizes both long and short term perspectives. These are important criteria which expresses the idea of sustainability. No one can dispute the fact that these are integral elements which should be found in a credible definition of sustainable development.

1 UNDP Nigeria (2005).
2 Ibid.
3 *Holmberg J (1992) 20.*
4 *Ibid.*
5 See *Ginther K, Denters E & de Wart JIMP (1995)17.*

However, the most generally cited definition of the term 'sustainable development' is that adduced in 1987 by the World Commission on Environment and Development (WCED).[6] The Commission defined it as "economic and social development that meets the needs of the current generation without undermining the ability of future generations to meet their own needs."[7] Again this definition has also not gained universal approval, because it failed to indicate how the idea can be made operative amongst other reasons.[8]

Irrespective of lack of consensus on a precise definition of the term,[9] it is indisputable that it transcends the attainment of economic goals. It assumes a more comprehensive perspective of human welfare and accentuates the long-term implications of current activities and decisions.[10] It focuses on qualitative parameters for evaluating development.

The international quest for sustainable development has gathered momentum in recent years. It has been the subject of several fora and workshops targeted at exploring ways of actualizing it. Further impetus was added to it through the enunciation of the Millennium Development Goals (MDGs) by the United Nations. The global pursuit of sustainable development has ensued in the devising of multifarious strategies and policies aimed at actualizing it. One such strategy which is increasingly being deployed ubiquitously is Foreign Direct Investment.

FDI therefore could help complement the resources needed to finance development. The fact that it brings with it, other benefits such as transfer of technology, managerial skills and its positive contribution to the rise of some Asian countries makes it a more compelling option. This has prompted spirited competition for it globally.

Africa and Nigeria has not been left out in the pursuit of FDI as best demonstrated by the New Economic Partnership for African Development (NEPAD).[11] Ironically, this amounts to a monumental *volte-face* when

[6] This Commission is popularly referred to as the Brundtland Commission.
[7] *Gehring WM & Segger (eds) (2005) 5.*
[8] *Ginther K, Denters E & de Wart JIMP (1995) 24*
[9] Ginther K, Denters e & de Wart JIMP (eds) (1995) 10
[10] OECD, Sustainable Development: Critical issues Policy Brief, September 2001, www.oecd .org
[11] Ajayi SI,FDI and Economic Development in Africa (2006),www.afdb.org

compared with the suspicion with which it was regarded in previous decades fuelled by nationalistic sentiments and neo-colonial suspicions.[12]

It is therefore interesting to see the radical change from aversion to FDI, to an overly-enthusiastic and at times, unquestioning pursuit of it. FDI is being sought at any and all cost. Bilateral treaties are badly negotiated; excessive incentives are offered;[13] environmental and other standards are lowered in a "race to the bottom" to attract FDI.[14] This gives the mistaken impression that it is an economic elixir which automatically guarantees sustainable development.[15]

Fixation on the benefits obscures the truth about FDI and blinds the eye to its dangers. The reality from theory and experiences establish the fact that FDI could bring benefits, and could also harm recipients.[16] Beyond the theoretical, experiences from different countries also reveal mixed outcomes on the impact of FDI on sustainable development. The recognition of this salient fact engendered the need for FDI to be deliberately geared towards this all-important desired end. Consequently, the trend has been to gear FDI towards sustainable development through various measures embodied in national policy, regulations and legislation.

Some of the measures that have been applied globally to achieve this end are performance requirements, local content, screening of FDI, selective targeting, trade-balancing requirements, joint venture, product sharing agreements, etc. These measures have been applied by developed and developing countries like the United States of America, Canada, Japan, China, Finland, Ireland - and have contributed tremendously towards their development.

Borrowing a leaf from these positive experiences, other countries like Nigeria, in a bid to ascend the economic ladder also adopted these measures in order to maximize the gains of FDI inflow into their economies. However, the Uruguay Round of World Trade Organization witnessed the advent of the Agreement on Trade-Related Investment Measures (TRIMs), which was to occasion a change in the *status quo.* This sets the scene for the articulation of the research problem of this thesis which is laid out below.

---

[12] *Carlson J & Shaw MT (eds) (1988) 127-133.* Here, Ojo gave an outlook of this changing attitude from the Nigerian perspective.
[13] *Easson (2004)12*
[14] *ibid*
[15] Ekwueme (2006)7 *Journal of World Investment and Trade* at 180
[16] A.Y. Dutse (2008) 3 *Communications of the IBIMA pages.*

1.2 Research problem

The extent to which FDI can contribute positively to sustainable development will hinge on the ability of countries to be able to hedge its risks and maximize its gains[17]. This will in turn demand that an FDI host country has the requisite policy space and ability to deploy the measures referred to above to gear FDI towards this end. However, policy space is increasingly being constrained by regional, bilateral, and multilateral treaties.

The emergence of the WTO TRIMs Agreement being a multilateral treaty also plays a role in this regard. Since Nigeria is a signatory to the Agreement, it is bound to have implications on the country. Accordingly, this thesis analyses the role the Agreement plays in Nigeria's quest to gear FDI towards sustainable development.

Consequently, the research questions which will be answered are as follows:

I. What is the scope or coverage of the TRIMs Agreement?
II. What effect has the TRIMs Agreement had on Nigeria's domestic regulatory and policy framework?
III. What role does the Agreement play in Nigeria's quest to gear FDI towards sustainable development FDI?
IV. What options are available to Nigeria to gear FDI towards sustainable development in the light of the emergence of the TRIMs Agreement?

1.3 Thesis statement

It will be argued in this thesis that the advent of the Agreement has further constricted the policy space available for Nigeria to utilize its domestic legislation, regulations, and policy measures to steer FDI towards the end of sustainable development. Nevertheless, it will be submitted that there are still several options of achieving the desired goal.

[17]OECD, Foreign Direct Investment for Development - Maximising Benefits, Minimising Costs, 2002, www.oecd.org, Kumar PS (2009) *NALSAR Student Law Review*

1.4 Significance of the study

This research is important for a variety of reasons. FDI represents a beacon of hope for Nigeria, and Africa's developing and least developed countries. This explains why serious attention is being paid to it with a view to leveraging on it to actualize sustainable development. The review of Nigeria's investment policy framework referred to above and South Africa's review of its bilateral treaties further underpins this salient point. It is hoped that this thesis will make contributions which will be significant for practice and policy-making with a view to enhancing the prospects of FDI's contribution to sustainable development, not only in Nigeria, but also the African continent, and developing countries as a whole.

Furthermore, the literature on the impact of the Agreement from the Nigerian perspective, and from a comprehensive approach is scant. It is hoped that this work will fill that void.

Finally, it is hoped that through a lucid appreciation and exposition of the key issues, underlying theories and this thesis will also be of academic value – illuminating, validating, challenging and hopefully extending the frontiers of existing knowledge in the field.

1.5 Literature survey

Generally speaking a review of the literature that has been written on the TRIMs Agreement reveals three schools of thought in terms of how the Agreement is perceived.

The first school of thought contends that the TRIMs Agreement is grossly inadequate in terms of its effect and scope. Accordingly, they advocate an extension of the Agreement for example through a multilateral Agreement that will cover a wider range of issues and also regulate FDI flows.[18]

The second school of thought holds an opposite position. They contend that the TRIMs Agreement has gone too far in terms of its effect and scope. They maintain that the Agreement seriously constrains national domestic policy space and countries' ability to use appropriate measures, to attune FDI more

[18] Brooks HD, Fan XE & Sumulong SR (2003) 20 *Asian Development Review* 1 at 26

closely with developmental goals. Accordingly, they would prefer a review of the Agreement to restore the policy space constricted by the Agreement in the interest of development.[19]

The third school of thought takes the middle-path approach. They admit that the Agreement does impose restraints on the policy autonomy of countries to channel FDI towards developmental goals. However, they do not consider the constraints formidable or insurmountable. On the contrary, they submit that there are still several options available to countries to achieve the same goal.[20]

It will be submitted in this thesis that this is the correct position. The Agreement does impose constraints on domestic policy autonomy. Nevertheless countries still have sufficient room to gear FDI towards sustainable development. Ideally it would be preferable for the Agreement to be reviewed to increase policy autonomy. Whether that comes to fruition or not, Nigeria and other countries are not helpless with regard to steering FDI towards developmental goals.

1.6 Methodology

This thesis is essentially a qualitative research utilizing an analytical approach. It reviewed an array of books, journal articles, and other documents from internet sources. It also made use of international treaties, especially the TRIMs Agreement. Relevant reported WTO Cases were also utilized.

The dissertation predominantly employed an analytical approach, exploring existing literature with a view to establishing the thesis.

1.7 Limitation of the study

There are other WTO treaties which have a bearing on the issue of gearing FDI towards sustainable development such as the GATS, GPA, TRIPS, ATC and the SCM. This work would only examine the role of the TRIMS Agreement.

[19] *FONDAD (2005) 178*. Here Kousari expressed the view that the Agreement should be reviewed to allow more flexibility to developing and least developed countries. See also *Khor M (2005) 35-36*

[20] *Gallagher PK (2005) 220*. Here Amsden submitted that the Agreement left considerable scope for developing countries to maintain local content rules, 100% export requirement rules, amongst other measures.

Furthermore there are other issues worth researching within the nexus of FDI and sustainable development such as the environment; conduct of MNEs, BITS, labour issues, etc. The scope of this work does not allow any exhaustive consideration of these issues.

Finally, there is not much information on the nature of the TRIMs adopted in Nigeria, and a breakdown of the sectors in which they were utilized. Consequently, this thesis would unfortunately not venture into this.

1.8 Outline of chapters

This is a dissertation of five chapters.

Chapter one introduces the subject of this thesis. In addition, it described how the research was conducted.

Chapter two provided a context for a discussion of the TRIMs Agreement by considering some issues within the FDI and sustainable development nexus.

Chapter three examined the impact of the Agreement on Nigeria. The crux of this chapter was an evaluation of the role of the Agreement on Nigeria's ability to channel FDI towards sustainable development. As a prelude however, several issues relating to the TRIMs and the Agreement were also examined.

Chapter four examined the options available for Nigeria towards gearing FDI towards sustainable development.

Chapter five makes some recommendations and also concludes the dissertation.

CHAPTER 2

FDI AND SUSTAINABLE DEVELOPMENT – A CONSIDERATION OF SALIENT THEMES

2.1 Introduction

This chapter will examine the concepts of foreign direct investment, sustainable development and other salient issues to provide a proper context for this thesis. It would also stress the rationale and importance of gearing FDI towards sustainable development.

2.2 The phenomenon of sustainable development

Against the background of unimaginable poverty, climate change, environmental degradation, and pockets of financial crisis, the concept of, and challenges to sustainable development has recently assumed greater significance globally.[21] This much is discernible from the various deliberations held in different conferences and *fora* which have been convened all over the world. It is also present in various regional, multilateral, and bilateral treaties.

However, the fact that it has gathered much needed momentum in recent times may obscure the fact that sustainable development is not a newly spawn idea.[22] Indeed it is of quite ancient origins.[23] Its origins are traceable to European forestry management practices laws of the late 18th Century.[24] Its most obvious application is the environmental sphere.[25] However, it is relevant to several facets of human existence.[26]

In terms of definitions, there are several that have been put forward. It might be expedient to however examine the meaning of development before exploring the concept of sustainable development.

---

[21] Senona (2009) 8 *Journal of International Trade Law and Policy* 60 at 60.
[22] Ginther K, Denters E & de Wart JIMP (eds) 111
[23] Ginther K, Denters E & de Wart JIMP (eds) 111; *Gehring & Segger (eds) (2005) 2.*
[24] *Gehring & Segger (eds) (2005) 4.*
[25] Ginther K, Denters E & de Wart JIMP (eds) 17
[2626] *ibid*

2.2.1 What is development?

One of the most frequently cited definitions of development is the one espoused by Amartya Sen in the book *Development as Freedom* , where it was defined as *a process of expanding the real personal freedoms that people might enjoy.* [27] Sen characterized this expansion of freedoms as the 'instrumental' and 'constitutive' roles of development, while identifying five spheres (or instrumental freedoms) where the individual capabilities of developing countries' citizens needed to be enhanced.[28] Furthermore, instrumental freedoms were grouped into five categories: *political freedoms; economic facilities; social opportunities; transparency guarantees; and protective security*.[29]

Admittedly, Sen's definition may not meet with universal consensus. Nevertheless, it is helpful because it reveals the multi-dimensional nature of development. It incorporates other important aspects of human existence taking its scope beyond mere economic parameters.[30] While economic growth is an indicator of development, it is by no means an exclusive parameter. Other qualitative factors must be factored in to appropriately gauge development.

This comprehensive nature of development expressed above is also buttressed by the 1986 United Nations Declaration on the Right to development.[31] The preamble to the declaration also revealed its comprehensive scope. It demanded taking into consideration economic, social, cultural and political issues, targeted at the continual improvement of the well-being of the human race. Furthermore, it envisaged the participation of every individual on the basis of their active, free and meaningful participation in the process and their enjoyment of the fair distribution of benefits resulting from it.[32] The Declaration accentuated the people-centred focus of development by expressing it beyond economic growth to encompass social, cultural and political elements.[33] With the concept of development having been considered, an attempt to define sustainable development will now be made below.

---

[27] *Gehring & Segger (eds) (2005) 5.*
[28] *Gehring & Segger (eds) (2005) 4.*
[29] *Gehring & Segger (eds) (2005) 4.*
[30] *Ibid.*
[31] For more on the UN and its enunciation of the right to development see Matsui's contribution in *Ginther K, Denters E & de Wart JIMP (1995) 53-71*
[32] *Ibid. See also* Ginther K, Denters E & de Wart JIMP (eds) (2001)15-16
[33] Senona (2009) 8 *Journal of International Trade Law and Policy* p 60 at 60

2.2.2 What is Sustainable Development?

All that has been said so far in respect of the concept of development applies *mutatis mutandis* to the idea of sustainable development. However, the idea of sustainability adds an extra dimension to it – since development can either be sustainable or unsustainable.[34] It is therefore crucial to give some insight into what sustainable development denotes.

One of the earliest attempts at defining the term 'sustainable development' can be found in the statement of the World Conservation Strategy (WCS) in 1980.[35] It was defined as one which "takes account of social and ecological factors, as well as economic ones; of the living and non-living resource base; and of the long-term as well as the short-term advantages and disadvantages of alternative action." [36]

The shortcoming of this definition is its narrow environmental leanings.[37] Nevertheless it is helpful since it reveals some of the integral components of the term. For example it includes within its scope social, ecological, and economic factors. More importantly, it demands a long-term consideration of issues.

Perhaps the most generally accepted definition of the term 'sustainable development' is that adduced in 1987 by the World Commission on Environment and Development (WCED). [38] It was defined as "economic and social development that meets the needs of the current generation without undermining the ability of future generations to meet their own needs." [39] Again this definition has also not gained universal approbation, because it failed to indicate how the idea can be made operative amongst other reasons.

Irrespective of lack of consensus on a precise definition of the term[40], it is indisputable that it transcends the attainment of economic goals, stretching into other spheres such as the environmental, the societal, and even the political.[41] It also stresses development over the long-term, rather than a mere short-term timeframe.[42] In essence, it reveals qualitative development, which is enduring or long-lasting.

---

[34] *Ginther K, Denters E & de Wart JIMP (eds) (2001) 111.*
[35] *Johan Holmberg (ed) (1992) 20.*
[36] *Ibid.*
[37] *Ginther K, Denters E & de Wart JIMP* (eds) (2001) 113; *John Kirkby, Phil O' Keefe & Lloyd Timberlake (eds.) (1996)1.*
[38] *Johan Holmberg (ed) (1992) 20.*
[39] *Gehring & Segger (eds) (2005) 4-5.*
[40] *Ginther K, Denters E & de Wart JIMP (eds) (2001) 25-26.* Here Malanczuk discussed the ambiguity and imprecision associated with the term; Newcombe (2007) 8 *Journal of World Investment and Trade* 356 at 361.
[41] *Ginther K, Denters E & de Wart JIMP (eds) (2001) 26.*
[42] Gehring & Segger (eds) (2005) 5.

Furthermore, it assumes a more comprehensive perspective of human welfare. It puts a premium on the long-term implications of current activities and decisions. It concerns itself with the qualitative parameters for evaluating development and not just the quantitative.[43] It goes beyond mere economic growth. It encompasses comprehensive parameters such as poverty reduction, raising standard of living; environmental considerations, and overall present and future socio-economic well-being of a country and its citizens.

The international quest for sustainable development has gathered momentum in recent years. It has been the subject of several fora, workshops, international guidelines, 'soft law' declarations[44], and the remit of several organizations. [45] As mentioned earlier, it is also found regularly in several treaties though its presence therein does not elevate it to the status of a binding international customary law principle.[46]

Further impetus was given to it through the enunciation of the Millennium Development Goals (MDGs) by the United Nations. Goal 8 of the MDGs advocated for a global collaboration for development predicated on the right to development[47] and new development economics with the objective of actualizing sustainable human development.[48] More significantly, the preamble of the Marrakesh Agreement establishing the World Trade Organization contains the phrase.[49] Its presence in the preamble while not clothing it with legal enforceability ensures that it could play a role in construing the object or purpose of the Agreement.[50]

---

[43] *Christina Voigt (2009) 3*

[44] WTO, Singapore Ministerial Declaration, WT/MIN(96)/DEC?W, 13 December 1996

[45] Gehring and Segger observed that the concept is found in one formulation or the other in about fifty binding international treaties. They further furnished examples of conferences where the concept was deliberated upon to include United Nations Conference on Environment and Development held in 1992 at Rio de Janeiro, Brazil; Monterrey Consensus of the International Conference on Financing for Development, organized by the United Nations and held in Monterrey, Mexico in 2002, World Summit on Sustainable Development held in 2002, New Delhi Declarations of Principles of International Law Relating to Sustainable Development, 2002; and the World Summit on Sustainable Development held in Johannesburg in 2002. See Gehring & Segger (eds) (2005) 5

[46] Gehring & Segger (eds) (2005) 5.

[47] This Right falls within the category of soft law, and is therefore not legally enforceable. Its origins are traceable to the 1960s. It was initially conferred legal recognition by the 1981 African Charter on Human and Peoples' Right, before it received further official imprimatur by the United Nations General assembly in 1986 through the Declaration on the Right to Development. See further *Matsushita, Schoenbaum & Mavrodis (2006)781*; Senona (2009) 8 *Journal of International Trade Law and Policy* 60 at 64-65.

[48] Senona (2009) 8 *Journal of International Trade Law and Policy* 60 at 78.

[49] See Preamble to the Marrakesh Agreement Establishing the WTO. *See also Kasto J ((1996) 54*

[50] See Article 31 Vienna Convention on the Law of Treaties 1969.

The cumulative conclusion to be drawn from the foregoing is that the concept of sustainable development is fundamental to human existence.[51] Consequently, it is contended that the principle must serve as the overarching undergird that must influence the practices, processes, and mechanisms of the international trade legal regime.[52]

Having considered the twin concepts of 'development' and sustainable 'development', it is clear that they are very similar, with idea of sustainability qualifying the former, and stressing its enduring nature. Therefore, subsequently in this thesis, for working purposes the two terms will be deemed synonymous in the rest of this thesis.

2.2.3 The quest for sustainable development – key factors

The quest for sustainable development will demand devising well-articulated and carefully monitored development strategies. These strategies usually integrate a synergy of different components, as the realization of this most important goal will obviously not hinge on a singular component. A good legal framework; good governance; competitive industries; domestic and international trade; domestic and international investment; good infrastructure; nurturing and encouragement of micro, small and medium enterprises (MSMEs); strong, efficient and sound institutions; well-educated populace; sound environmental management practices; macro-economic stability; good governance; technological acumen; promotion of a good business and investment climate are some of the key components of this dynamic matrix.

Financing is also one of the most important factors.[53] It is needed to facilitate productive activities, provision of infrastructure, government expenditure on public utilities, and for investment purposes. Finance in this regard, in an ideal world should be available domestically. It is common knowledge that we live in a world that is far less than ideal. With many countries having mammoth populations, and with inadequate resources to support development programmes, resort necessarily had to be made to external finance.

Consequently, countries (including Nigeria) have had to rely on loans from International Financial Institutions such as the World Bank, International Monetary Fund, International Finance Corporation (IFC)

[51] *Christina Voigt (2009) 3.*
[52] *Gehring & Segger (eds) (2005) 73.*
[53] Ginther K, Denters E & de Wart JIMP (eds) (2001) 44-49

amongst others. Other sources of external financing include Official Development Assistance (ODA) and donor funding from other development-oriented donor organizations.

In terms of private external capital flows, portfolio capital[54] has always figured prominently, while remittances are increasingly making a contribution. But arguably the most important, desired and preferred source of external private finance, especially from the perspective of this thesis, is foreign direct investment. Accordingly, it will be examined exhaustively below.

2.3 Definition and Classification of Foreign Direct Investment

The most popularly referenced definition of Foreign Direct Investment is that given by the World Bank, where the concept was defined in terms of the acquisition of shares exceeding a threshold of ten percent in another firm in a foreign country, with a view to securing a managerial or controlling interest in it.[55] However, this definition shrouds the full picture of what Foreign Direct Investment denotes, because it ignores the existence of other classifications of FDI.

2.3.1 Classification of Foreign Direct Investment

Foreign Direct Investment can be classified according different criteria. If the mode of entry is the criterion adopted, FDI can be classified into greenfield investment, and brownfield Investment. Where the rationale for making the foreign investment is the criterion adopted, it can be classified into natural resource-seeking, market-seeking, efficiency-seeking, and strategic-asset or capability seeking FDI.[56] If the direction of FDI flows is the criteria to be used, then it can also be classified into inward FDI and outward FDI.

[54] This could either be equity portfolio investment such as shares; or alternatively, it could be Bond finance, encompassing different species of debt securities. See further Goldin AI & Reinert AK (2005) 14 *Journal of International Trade and Development* 453 at 454
[55] Goldin AI & Reinert AK (2005) 14 *Journal of International Trade and Development* 453 at 455
[56] *Dunning HJ & Sarianna LM (2008) 67-68*

2.3.1.1 Greenfield Investment

Greenfield investment entails the establishment of a new venture, firm, or subsidiary in another country, for example through Mode 3 (commercial presence) of the WTO General Agreement on Trade and Services (GATS). Clearly, this may never require the acquisition of the so-called minimum ten-percent controlling interest. It would require establishing the firm in the foreign country by complying with the relevant laws on incorporation and other relevant laws in the foreign jurisdiction. An illustration of this is the establishment of South African telecommunications company MTN in Nigeria and several other African countries. Another example is the South African supermarket Shoprite setting up a commercial presence in Nigeria. In these two examples, both firms established a commercial presence as a new venture in Lekki, Lagos, Nigeria by complying with the relevant Nigerian laws. They never needed to purchase shares in any company. This variant of FDI clearly depicts the inadequacy and narrowness of the World Bank's definition of FDI adduced above.

2.3.1.2 Brownfield Investment

The World Bank definition of FDI given above is more descriptive of brownfield investment. This is the acquisition of sufficient controlling interest in an existing firm in a foreign country. The means by which this is effectuated is usually through the mechanism of mergers and acquisitions. In Nigeria and other African countries, privatization has also served as a key conduit for entry of brownfield Investments. A good example of this is the merger between Nigerian bank, IBTC and South African bank, Standard Bank, which resulted in IBTC Standard Chartered Bank. This was actuated by the foreign bank acquiring controlling interest in an *existing* firm in Nigeria.

2.3.1.3 Natural Resource-seeking FDI

This is a type of FDI classified on the basis of rationale for investing on the part of the foreign investor. In this case, the investment is made in order to exploit an asset or resource in a foreign country. This type of FDI limits the options available to the foreign investor and gives the home country tremendous bargaining advantage.

The same way countries compete for foreign investors, investors could also compete for limited available resource-rich locations. Bad governance, poor infrastructure, poor quality, high perception of risks and generally poor investment climate of resource-rich countries, is usually counterbalanced by the desire to make huge profits. Consequently investors still compete for those locations.

Resource-seeking FDI tend to be concentrated in the extractive sectors such as the mining and oil industries. An example of this type of FDI is that made by Shell BP in the Niger-Delta region of Nigeria. A disadvantage of this type of FDI is that they tend to be enclave-type activities whose beneficial effects do not reverberate into other sectors of the host economy. Another disadvantage is the attendant environmental problems which they tend to inflict on the host economy. The Bhopal disaster in India and the Niger-Delta situation in Nigeria are vivid illustrations of this. It could also foster overdependence by the host economy on the asset or resource to the exclusion of other sectors of the economy.[57] However, it could be a good launch-pad for more broad-based development if well-harnessed.

2.3.1.4 Efficiency-Seeking FDI

This kind of FDI is made pursuant to a need to make efficiency gains with a view to maximizing profits and minimizing the costs of the firm.[58] The higher the costs of production such as land, labour, and capital, the less the profit a firm is likely to make, except in the case of necessary goods. There could be other costs incurred by a firm for marketing, distribution, transporting, power-generation, and even tax which could contrive to reduce the profit a firm is likely to make. Consequently, firms are always exploring ways of bringing down their costs or being more efficient. A country offering comparatively lower costs of factors of production, better infrastructure, lower tax, amongst other costs naturally becomes the destination for efficiency seeking-FDI.

It is the need to ensure efficiency gains that has ensued in the globalization of production by Multinational Corporations. This is a situation where different facets of the production process could be done in different locations or countries based on the lower production and other costs they offer. China and some other Asian countries due to their cheap labour and other costs are recipients of this type of FDI. Nigeria and

[57] This problem has been given different names by scholars such as the “Dutch disease” or “resource-curse”
[58] *Dunning HJ & Sarianna LM (2008) 72.*

other African countries are not attractive locations for this type of FDI because of notoriously high production and other costs.

2.3.1.5 Market-Seeking FDI

This is the kind of FDI made with a view to either gaining access to a foreign market or being able to secure a larger market for their product or services.[59] High tariffs or import bans have posed near formidable obstacles to firms seeking access to foreign markets. These protectionist measures are usually deployed by countries in a bid to prevent foreign products from competing with domestic products. Market-seeking FDI therefore is made by a Multinational Company to surmount this obstacle. Once the tariff walls have been scaled by establishing a plant or commercial presence within the foreign country, it would be much easier for such firms to supply the local market. Alternatively, the potential of securing a larger market and making greater profits could inform the making of this type of investment. In this regard, the potential presented by countries with massive population like China, Nigeria and India makes them destinations of choice for this type of FDI.

2.3.1.6 Strategic asset-seeking FDI

This is the type of FDI geared at the acquisition of the assets of foreign corporation in line with their long-terms strategic objectives.[60]

2.3.1.7 Inward and outward FDI

This is a classification of FDI based on direction of flow. Inward FDI refers to the total volume or value of FDI it receives into its economy from firms located in foreign countries. While outward FDI refers to the total value of FDI made by firms located within its jurisdiction in other countries. Some do not perceive outward FDI as positive premised on the notion that it ought to have been used for domestic developmental

[59] *Dunning HJ & Sarianna LM (2008) 70*
[60] *Dunning HJ & Sarianna LM (2008) 67-68.*

purposes. However, apart from the fact that profits can be repatriated back to the home country, outward FDI is an indicator of the maturity of an economy.

2.4 FDI and other global private capital flows

FDI has traditionally been distinguished from other global private capital flows like commercial lending, remittances and portfolio capital.[61] It is has been asserted that the key factor that distinguishes FDI from the other genre of capital listed above is controlling or managerial interest. Controlling interest ensures a measure of stability and commitment to the host economy, which ensure its survival amidst recurring financial crises. In contrast, in the event of crisis, capital flight usually ensues in respect of the others. This resilience, even amidst cycles of financial and economic upheavals is one of the reason which gives FDI its appeal.

FDI is also preferred, over debt-financing whether in the form of commercial lending or commercial bonds. Commercial lending attracts continual and usually fluctuating interest rates, and along with bond portfolio finance are essentially debt financing. Debt financing, especially, sovereign debts has done more havoc to the economies of several African countries (including Nigeria).[62] Majority of these economies, virtually grounded by the burden of debt-servicing, have had to resort to recurring debt-rescheduling or appealing for debt forgiveness. FDI on the other hand since it is equity capital does not create such problems for countries.

However, the conventional distinction between FDI and portfolio investment is becoming increasingly blurry. Owing to a broader definition of FDI, it is not unusual to find bonds (especially corporate or commercial bonds) being categorized as FDI.[63] The reasons adduced in support of this stance are hinged on the long-term nature of some bonds; its potential convertibility (through equity-debt swap) into shares with attendant acquisition of managerial interest,[64] and its general nature as a form of investment.

---

[61] *Trebilcock JM and Howse R (2005) 438*
[62] This has been worsened in recent times by the phenomenon of "vulture funds".
[63] Dr. Rosalind Thomas made these submissions at an high level FDI meeting convened by the International Development Law Unit, Faculty of Law, University of Pretoria, on Foreign Direct Investment, held at the Faculty of Law, University of Pretoria, April 2010.
[64] This can be done through a debt-equity swap.

This emerging paradigm finds expression in Bilateral Investment Treaties, and investment chapters of Regional Trade Agreements such as the Southern Africa Development Community (SADC) Protocol,[65] and the botched draft Multilateral Agreement on Investment (MAI) Organization for Economic Cooperation and Development (OECD), which both include bonds within the definition of FDI.

It is doubtful however, if the foregoing trend would garner universal support, with most scholars and countries entertaining anxieties at the idea of extending equivalent level of protection given to FDI to bonds. In the final analysis, it is left to countries, whether at the domestic level, or in the context of a Regional Trade Agreement to clearly delineate what they consider to be FDI.

Nevertheless, dwindling official aid, paucity of domestic resources, desire to avoid compounding overbearing debt burdens, and the non-debt-creating nature of FDI have cumulated to enthrone FDI at the apex of the hierarchy of private capital flows. Other potential concomitant benefits such as transfer of technology, managerial skills, employment generation, crowding-in of investments, has further intensified its strong appeal.

The foregoing explains why the attraction of FDI has become the ardent pursuit of several countries, with a view to actualizing sustainable development. However, it has not always been appealing. Indeed over the years there have been shifts in countries' attitude towards Foreign Direct Investment.[66] These attitudes are reflective of theoretical underpinnings which will be discussed below.

2.5 Theoretical underpinnings influencing FDI perception

Three economic theories have primarily underpinned the perception of FDI for several years. They are the classical economic theory; dependency economic theory; and the middle ground theory.

[65] The SADC Protocol however contains an opt-out clause which allows countries to exclude themselves from including bonds within their definition of FDI.
[66] *Hoekman B, Mattoo A & English P (2002) 171.*

2.5.1 The classical economic theory

The classical economic theory posits the view that FDI is unequivocally beneficial for host countries.[67] It cites a number of advantages such as allowing countries' limited resources to be expended on other ends; employment generation; transfer of new technologies, amongst other benefits in reaching that conclusion. This theory is however faulty because it ignores disadvantages of FDI such as transfer-pricing, restrictive business practices, monopolistic behaviour, human right violation and environmental devastation. It also makes the false assumption that the supposed benefits of FDI accrue automatically. It is doubtful if this opinion can be genuinely held by any respectable school of thought in contemporary times.

2.5.2 The dependency theory

The dependency economic theory on the other hand presents the converse view to the classical economic theory. It postulates the view that FDI will not ensue in the meaningful development of the economy of host countries. While conceding the view that FDI could be good for an economy, they assert that it is not the cure for the underdevelopment that plagued several countries. They construe the repatriation of profits to their home countries as a way of bolstering such economies and perpetuating domination in the economic sphere over host economies.

Furthermore, they described scenarios where profit-driven multinational corporations teamed up with powerful individuals in the corridors of powers to further private ends. They allege that such unholy alliances resulted in corruption and enrichment of the ruling class to the detriment of the host economy. Thus, they opined that FDI was a tool for preserving the domination of home countries over host economies.

In addition, they believed it fostered dependency of the host economy on FDI, thereby making them subservient and permanently dependent on home economies. Consequently, they conclude that FDI is unequivocally bad for host economies. Predicated on this, they maintained that rather than attract FDI, countries should eradicate and resist it. This theory must have influenced the spate of nationalizations in many African countries which occurred during the currency of the theory.

[67] Sornarajah maintained that this was the view supported by the neoliberal economists and championed by the Breton Woods Institutions i.e. the World Bank and the IMF in the 1990s. It also informed the view that foreign investors and their investment should be given unbridled freedom. See Sornarajah (2004) 52.

Again, like the former theory, this stance is also an extreme view. While historical circumstances may lend some credence to this view, to hold that FDI is unequivocally bad would amount to the proverbial "throwing away of the baby with the bathwater". FDI cannot be described as being unequivocally bad, considering the strategic role it played in the development of several economies, especially East Asian countries.

2.5.3 Middle-ground theory

The Middle-Ground theory presents a more practical approach by striking a balance between the two aforementioned extreme theories. Without agreeing completely with both views, it synthesizes shades of truth from both to come to a compromise stance which few will find hard to controvert. While recognizing the benefits which could accrue to the host economy through FDI, it also acknowledged the dangers it could pose. This view, predicated on analyses of the effect of FDI on host economies, stress the importance of regulation in maximizing benefits derivable from it.

It is submitted that the middle-ground view is the more plausible view. This is borne out by both empirical and case studies which highlight the double-edged impact that FDI could have on host economy. This would be covered in more detail subsequently in this chapter.

Suffice to say that the theories highlighted above concede that FDI does impact on development of host economies. However, they differ on the nature of its impact (whether negative or positive) and also on the degree (meaningful or otherwise). Two further observations is worthy of mention at this juncture. First, it seems the acceptance of the middle-ground theory has brought renewed focus on the role that FDI could play in actualizing sustainable development. This much is discernible in key national, sub-regional, and international documents emanating from different fora. Second, the acceptance of the theory seems to have precipitated an upsurge in global FDI flows. These observations will be examined below.

2.6 Renewed focus on potential of FDI in promoting sustainable development

Foreign Direct Investment can indeed play a pivotal role in the quest for sustainable development. It is a form of capital which can be used for productive purposes. The immense global marketing networks can be exploited to generate foreign exchange from export earnings for the country. It could be a source of employment, as well as means of upgrading the technological capacities of host countries. Further, FDI

could be a strategic mechanism which could promote the quest for industrialization. In addition, it could be a strategic means of providing infrastructure such as power generation, telecommunications, roads, without which development may be elusive. FDI, if properly harnessed could be pivotal to sustainable development. Accordingly, the importance of FDI to sustainable development has been accentuated in several fora.[68]

The crucial contribution that FDI could make to sustainable development was highlighted in Agenda 21 of the United Nations Conference on Environment and Development held in Rio de Janeiro, Brazil in 1992. This was reiterated at the Monterrey Consensus in Mexico a decade later in 2002. Recognition of the role of FDI in this regard prompted several references to the need to create an investment-friendly climate in the Johannesburg Plan of Action (Plan of Implementation) which was given imprimatur at the World Summit on Sustainable Development in 2002.

At continental and sub-regional level, the potential contribution of FDI to sustainable development has also been recognized. At continental level, this affirmation is embodied in the New Economic Partnership for African Development (NEPAD). This is the new vision for Africa's development conceived and adopted by the African Union in 2001. FDI is an integral cog of NEPAD's vision to actualize sustainable development in Africa. Similar sentiments have been expressed by the Economic Community of West African States (ECOWAS) at sub-regional level. This is encapsulated in the specific objectives of the sub-region's evolving common investment policy framework and investment code.[69]

At the national level, Nigeria also not been left out in this regard. FDI is integral to the Nigeria's medium term economic development strategy – National Economic Empowerment and Development Strategy (NEEDS).[70] The NEEDS on the other hand is crucial to the attainment of the United Nations Millennium Development Goals.[71] Its importance is underscored by the fact that attracting FDI into all major sectors of the economy is one of Nigeria's trade policy objectives.[72] This makes FDI assume great significance in the scheme of things.

Furthermore, exploring ways of enhancing FDI's contribution to sustainable development was one of the motives for Nigeria's investment policy review carried out between 2005-2008, by the United Nations

[68] Newcombe (2007) *8 Journal of World Investment and Trade* 356 at 357
[69] Addy G & Falou S (2008) 7,18 & 28
[70] *Federal Ministry of Commerce and Industry (2009) 1.* The writer is grateful to Professor Ademola T. Oyejide for making available the foregoing draft document. See also *UNCTAD (2009) 6.*
[71] *UNCTAD (2009) 6*
[72] *Oyejide A & Njinkeu D (ed.) (2007) p.257*

Commission for Trade and Development.[73] The ensuing document emanating from the review, reiterated the resolve to utilize FDI in promoting sustainable development in Nigeria.[74] Furthermore apart from the investment policy, Nigeria's draft trade and industrial policy also underscores the significance of investment in realizing development.[75]

The foregoing shows the importance being attached to FDI, with regard to its potential role in contributing to sustainable development. A further indication of its increasing significance can be glimpsed from the increase in volume and value of FDI flows in contemporary times.[76] This will be examined briefly below.

2.7 Global flows as indicative of FDI's significance

Within the last decade of the twentieth century there was a dramatic upsurge in global FDI flows.[77] The distribution of these flows has not however been even amongst regions, with the bulk of the flows concentrated amongst some countries. Nevertheless, the huge surge attracted the attention of countries who, with a view to attracting some of the flows worked hard at creating an investment-friendly climate.

Africa has also witnessed a growth in FDI flows, though when compared to other regions, the volume is quite meagre. The bulk of the FDI attracted by Africa is concentrated amongst a few developing countries, with the share of Least Developed Countries being near insignificant. Furthermore, the FDI attracted by Africa has been concentrated mainly in the extractive sectors such as mining and oil exploration. Consequently, Nigeria, South Africa, and Angola, Botswana have been top recipients.

Despite attempts to increase its share of FDI by liberalizing investment regime and offering huge incentives to investors, there has not been a corresponding increase in FDI in Africa. This shows that liberalization and the giving of incentives are not sufficient to influence foreign investors' choice of location. In other words there are stronger determinants of FDI. A good investment climate coupled with strong and efficient institutions, stable regulatory and legal environment, quality and affordable human resources, size of the market, good infrastructure, and reducing the cost of business, and general attention to fundamentals are more likely to have a greater bearing on investors' choice of location. In the final analysis, the profit motive

[73] *UNDP (2005) 1*
[74] *UNCTAD (2009) Investment Policy Review – Nigeria 69.*
[75] *Federal Ministry of Commerce and Industry (2009) 12-13.*
[76] *Correa C & Kumar N (2003)7-9.*
[77] *Trebilcock JM & Howse R (2005) 438.*

is an extremely potent motivating factor. This the rationale for investors opting for locations with draconian or 'undemocratic' governments, which even lacks some of the factors outlined above.

Generally, Africa is deficient with regard to several of these factors. The perception of Africa's investment climate has been poor. It is seen as a high risk continent and this partly explains why it has not attracted significant flows of FDI. There is a great deal to be done if Africa is to increase its performance in FDI. However, a few of its countries have done comparatively better than their contemporaries within the continent. Tunisia and Angola have not done too badly. Nigeria is also one of Africa's better performers, with the bulk of its inflows going to the extractive sector.

The appreciation of the importance of FDI as evidenced at different fora and its increasing significance as discernible from the upsurge in flows has resulted in an uncritical pursuit of FDI. Countries go to extreme lengths to woo the foreign investor, engaging in incentives war which only ends up overly enriching the investor. Bilateral investment treaties have proliferated tremendously. Regional Trade Agreements, with investment chapters are also sought in a bid to secure greater inward FDI. The zeal with which it is pursued obscures the sober reality that FDI is not an economic elixir. It can best be described as a double-edged sword, which could bring benefits, as well as risks to an economy.[78] This much has been revealed by the classical economic theory of FDI. This dual potential impact of FDI has also been established by both theoretical and case studies, which will be briefly discussed below.

2.8 FDI as a double-edged sword

As already stated earlier, FDI has the potential of generating a variety of benefits to a host economy.[79] It could crowd in investments; generate employment; transfer technology; increase revenue from taxes; transfer managerial and organizational skills; generate healthy competition; amongst other benefits. This is the side of FDI which is usually emphasized. However, this idyllic picture may very well prove illusory for two reasons.

First, the highlighted benefits of FDI may not materialize. Rather than crowd in investments, FDI may crowd out investments and destroy local competition. Instead of improving welfare, it may reduce it through anti-competitive practices. FDI rather than bringing state of the art-technology may bring old ones. It may

[78] *Smith SM (ed) (2006) 214-215.*
[79] *Gilpin R (2000) 175.*

generate the expected level of employment due to the methods adopted by the firm. Second, apart from the expected benefits not materializing, it may bring its own unique risks. These include environmental degradation, restrictive business practices, transfer-pricing, balance of payment problems due to high cost of intermediate goods for production amongst others. [80]

FDI thus poses a dilemma for countries. More is not necessarily better. It is not about the quantity of FDI flows, but rather its quality. It is because of the foregoing problems that motivated the Dependency school of thought to conclude that FDI was unequivocally harmful to the host economy. It is also partly responsible for the stance of those who advocate a rethinking of the role that FDI could play in sustainable development. However, the approach should not be to completely jettison FDI. Rather, the better approach should be to devise a way of maximizing benefits and minimizing the risks posed by FDI.[81] If there is a key point to underscore here, it is that the positive contribution of FDI to sustainable development cannot be assumed. On the contrary, FDI must be consciously geared towards sustainable development of the host economy.

2.9 Rationale for gearing FDI towards sustainable development

The rationale for gearing FDI towards sustainable development is rooted in the understanding that a positive link between FDI cannot be assumed. Rather than contribute to the goal of sustainable development, FDI may indeed hamper it. Theoretical and case-study evidence prove this. They also underscore the importance of host country policies in ensuring positive contribution of FDI to their economy and to their development objectives.[82]

A firm appreciation of these facts has compelled countries to deploy a variety of mechanisms. These measures include both trade-related and non trade-related measures. Examples of these policies these measures or tools are screening; joint venture requirements; local content requirement; export requirements, domestic employment requirement; general and sectoral foreign equity limits; nationalization; restriction of repatriation of profits; land ownership restrictions; and positive incentives.[83]

[80] *Gallagher PK (ed.)(2005) 179.*
[81] *Meir MG (1989)254-262.*
[82] *Jones E & Whittingham P (1998)77.*
[83] *Bernard Hoekman B, Mattoo A, English P (eds) (2002) 439.*

Several developed and developing countries have utilized these measures with varying degrees of success. Even in the present era these measures are still being deployed although there are now constraints on their ability of countries to use them. The International arena has suddenly become hostile to countries.[84] The ability to channel FDI is becoming increasingly difficult, as the policy space to deploy these measures is increasingly shrinking.[85] The bulk of these constraints come from a variety of investment agreements.

Investment Agreements in varying degrees, cumulatively constrain the ability of countries to gear FDI towards developmental objectives.[86] Perhaps the most notorious amongst them are the universe of bilateral investment treaties (BITs) which have proliferated significantly in recent times. At regional level, the Investment chapters of regional Free Trade Agreements (FTA) such as the Economic Partnership agreements (EPAs) also contribute added constraints.[87]

At the global level, there is no multilaterally agreed investment agreement that can be examined as to its effect on host economies. The closest to a multilateral investment agreement was the failed OECD draft Multilateral Agreement on Investment (MAI). However, there are a number of WTO Agreements which have some bearing on Foreign Direct Investment.[88] These are the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Investment Measures (TRIMs); Agreement on Trade-Related Aspects of Intellectual Property (TRIPs); Agreement on Government Procurement Agreement (GPA); Agreement on Textiles and Clothing (ATC); and the Agreement on Subsidies and Countervailing Measures (SCM).[89]

[84] *Addo KM (ed) (1999) 140.*
[85] *Gallagher PK (ed)(2005) 10.*
[86] *Gallagher PK (ed)(2005) 10*.
[87] Chapter 11 of the North American Free Trade Agreement (NAFTA) and the Investment chapter of the CARIFORUM EPA have come under severe criticism for their constraining effect on host country policy autonomy.
[88] *Khalid R, Ley P & Saleem M (2001) 59.*
[89] Sachdeva MA (2007) 8 *Journal of World Investment and Trade* 533 at 536

2.10 Conclusion

With the exception of the GPA,[90] Nigeria being a member of the WTO is a signatory to all the agreements listed above. This is because of the single undertaking principle of the WTO.[91] Each of these agreements has implications for Nigeria. However the preoccupation of this thesis is the TRIMs Agreement. Consequently, chapter three will examine the impact of the TRIMs agreement on Nigeria. More pointedly, it will examine, amongst other salient issues, how the Agreement impacts on Nigeria's ability to gear FDI towards sustainable development.

[90] The GPA is one of the four plurilateral agreements outside the gamut of the single undertaking. Consequently, have a choice on whether to be bound by it or otherwise. The other three are Agreement on Trade in Civil Aircraft; Agreement on Government Procurement; International Dairy Agreement; and International Bovine Meat Agreement

[91] The single undertaking is a principle introduced during the Uruguay Round which in essence made signatories to the WTO to be bound by all its Agreements, except the plurilateral codes. It was a radical departure from the pre-Uruguay Round system which allowed countries to choose which agreements to undertake to be bound by.

CHAPTER 3

THE IMPACT OF THE TRIMS AGREEMENT ON NIGERIA

3.1 Introduction

This chapter examines the impact of the TRIMs Agreement on Nigeria. The object is to ascertain whether, and to what extent it constrains Nigeria's ability to gear FDI towards sustainable development. It would examine a host of salient issues.

3.2 Distinction between TRIMs and the WTO TRIMs Agreement

Trade-related investment measures are not equivalent to the WTO TRIMs Agreement – although the latter concerns itself with the former. Moreover, the WTO Agreement does not cover all the available TRIMs. It is therefore important for the purpose of clarity to draw some distinctions between TRIMs and the TRIMs Agreement.

First, TRIMs are measures, while the TRIMs agreement is one of the codes of the WTO which by virtue of the single undertaking principle is binding on its members. Second, TRIMs predates the WTO TRIMs agreement. Ever before the TRIMs Agreement was consummated TRIMs had been applied been used by several countries. Third, the TRIMs that are available to countries are much more than that which falls under WTO disciplines.

3.3 Definition of TRIMS

There is no consensus on the definition of TRIMs.[92] Even the TRIMs Agreement contains no definition of the term. It is clear however is that there are assortments of policy measures deployed by host countries targeted at maximizing net benefits of FDI accruing to their economies.[93] Examples of these measures are

[92] *Muchlinski PT(1999) 257.*

[93] Examples of measures countries could use are tax concessions, subsidies, and investment grants. They also include a broad range of performance requirements such as local equity requirements; licensing requirements, transfer of technology requirements; restrictions on the repatriation of funds; manufacturing limitations; domestic sales requirements; export requirements; local content requirements. See *Muchlinski PT (1999) 257.*

a variety of performance requirements such as local content requirements, trade-balancing, export performance requirement, local equity, employment of local personnel, transfer of technology, requirement to locate in a particular area etc. Some of these measures have restrictive and trade-distortive effect, while others do not. Consequently, the former measures which distort trade are conveniently captioned, "TRIMS".[94]

The TRIMs does not preoccupy itself with investment measures that do not distort trade. Moreover, it does not regulate all available TRIMs. However other investment agreements like bilateral investment treaties (BITs) and investment chapters of Regional Trade Agreements bring a wider category of TRIMs under their disciplines.

TRIMs have been applied by several countries across the development divide for several years. Even now, despite the advent of the TRIMs Agreement, they are still in use in some countries. Interestingly, some of the TRIMs prohibited have been ingeniously transmuted and "smuggled" back into use. Good illustrations of this are the Rules of Origin (ROO) of the European Union, which has been asserted as having the same effect as local content – one of the prohibited TRIMs under the TRIMs Agreement. Could this reflect, beyond the rhetoric and politicking, an unwillingness to jettison valuable policy instruments?

3.4 Dual theoretical context of the TRIMS Agreement & FDI Regulation

It is important to realize that the debate over TRIMs and indeed investment regulation generally is steeped in a dual context. First, there is a political economy context. Second, there is a theoretical economic context. These are the hands that wear the glove. These are the potent forces behind the scenes that undergird, vivify and determine the emergence, nature and content of investment agreements. The emergence and content of the TRIMs Agreement has been influenced by these contexts. Indeed it is undeniable that debates over investment regulation are mere manifestations of these two contexts which shall be examined briefly below.

[94] *Muchlinski PT (1999)* 257.

3.4.1 Political economy of the TRIMs Agreement & FDI regulation

The political economy of FDI is rooted in an amalgam of conflicting interests of key protagonists in the field of FDI. [95]In this regard, the key actors featuring in the script are the Home Country, Host Country, and Multinational Corporations (MNEs).[96]

The Home Countries are the capital exporters and the base of the MNEs. On the one hand, the exported capital is a leakage from its economy. This may stir up some resentment by different groups within the Home country. However, economic research indicates that outward FDI is beneficial for the Home country.[97] It enhances a country's reputation and evinces proof of the maturity of its economy. The interest of the home country is to ensure unfettered access of its MNEs to other jurisdictions.[98]Consequently, complete, and preferably immediate liberalization of FDI becomes its ardent pursuit.[99] Any attempt to regulate is therefore disdained. The interest of the host country does not rank highly in the home country's agenda. It is surmised that home-country interest, especially that of the United States, was a key factor in the emergence of the TRIMs Agreement.

The MNE's interest is the easiest to identify. It has been traditionally averred that the business of businesses is to make profits. That is the most important of the objective of the MNE. It is the primary reason why it opts for a location for its investment. It is the reason why they engage in restrictive business practices, move to locations with less cost, obtain production inputs from the cheapest sources available, and seek out ways of obtaining greater efficiency gains. This is also the reason why developmental aspirations of the host countries may rank secondary to MNEs. From their perspective there could only be one winner – profits. They would therefore frown at regulations which would fetter their access or affect the profitability of their investment. The power of MNEs to influence governments to promote their agenda is well documented.

Host countries on the other hand have a different interest entirely. They desire to attract FDI with a view to ensuring its contribution to their development, mindful of the fact that without regulation that objective may

[95] Seifu G (2008) 9 *Journal of World Investment and Trade* 408-410.
[96] There are also other actors such as non-governmental organizations, International Financial Institutions (IFIs) and trans-governmental, and the citizens of both home and host countries.
[97] *Gilpin R (2000)181.*
[98] *Gallagher KP (ed.) (2005) 80 & 213*
[99] *Muchlinski TP (1999) 103.*

prove elusive.[100] Consequently based on this important interest, they adopt measures targeted and realizing that objective.[101] This also makes them extremely hesitant when it comes to giving FDI free rein in their economies.

The conflicting interests sketched above are powerful influencing factors during negotiations. It is clear that the interests of the main protagonists in the FDI script sketched above are divergent. The ideal approach should be an attempt to find common ground to reconcile these conflicting interests. More often than not this is not the case. Consequently, the outcomes are imbalanced or skewed agreements which fail to adequately strike a proper balance between conflicting interests of the parties involved. This was one of the greatest criticisms levelled against the failed OECD Draft MAI.[102] It is also the reason a multilateral agreement on investment has proved elusive so far.

The political economy context described above is however nuanced. Some FDI home countries have now also become huge FDI recipients.[103] Thus issues are now not as clear-cut as they used to be - the waters have become muddled. Simplistic generalizations can no longer hold.

3.4.2 Theoretical economic context of the TRIMs Agreement & FDI Regulation

Just as the TRIMs agreement has a political economy context, it also has theoretical economic context. The TRIMs Agreement, investment agreement generally, and even trade agreements are steeped in the raging cold war between two major economic ideologies.[104] These are the neoliberal ideology, and structuralist ideology.[105] These ideologies have influenced the pace, direction, trends and content of trade and investment liberalization for several years.

---

[100] *Muchlinski TP (1999) 104.*
[101] *Ibid.*
[102] This is also one of the criticisms levelled against the TRIMs Agreement which was construed in some quarters as being skewed against the interests of developing nations.
[103] The United States of America and China aptly illustrates this scenario. The United States of America has become such a huge recipient of FDI that it had to introduce the Exon-Florio Act as a form of regulation. In fact, the US congress were advocating for more extensive regulation of FDI
[104] *Gallagher PK (ed)(2005) 33.*
[105] See *Chang (2003)97-98.* Here Chang essentially regarded challenged the theoretical underpinnings of neoliberal ideology, and views it as flawed. Further he rejected its underlying assumption of market primacy, opining that the neoclassical is only one of many plausible theories. Further he remarked that it was not a particularly good one.

The Neo-liberalists are the advocates of free market mechanisms.[106] They strongly push for liberalization of trade and investment regimes as the best strategy in all circumstances.[107] Further they disapprove of interventions or regulation.[108] They have a near-blind professed faith in liberalization and disdain all interventionist approaches. This ideology has been the intellectual catalyst behind the liberalization of national regulatory regimes, promoted by the triad of the WTO, IMF, and the World Bank. Experiences of several countries however show the failure of the ideology. It has fuelled a globalization process filled with discontents, marked inequalities and impoverishment.[109] Even worse its exponents acted contrary to the ideology they so passionately espouse.[110]

Structuralist ideology on the other hand, repose less faith in the free market.[111] They believe well-orchestrated intervention is crucial in developing countries, where market failures and information asymmetry are rife.[112] They also urge sequenced liberalization of trade and investment regimes of countries, in line with their peculiar circumstances.[113]

For almost three decades now, the neoliberal doctrine has held sway.[114] It has been the intellectual fount behind liberalization and globalization. Along with the political economy scenario depicted above, it is submitted that Neoliberal economic theory also strongly contributed to the emergence of the WTO TRIMs Agreement. The TRIMs Agreement will now be considered below.

---

[106] *Muchlinski PT (1999) 93.*
[107] *Gallagher KP (ed) (2005) 33.*
[108] Ja-Hoon Chang rebutted claims that developed countries thrived due to neoliberalism by cataloguing several examples of several interventionist policies used by Britain, United States, Germany, France, Japan during enroute their ascension of their development ladder. See *Gallagher KP (ed) (2005) 103-11.*
[109] *Stiglitz J (2002) 4-7.*
[110] *Muchlinski PT (1999) 93-94; Stiglitz J (2002) 6-7.*
[111] *Gallagher PK (ed.) (2005) 34.*
[112] *Gallagher (2005) 18.*
[113] Development economists have cited the recent global economic crisis, and huge under-development of several nations all over the world who followed their prescriptions as proof of flaws of neo-liberalism
[114] The global economic crisis has left a serious chink in the intellectual armour of the neo-liberalists, with calls for a rethinking of the theory and the Washington Consensus

3.5 The WTO TRIMs Agreement

3.5.1 Brief historical background of the TRIMs Agreement

The TRIMS Agreement which entered into force 1 January, 1995, is part of the single undertaking of the WTO. It is part of the Uruguay Round Agreements which culminated in the establishment of the WTO through the Marrakesh Agreement in 1995. Historical circumstances which will be examined below however precipitated its inclusion within the WTO codes.

Efforts towards the formulation of what is now called the TRIMs Agreement can be said to have commenced after the completion of the Tokyo Round in 1979.[115] The USA and other developed countries' attempt to bring host country measures under GATT disciplines was resisted, largely by developing economies.[116] The grounds for refusal, was predicated on the contention that FDI was not within the ambit of GATT. The idea was however resuscitated as a result of the Canadian Foreign Investment Review Act (FIRA) case in 1982.

The FIRA case involved a dispute brought to the GATT Panel by the USA against Canada. The USA contended that certain provisions of Canada's FIRA Act contravened Articles III: 4; III: V; XI, and XVI: 1 of GATT 1947; dealing respectively with national treatment on internal taxation; national treatment on internal quantitative restrictions; and subsidies. The Act compelled foreign investors to buy goods of Canadian origin (i.e. local content). In addition it imposed export performance targets. The Panel found the measures as violations of Art III: 4 and XV1:1, the national treatment and quantitative restrictions provisions of GATT 1947.

The success with the FIRA case provided further impetus for inclusion of an agreement on Trade-related-investment in the Uruguay Round negotiations. Spearheaded by the USA, an agreement disciplining a wide range of TRIMs was sought. However, inclusion of TRIMs was initially resisted altogether by developing economies.[117] Ultimately, developing economies caved in to enormous pressure and a compromise was

[115] *Correa MC & Kumar N (2003) 70.*
[116] *Trebilcock JM & Howse R (2005) 455; Khalid R, Ley P & Saleem M (1999) 78.*
[117] *Oyejide TA & Lyakurwa W (eds) (2005) 42.*

found.[118] The TRIMs was therefore included on the Uruguay Round Agenda, culminating in the WTO Agreement on TRIMs.[119]

3.5.2 Structure of the TRIMs Agreement

In terms of structure, the TRIMs Agreement, when compared to other agreements under the WTO code can be described as extremely brief.[120] This brevity is reflective of how problematic it was to have it included on the agenda of the Uruguay Round.

The agreement is prefaced by a preamble which sets forth the objectives of the TRIMs Agreement. The preamble cited the trade-restrictive and distorting nature of investment measures as the primary reason for the agreement. Its avowed objective is therefore to eliminate them with a view to facilitating the international flow of investments amongst. Following the preamble is the body of the text which consists of just 9 articles.

3.5.3 Scope of the TRIMs Agreement

The TRIMs agreement covers only investment measures that are related to trade in goods.[121] Consequently, the TRIMS Agreement is not applicable to trade in services. Its brevity of scope is said to be reflective of developing countries' success in limiting the Agreement to an iteration of existing GATT principles.[122]

The Agreement also prohibits members from using TRIMs which are inconsistent with national treatment principle of the GATT 1994 (Art. III:4) ; and the provision on quantitative restrictions (Art XI GATT 1994).[123] In the Annex 1 to the agreement, a list of prohibited TRIMs is furnished for illustrative purposes.[124]

---

[118] *Ibid.*
[119] For more extensive discussion of negotiation dynamics of the Agreement see: *Croome J (1999) 116-119.*
[120] *WTO Secretariat (ed) (2000) 24.*
[121] Article 1, Agreement on Trade-Related Investment Measures. It been rightly observed that nowhere in the TRIMs Agreement is the phrase 'TRIMS' defined.
[122] *Schott JJ & Buurman WJ (1994) 112.*
[123] Article 2(1), Agreement on Trade-Related Investment Measures, www.wto.org; See also *Oyejide TA & Lyakurwa W(eds) (2005) 221.*

The Annex described TRIMs which are deemed to violate the national treatment principle to include those which are "mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage".[125] It then proceeded to list local content and[126] trade-balancing requirements,[127]as illustrations.[128] Using essentially, the same chapeau as employed in Article 1, the Annex further listed trade balancing-requirements,[129] foreign exchange restrictions,[130] and domestic sales requirement.[131]

Delineation of the scope as discussed above is extremely vital. This is because an understanding of what is covered by the Agreement will help in establishing what is not within its purview. Whatever is not covered will therefore be available as policy tools for countries.

3.5.4 What is not covered?

From the discussion above two conclusions can be drawn about what falls outside the scope of the Agreement. First, from a definitive standpoint, non-trade related investment measures are not within the intendment of the Agreement. Second, TRIMs which do not violate Art III: 4 and XI of GATT 1994 are also outside the scope of the agreement. Export requirement is an example of TRIMs that are not prohibited by the Agreement.

3.5.5 Other Provisions

The Agreement recognized some exceptions to the TRIMs Agreement.[132] It made all appropriate exceptions under the GATT 1994 equally applicable to the TRIMs Agreement. This would include all relevant exceptions to the national treatment and quantitative restrictions provisions. A good illustration of a

---

[124]Article 2(2), Agreement on Trade-Related Investment Measures, www.wto.org. The idea of an illustrative list would seem to imply that other TRIMs not mentioned therein, but which violates Art. III:4 and XI of GATT are still caught by the Agreement.
[125] See chapeau of Article 1 of Annex 1, Agreement on Trade-Related Investment Measures (TRIMs)
[126] Annex 1(a), Agreement on Trade-Related Investment Measures, www.wto.org
[127] Annex 1(b), Agreement on Trade-Related Investment Measures, www.wto.org
[128] The Panel in the Canada-Autos case opined that the idea of an illustrative list meant the TRIMs listed were not exhaustive. Consequently, other WTO panels could find more TRIMs violating Art III:4 and XI of which were not on the list.
[129] Article 2(a), Annex, 1 Agreement on Trade-Related Investment Measures, www.wto.org. It has been noted that the distinction between the trade-balancing requirements in Art 1(b) and 2(a) of the Annex is that the former deals with internal measures affecting the purchase or use of products after they have been imported, while the latter deals with border measures affecting the importation of products. See Asian Development Bank (ADB), Trade Related Investment Measures – Background Information, p4, www.adb.org
[130] Annex 2(b), Agreement on Trade-Related Investment Measures, www.wto.org
[131] Annex 2(c), Agreement on Trade-Related Investment Measures, www.wto.org
[132] Article 3, Agreement on Trade-Related Investment Measures, www.wto.org

relevant exception is the discrimination permitted within the context of free trade agreements.[133] This is arguably the basis on which local content has been transmuted and indirectly brought into use through the Rules of Origin.

Equally applicable will be appropriate general exceptions in the GATT 1994 Agreement such as public morality, security, environmental protection and balance of payments exceptions.[134] All these, and other relevant exceptions, having been incorporated by reference in the TRIMs Agreement provide some leeway for temporary derogation from it disciplines.

Article IV of the TRIMs is rather superfluous. It allows developing countries the opportunity of temporary deviation from Article II of the TRIMs Agreement on the grounds of balance of payment difficulties. This has already been covered by Article III of the Agreement. There seems to be no comprehensible reason for this unless it was targeted at stressing the availability of that exception to developing countries alone.

Ironically, Article V, which deals with procedural matters, is the longest provision in the TRIMs Agreement. The Article deals with notification and transitional arrangements. It stipulated a ninety-day period for members to notify prohibited TRIMs (both specific and general) to the Council on Trade and Goods.[135]

Further, the principle of special and differential treatment is also found in the agreement.[136] It outlined varied time periods within which its members on different cadres of development were to eliminate the notified TRIMS.[137] Least Developed Countries were granted seven years; Developing Countries had five

[133] See Article XXIV of GATT 1994
[134] See Art XX, for a full list of general exceptions to the GATT 1994 Agreement.
[135] Article 5:1, Agreement on Trade-Related Investment Measures
[136] This is one of the most important principles, reflected in nearly all WTO Agreements, and enshrined within the Enabling Clause of 1979. It attempts to give special treatment to developing and least developed countries, based on the recognition of the differences in capacity and level of development. However, since the Uruguay Round, the principle has undergone a radical transformation from its former status during the GATT era. The single undertaking has considerably limited the scope of SDT. It now aims at assisting developing countries towards compliance with WTO disciplines. Avoiding them altogether has now become a rarity. See for a comprehensive discussion of this see *Oyejide TA & Lyakurwa W (eds)175-203.*
[137] See Article 5:2, Agreement on Trade-Related Investment Measures, www.wto.org. Developing or developed country status is not judged at the WTO on objective criteria. Rather it is by self-declaration, leaving others members the liberty to accept or reject. This lack of objectivity has occasioned calls for a review of this method in favour of more objective criteria. For more discussion on this issue, see *Matsushita M, Schoenbaum JT & Mavriodis P (eds) (2006) 764-765.*

years; while Developed Countries had a two-year time-frame. In addition, developing countries were given the opportunity to seek for extension in the event of experiencing difficulties with implementation.[138]

A standstill clause was also introduced which precluded the introduction of new TRIMs during the phase-out period. However, this was to be allowed where it could be proved that failure to do so will skew the playing-field against existing firms.

The remaining provisions deal with the transparency in the application, notification and application of TRIMs;[139] the establishment of a Committee on Trade-Related Investment Measures;[140] the settlement of TRIMs disputes;[141] and a review of the TRIMs Agreement.[142] The agreement does not have provisions regulating FDI flows.[143]

Having examined the provisions of the substance of the TRIMs Agreement, it is important to reach some sort of conclusion on the effectiveness of the TRIMs Agreement. This would be considered briefly below.

3.6 Effectiveness of the TRIMs Agreement

There are at least four criteria which provide a plausible litmus test for evaluating the effectiveness of the TRIMs agreement. These are the impact on investment flows; number of notifications; rate of enforcement as perceived through the matters taken before the WTO Panel and Appellate Body; and its impact on the regulatory and policy framework of members deploying TRIMs.

---

[138] Art. 5:3, Agreement on Trade-Related Investment Measures

[139] Article 6, Agreement on Trade-Related Investment Measures. This provision requires members to notify the WTO Secretariat of the publications embodying their TRIMS. The TRIMs to be notified include those applied by regional and local governments and authorities within their territories

[140] Article 7, Agreement on Trade-Related Investment Measures. The Committee, which was accountable to the Council on Trade and Goods, was tasked with the responsibility of monitoring the operation and implementation of the Agreement.

[141] Article 8, Agreement on Trade-Related Investment Measures, www.wto.org. The article provided for the application of Articles XXII-XXIII of GATT 1994 and Annex 2 Dispute Settlement Understanding for the settlement of disputes. A number of disputes have since involved the TRIMs Agreement.

[142] Article 9, Agreement on Trade-Related Investment Measures, www.wto.org. This Article provided for a review of the TRIMS Agreement within five years of its coming into operation. Part of the object of the review was to consider the relevance of complementing the TRIMs Agreement with rules on investment and competition policy. It is important to note that nothing concrete came out of the review, except perhaps the creation of the Working Group on Trade and Investment.

[143] *Oyejide TA & Lyakurwa W (eds) (2005) 274.*

Since the influence on regulatory framework can be assumed from the second and third criteria, the searchlight will accordingly only be on the remaining three. However, the fourth would be considered more elaborately while examining the role the Agreement plays in gearing FDI towards sustainable development in Nigeria. The first three criteria will therefore be examined below.

3.6.1 TRIMs Agreement and its impact on investment flows

Measuring the influence of the TRIMs agreement on investment flows is arguably one of the best ways of judging the effectiveness of the TRIMs Agreement. As earlier mentioned, the primary goal of the agreement is to facilitate investment flows by the prohibition of trade-distortive TRIMs.[144] It stands to reason that the extent to which the Agreement actually increases investment flows is crucial measure of its effectiveness.

Research done by the World Bank suggests that investment treaties generally may have little effect on investment flows.[145] In the absence of specific research on the link between the TRIMs Agreement and increase in FDI flows, the same conclusion may hold for the Agreement. This stance is buttressed by the experiences of several countries that have undergone waves of liberalization through the World Bank, IMF and even the WTO without a corresponding increase in trade and investment flows. If this can be relied on, then the link between the agreement and FDI flows can be described as being at best tenuous.

3.6.2 Notification of TRIMs as a gauge of effectiveness

Notification of contravening TRIMs can be is an important criterion for evaluating the effectiveness of the TRIMs Agreement.[146] This is a logical conclusion which flows from the very object of the agreement itself. For contravening TRIMS to be eradicated, it must first be known. Without notification therefore, the Agreement would have rendered ineffective – since countries would have surreptitiously continued deploying the prohibited TRIMs. The requirement of notification and subsequent number of notified TRIMs is a measure of the effectiveness of the Agreement.

---

[144] *Subedi PS (2008) 38.*
[145] *Gallagher PK (ed.) (2005) 149.*
[146] *Hoekman B, Mattoo A & English P (eds) 172.*

Pursuant to Article V of the Agreement, a number of members, comprising mostly developing country members notified their TRIMs.[147] Nigeria also notified TRIMs of a general nature.[148] In terms of the nature of TRIMs notified local content and foreign exchange balancing requirements were the most frequently used measures.[149]

3.6.3 Disputes involving TRIMS as an indicator of effectiveness

Another good gauge of the effectiveness of the TRIMs Agreement is the number of disputes involving TRIMS, brought before the WTO Panel or its Appellate Body.[150] This is linked to the indices mentioned above, since it is notification that opens the door for enforcement where members fail to adhere to the provisions of the TRIMs Agreement.

A number of disputes were brought before the WTO Panel and Appellate Body which has involved TRIMs. It is however difficult to cite a definite number because some members joined as third parties.[151] A sizeable number of the disputes have involved the automotive sector. In resolving these disputes, the principle of judicial economy has been resorted to.[152] This obviated the need to consider the TRIMs aspect of the disputes.[153] The fact that there was enforcement of the Agreement through the WTO dispute resolution mechanisms is therefore a pointer to its effectiveness.

---

[147] Argentina, Barbados, Chile, Colombia, Costa Rica, Cyprus, Dominican Republic, Ecuador, Egypt, India, Indonesia, Mexico, Malaysia, Mauritius, Nigeria, Pakistan, Peru, the Philippines, Poland, Romania, Thailand, Uganda, Uruguay, Venezuela, and South Africa, Zambia.

[148] See WTO, G/TRIMS/N/1.Nigeria.

[149] *Hoekman B, Mattoo A & English P (eds) 172*.

[150] *Ibid.*

[151] About nine disputes relating to the TRIMs Agreement have been brought before the WTO. These are the India Autos Case (DS 146, DS 175) with European Community and the US being the Complainants respectively; Indonesia Autos case (DS 54) with the European Communities being the Complainant; Indonesia Autos case (DS 59), with the US being the Complainant; and Indonesian-Autos Case (DS 55 and DS 64), with Japan being the Complainant; Canada -Autos case (DS 139 and DS 142) with Japan and the European Community as Complainants respectively.

[152] The principle of judicial economy is a principle whereby where a matter is dispensed with based on the established violation of a provision of the WTO Agreement - without further examining the contravention of other provisions. Consequently, where a violation of the national treatment principle under Art III:4 GATT 1994 is established, tribunals have been known not to look into the TRIMs-related aspects of the matter. The problem with this principle is where a matter goes to the Appellate Body. Issues not considered before the Panel would not be reviewed by the Appellate Body

[153] See for illustrations of the principle India Measures Affecting the Automotive Industry, WT/DS 146/R, WT/DS 175/R, Report of the Panel, 2 July 1998; European Communities – Regime for the Importation, Sale and Distribution of Bananas, (WT/DS27/AB/R) 25 September, 1997;Canada-Certain Measures Affecting the Automotive Industry, (WT/DS/139R, WT/DS142/. In these cases, the Panel did not venture into alleged violations of TRIMS once it had found that the national treatment principle had, or had not been violated.

The fact that there are disputes at all is indicative of conflicts of opinion on the TRIMs Agreement. The Agreement has been perceived differently in different quarters as to its scope, value and effect on countries. Consequently, the next section will attempt a critique of the Agreement.

3.7 Critique of the TRIMs Agreement

The critique of the TRIMs Agreement will be approached in two ways. First, the perception of the Agreement will be examined. Second, the arguments for and against the agreement would also be discussed.

3.7.1 Perception of the TRIMs Agreement

Generally, perception of the TRIMs Agreement can be divided into three schools of thought. First there is the school of thought that believes the Agreement is grossly inadequate. The second school of thought asserts that the Agreement has gone too far. While the third school of thought take the middle path.

As mentioned above, the first school of thought avers that the TRIMs Agreement is grossly inadequate. They flay its limited scope and cite it as primary reason why the Agreement is of limited value. They opine that the Agreement merely confirms the existing GATT principles on national treatment and quantitative restrictions. This school would prefer a much more comprehensive multilateral investment agreement covering a much wider range of TRIMs, disciplining investment incentives, and having provisions dealing with the flow of investment amongst members.[154] Consequently, those who belong to this school usually advocate strongly for a Multilateral Agreement on Investment (MAI) which would go beyond the TRIMs Agreement.[155]

The second school of thought takes the opposite view to the preceding one. It believes that the agreement has gone too far in terms of imposing undue constraint on member countries ability to regulate FDI. It takes the view that the TRIMs agreement by proscribing some TRIMs in essence trims the development prospects of member countries. Accordingly, this school of thought advocate for a review of the agreement to re-open policy spaces closed off by the Agreement. A vivid illustration of this sentiment can be found in

[154] *Commonwealth Business Council (2001) 59.*
[155] *See Patrick Grady P & Kathleen MacMillan K (1999) 90-95.*

the move by some member countries led by India, and including Nigeria, to roll back the TRIMs Agreement.[156]A measure of the strength of this school can be deduced from the fact that implementation of the TRIMs Agreement is one of the 88 Special and Differential Treatment issues on the agenda in the Doha Development Round.[157]

The third school of thought is somewhat heterogeneous in terms of their stance. It contains some an admixture of sentiments from the preceding schools. For example in terms of scope, some within the school opine that it is limited. They also admit that the Agreement imposes some constraints on member countries. However, they do not view the constraints as being so overbearing. They point out the fact that countries still have a variety of options to achieve the end of gearing FDI towards sustainable development.[158] Therefore, rather than calling for a roll back of the TRIMs agreement, they suggest that members work within the ample available policy space to maximize the gains from FDI. Some within the school also warn against having multilateral negotiations on investment.[159]

At this juncture, it suffices to submit that the last school of thought seems the most plausible. The TRIMs agreement does indeed constrain members' policy autonomy, but there are still several options available.

The arguments for and against the TRIMs Agreement will help a thorough appreciation of these viewpoints. These arguments would precede an examination of the role of the Agreement in gearing FDI towards sustainable development Nigeria.

3.7.2 Pro-TRIMs Agreement arguments

A number of arguments have been raised in support of the TRIMs Agreement. These arguments include the general benefits of liberalization; domestic reforms effect; integration into global economy; eradication of wasteful mechanisms; putting investment on the WTO agenda; and the idea of a grand bargain. These will be examined below.

---

[156] WTO, WT/GC/W/354.
[157] Para 44 of the Doha Declaration stated the need to review SDT provisions. An impediment to actualizing this is the fact that developing countries are a heterogeneous group, with some such as Brazil and India far more developed than others. This makes developed countries reluctant to treat these countries the same way. A first step towards enhancing SDT would be to have a set of objective criteria for classifying developing countries. *See Whaley J (1989) 9-10* for a greater discussion of the heterogeneity of developing countries.
[158] *Gallagher KP (ed.) (2005) 220.*
[159] *Hoekman B. & Martin W (eds.) (2001) 203.*

3.7.2.1 General Benefits of Liberalization

This is the strongest argument usually cited in support of the TRIMs Agreement. Liberalization generally, (whether of trade or investment framework) is said to hasten countries' integration into the global economy. This integration is then averred to ensue in countries attracting greater investment flows, thereby securing greater contribution to growth and development prospects.

Accordingly, they contend that a very liberal and high degree of openness of investment regime, removal of all impediments to investment flows; and speedy liberalization is in the best interest of countries. In addition, they disparage attempts to regulate foreign direct investment. They also view all forms of discrimination between foreign and local investor as protectionism which ought to be eliminated.

3.7.2.2 Means of Implementing Domestic Reforms

This is another argument which is interconnected with the one listed above. The TRIMs Agreement is perceived as a way of hastening much needed domestic reforms. Implicit within this argument is the sentiment that most measures targeted at regulating FDI are counter-productive and welfare-reducing. They affirm their implicit faith in the market-mechanism to effectively allocate resources.

Furthermore they contend that the TRIMs agreement is therefore beneficial in compelling the implementation of necessary domestic reforms to break away from past ineffectual policies adopted by countries. In other words, the TRIMs Agreement could help in emboldening authorities to make the changes they were prevented from making, in addition to locking in domestic reforms.

3.7.2.3 A Means of Placing Investment on the WTO Agenda

The TRIMs Agreement is also seen as beneficial because it helped place investment within the WTO Agenda.[160] The issue of investment has traditionally been a contentious issue. This explains why a

[160] *Hoekman B, Aaditya Mattoo A, Phillip English P (eds) (2002) 172.*

Multilateral Agreement on Investment has failed to see the light of the day. Even within the OECD, promoters of the failed MAI, there were serious dissensions.[161]

Part of the contentious issues on the investment debate is the appropriate forum for the brokering of a MAI. Many opine that the WTO, apart from being overloaded with manifold issues, was not the right forum. Others took the opposite view due to the potent enforcement mechanism of the WTO through the Dispute Settlement Understanding (DSU).

Amidst these splintering of opinions, the TRIMs Agreement was therefore seen as a victory by proponents. They saw it as a prelude to the subsequent brokering of a more comprehensive agreement on investment at the WTO.[162] This has not however materialized.

3.7.2.4 The 'Grand Bargain' argument

This is an argument utilized during negotiations at the Uruguay Round.[163] The idea of a grand bargain is connected to the concept of issue linkage. Issue linkage connotes the idea of viewing negotiations in one area in the light of a much bigger picture, rather than viewing each as separate. Consequently, concession in a particular area is given in lieu of benefits in another area[164]. As a result, countries thereby accept disciplines in areas where they were not particularly eager in exchange for benefits in areas where they are keen.[165]

It is thus asserted that the TRIMs Agreement was part of the grand bargain whereby market access was to be granted to developing countries in exchange for accepting disciplining of TRIMs.[166] The idea of the grand bargain in terms of market access has however proved virtually illusory. It has rendered nugatory by tariff escalation,[167] non-tariff barriers to products from developing countries,[168] and huge subsidies which

[161] Ekwueme K (2006) 7 *Journal of World Investment and Trade* 169.
[162] Sachdeva MA (2007) 8 *Journal of World Investment and Trade 533 at* 534.
[163] See Ostry S (2002) 286-289
[164] *Hoekman B, Mattoo A & English P (eds) (2002)* 210, for some discussion on issue linkage and the 'grand bargain'.
[165] See *Oyejide TA & Lyakurwa W (eds) (2005) 313.*
[166] *Stiglitz EJ & Charlton A (2005) 45.*
[167] Tariff escalation essentially means that the more refined or value-added products are, the more tariffs would be paid on it. Consequently, a manufactured product would attract greater tariffs than primary or unprocessed products.
[168] Examples of this are unduly restrictive rules of origin; technical standards; and Sanitary and Phyto-sanitary standards.

render developing countries' products uncompetitive. The Uruguay Round has only further deepened imbalances.[169]

3.7.3 Anti-TRIMs Argument

From a developing country perspective, it is submitted that supposed benefits of the TRIMs Agreement discussed above is overshadowed by the negative implications it portends. Some of this will be examined below.

3.7.3.1 Imbalance of obligations

The TRIMs agreement, like most of the WTO agreements is imbalanced, to the detriment of most developing countries. The agreement primarily caters for the interest of foreign investors and home countries at the expense of the host country. This situation is particularly exacerbated where poor developing countries are recipients of FDI. A situation where foreign investors are given rights without corresponding obligations imposed upon them is not ideal. This is the situation with the TRIMs agreement where host governments are prevented from channelling FDI to ensure it generates a net benefit to their economy by using TRIMs which could assist in achieving that objective.

In contrast, there are no corresponding obligations imposed either on the home countries or the foreign investors. A more balanced TRIMs agreement should have ensured a more acceptable balance among the competing interests of key actors in the FDI terrain. A reading of the TRIMs agreement would however reveal that there is not a single obligation assumed by the foreign investors or the home country. Rather, all the obligations are assumed by the host economy.

3.7.3.2 The TRIMs Agreement – a product of coercion

Another criticism of the TRIMs agreement is the manner in which it was brokered. The agreement was resisted by developing countries led by Brazil and India.[170] It was not even initially part of the agenda for

[169] *Smith R (2001) 9-12.*
[170] *Schott JJ an Johanna W. Buurman WJ (1994) 112.*

the Uruguay Round. However, due to tremendous pressure on the part of the United States and a few other countries, the TRIMs Agreement found its way into the negotiations.[171]

If the Agreement was an international contract and duress and coercion were to be proved, those would be sufficient grounds for setting it aside. However, different rules operate when it comes to treaty-making. Diplomacy, bullying, coercion seem to be factors which come into play in negotiations among countries.

3.7.3.3 Trimming domestic policy space

The Agreement has clearly resulted in further constricting the policy space which was originally available to countries. The erosion of policy space is a feature of globalization with decisions affecting the destinies of countries being increasingly decided by supranational organizations, and not by national legislators. Naturally, some constraint on self-determination and autonomous policy-making is an expected part of the treaty-making terrain - whether at the bilateral, regional or global level. However, such constraints must not be too overbearing as to incapacitate domestic policy-making in the national interest.

The TRIMs Agreement has contributed to limiting the policy space of countries by proscribing policy tools which were previously utilized by developed and developing countries.[172] The performance requirements prohibited by the TRIMs Agreement have been integral and strategic components of trade, industrial, and investment policy of countries for years. These policies have been legally deployed with mixed results by both developed and developing countries in the past with mixed outcomes. Much to the dissatisfaction of several developing countries, the TRIMs Agreement has made those valuable policy tools legally unemployable.

3.7.3.4 Trimming Development Prospects

Issuing from the foregoing points, the TRIMs Agreement has been criticized for being a threat to the prospects of countries ascending the development ladder. FDI is indeed an invaluable tool in the development of several countries. However, as earlier submitted the benefits from FDI are neither

[171] Ekwueme K (2006) 7 *Journal of World Investment and Trade* at 177; See also *Das LB (2003) 118-119.*.
[172] *Shahin M (1996) 35.*

automatic, nor can it be assumed. As already established, deliberate policy-making plays an important role in ensuring the positive contribution of FDI to development of national economies.

Recognition of the foregoing salient fact fuelled the deployment of the now proscribed TRIMs to mixed effect by countries. By channelling FDI, through the TRIMs Agreement countries have been able to maximize the benefits from FDI, promote industrialization, and ascend the ladder of development. In the light of this fact, the proscription of valuable TRIMs by the Agreement is tantamount to trimming development prospects. It is for this reason that the TRIMs agreement and some other WTO Agreements have been described as having the effect of kicking away the ladder of development from developing countries.[173] This idea of kicking away the ladder has undertones of both malice and hypocrisy.

The idea of malice is conveyed with the picture of developed countries, having successfully ascended the ladder of development (through the use of the TRIMs and other interventionist policies) now deliberately preventing developing countries from following the same development path.[174] Thus, the TRIMs Agreement and other WTO Agreements are viewed as mechanisms used by developed countries for actuating that objective.

On the other hand the idea of hypocrisy is intricately bound with that of malice. Some countries who promoted the TRIMs agreement have been accused of hardly having the moral ground to prevent other countries from using the TRIMs prohibited by the Agreement. Critics assert that using the TRIMs Agreement to proscribe TRIMs which they had used extensively in the past was hypocritical.[175] They maintain that this hypocritical behaviour is even perpetuated, for example, through the continued use of local content under the garb of rules of origin.

---

[173] *Chang H (2005) 3-4.*
[174] *Chang H (2005) 125.*
[175] Sachdeva MA (2007)*8 Journal of World Investment and Trade* 533 at 541-543.The writer cited the US, United Kingdom, France, Germany, Finland, and Ireland as examples of countries whose experiences belied their much touted liberal and unregulated foreign investment policy as the source of their progress. Contrariwise, he asserted that these countries while they were huge recipients of FDI used what is now termed trade-distorting measures to regulate FDI to align with their national interests.

3.7.3.5 Endorsement of neo-liberalism as universal prescription for development

The TRIMs Agreement is also seen as an endorsement of neoliberalism as the universal prescription for development of WTO members' economies.[176] This neoliberal stance can be glimpsed from the fact that the Agreement does not really take into serious account differences in the level of development of countries. Rather than having provisions which would allow developing countries in certain circumstances to use the proscribed policy instruments, it merely stipulated varying transition periods to phase out the prohibited TRIMs.

Development economists have however attacked the theoretical underpinnings of neoliberalism as being flawed. They opine that it makes assumptions of perfect market and information in all countries. They assert that neoliberal ideology is not the only ideal development model that could be adopted by countries.

They contend that the one-size-fits-all neoliberal approach of the TRIMs and other WTO agreements should be jettisoned in favour of one which takes into account genuine differences between countries through enhanced special and differential treatment provisions. They advocate for an approach which would allow countries to sequence the timing and pace of liberalization. Therefore, they contend that the TRIMs Agreement rather than imposing an outright proscription of TRIMs for all countries, should have allowed continued use of it for some countries subject to certain conditions.

3.7.3.6 TRIMs Agreement and Investment Flows

Another criticism against the Agreement is that there is no strong link or assurance that liberalization generally, or even through the TRIMs Agreement would result in increased flows of investment. Liberalization ranks extremely low when it comes to determinants of FDI. This is one of the reasons why despite years of liberalization of investment and trade regime of countries, there has been very little increase in FDI flows to Africa and other developing countries.[177]

[176] For a critique of neoliberalism and its inappropriateness in African circumstances see *Ijeoma OE (2008) 62-63.*
[177] *Njinkeu D & English P (eds) (2008) 81.*

3.7.3.7 Rebuttal of the Grand Bargain Concept

The idea of the TRIMs Agreement being part of a 'grand bargain' through the concept of issue linkage has proved to be quite unsound for two reasons. First, the supposed gains from other Agreements at the Uruguay Round have simply not materialized.[178] Market access in areas of core interest to developing countries is still largely elusive, due to protectionism on the part of developed countries.[179] Subsidies for example are still an insurmountable barrier to agricultural produce - an area where Africa has a clear comparative advantage.[180]

Second, the idea of sacrificing present and future policy space for directing FDI towards domestic development goals was never a good deal in the first place. A true understanding of the implications of the TRIMs Agreement on policy space only dawned on developing countries after the Uruguay Round.[181] Calls have since been made for the re-opening of the policy space lost due to the TRIMs Agreement and other WTO Agreements.[182]

It is submitted that the arguments against the TRIMs Agreement are valid. The TRIMs agreement is imbalanced as it caters little for the interests of developing countries. There is also no doubt that it also constraints the policy space of countries and limits their ability to direct FDI towards sustainable development through the proscription of certain TRIMS. Nevertheless, the constraints imposed by the Agreement are by no means insurmountable.

Having critiqued the TRIMs Agreement, it is important to bring the issue nearer home. Consequently, the impact of the Agreement on Nigeria would be examined below.

---

[178] *Njinkeu D & English P (eds) (2008) 5.*
[179] *Njinkeu D & English P (eds) (2008) 6.*
[180] *Ibid.*
[181] *Kevin Gallagher PK (ed) (2005) 12.*
[182] *Njinkeu D & English P (eds) (2008)* 6.

3.8 Implication of the TRIMs Agreement for Nigeria's regulation of FDI

Nigeria is one of the founding members of the World Trade Organization.[183] Membership of the organization, by virtue of the single undertaking, requires every member to be bound by all WTO agreements.[184] The only exceptions are the plurilateral agreements earlier mentioned which countries are at liberty to refrain from or assume their obligations.[185] The TRIMs Agreement, not being a plurilateral Agreement, is binding on Nigeria. The key areas where the impact of the Agreement is felt are its policy framework and its FDI legal regime.

3.8.1 Effect on Nigeria's national policy framework

The Agreement directly impacts domestic policies of members. This is perhaps the most significant area where the impact of the Agreement is felt. Policy is the fount from which laws, regulations, and administrative mechanism spring from. Once the policy framework is impacted, then inevitably, the laws, regulations, and other mechanisms which are manifestations of policy choices would also be affected.

Three key areas of policy where the impact of the TRIMs agreement is felt in Nigeria are trade policy, industrial policy, and investment policy.[186] The Agreement has exerted a constraining influence on the trade, and industrial, and investment policies of Nigeria. Specifically, it affects the complexion of policy tools which can form components of the policies.[187] It has limited the flexibility of Nigeria to use strategic policy tools to attune FDI more closely towards development goals.[188]

Prior to the advent of the TRIMs Agreement Nigeria could freely utilize variants of TRIMs as part of its trade, industrial and investment policy.[189] It could use them to promote industrialization, regulate FDI, and utilize trade towards the overarching goal of sustainable development. These TRIMs embedded in these

---

[183] The phrase 'members' are used here instead of 'countries' because the WTO also has within its ranks non-countries. An example is the European Union.
[184] *Janow EM, Donaldson V & Yanovich A (eds) (2008) 185*
[185] Originally there were four, but the signatories to the International Dairy Agreement and international Bovine Meat Agreement discontinued with it. See *Das LB (1999)321*
[186] In Nigeria's case, it will be two, as Trade and Industrial Policy are integrated while the Investment Policy is separate.
[187] *See Hoekman B & Martin W (eds) (2001)174.*
[188] i*bid*
[189] This was in spite of the fact that this TRIMs violated the national treatment principle under GATT 1994. Das observed that before the TRIMs Agreement, the infractions were not taken seriously. *See Das LB (2003)72.*

policies could hitherto be freely given expression in various laws, regulations and mechanisms. The advent of the Agreement has however brought into being a new state of affairs.[190]

As earlier mentioned the Agreement prohibited the imposition of TRIMs, contained in the illustrative list, which violated the national treatment principle, and the provision on quantitative restrictions. Consequently, whereas these TRIMs where legally available to Nigeria before, the legal effect of the Agreement is now to make them legally unavailable.[191] This warranted the removal of contravening TRIMs which were in operation in Nigeria before the advent of the Agreement from Nigeria's policy framework. Other tools and mechanisms would have to be sought to achieve the desired end. However, the nature of tools that can be deployed has been circumscribed to generic rather than specific policy instruments.[192]

Second, it prevents the future introduction of contravening TRIMs by Nigeria no matter how strategic and valuable they are deemed. In other words, it limits policy space or autonomy of Nigeria to utilize these measures in the future – even when circumstances may demand it.

3.8.2 Effect on Nigeria's FDI Legal Framework

The TRIMs agreement has had an effect on Nigeria's FDI legal framework. When Nigeria's FDI legal framework is referred to here, the notion of a single FDI Law as it obtains in some countries should be discountenanced. Nigeria's FDI Law is more like a patchwork contained in different laws.

Subsequent to notification of Nigeria's TRIMs, some changes were made to eliminate some of TRIMs from Nigeria's FDI legal regime. The Nigerian Investment Promotion Act 1995 was enacted to essentially completely relax the minimum shareholding requirement in companies wholly owned by foreigners which initially stood at N2 million naira.

In addition, the requirement of joint ventures in the insurance and banking sectors was eliminated, thereby allowing unlimited foreign participation in the sector.[193] Furthermore, compulsory joint venturing in

[190] Dicaprio A & Gallagher PK (2006) *7 Journal of World Investment and Trade* 785 at 799-800.
[191] *Njinkeu D & English P (eds) (2008)* 61 & 68.
[192] *See Hoekman B & Martin W (eds) (2001)175*; *Hoekman B, Mattoo A & English P (eds) (2002) 158.*
[193] Ekwueme K (2006) *7 Journal of World Investment and Trade at* 178

petroleum sector was also abolished through an amendment to the NIPC Act in 1998.[194] What is worth noting is that the aforementioned measures which were abolished did not contravene the TRIMs Agreement. Therefore, should Nigeria for strategic policy reasons elect to restore this TRIMs, Nigeria would certainly not be in violation of the TRIMs Agreement. The best that can be surmised from Nigeria's elimination of non-contravening TRIMs is that the Agreement probably prompted a general rethinking of all investment measures. This rethinking may have culminated in the removal of the above TRIMs.

However, Nigeria's FDI legal Framework has not been suddenly shorn of all these measures. Certain legally deployable performance requirements have been retained. Accordingly, some measures are validly deployed and hinged on the receipt of benefits, and made conferrable on both domestic and foreign investors. A good example is the Export Processing Zones (EPZ) scheme, which is designed to boost the flow of FDI into Nigeria. The scheme confers some benefits for investors who satisfy the criteria of employment generation and exportation of 75% of their total output. [195] Similar criteria are also applicable under the Oil and Gas Export Free Zone Act.[196] Again, these measures are clearly not in violation of the Agreement.

On the other hand, there are some measures which are being used which could be deemed in contravention of the TRIMs Agreement if Nigeria is taken to the WTO's dispute settlement mechanism. A fitting illustration of this can be found in the oil sector where local content is seemingly being perpetuated. A case in reference is the Agbami deepwater oil project where the Nigerian National Petroleum Corporation issued a directive to the effect that 40 per cent of contracts in relation to the field must be sourced domestically.[197] To all intent and purposes this directive runs counter to the TRIMs Agreement. Nevertheless, until a country takes up the gauntlet and enters into consultation with Nigeria, the practice would continue.

---

[194] *Ibid.*

[195] See S.8, 12, 18 of the Nigeria Export Processing Zones Act. S 18 particularly outlined the incentives available to investors who meet the specified criteria. See also Ekwueme K (2006) *7 Journal of World Investment and Trade at* 178.

[196] *Ibid.*

[197] Khrushchev Ekwueme (2006) *7 Journal of World Investment and Trade at* 178. Ekwueme revealed that this measure was taken after oil experts at a Petroleum conference in 2003 berated the fact that local content of goods and services in the sector was less than 5% in over 50 years of oil production.

3.9 Conclusion

The role of the TRIMs Agreement in gearing FDI towards sustainable development in Nigeria is therefore obvious, especially when the importance of TRIMs as instruments of trade, industrial and investment policy is appreciated. Since TRIMs are mechanisms deployed by countries to maximize benefits from FDI, and the TRIMs agreement prohibit certain TRIMs; it is clear that the Agreement limits the options available in the policy toolbox of countries. The TRIMs Agreement therefore plays a constraining role in Nigeria's quest to channel FDI towards sustainable development. No longer can we include the prohibited TRIMs as part of our Trade and Industrial Policy, or as part of our Investment framework.

The constraints of the TRIMs Agreement is the reason why the prohibited TRIMs are conspicuously absent from Nigeria's 170-page Draft Trade and Industrial Policy. It is the same reason why the 154-page Investment Policy Review Document produced by UNCTAD, avoids the prohibited TRIMs in discussing how to maximize benefits from FDI. It is also the reason why Nigeria's Investment Laws steer clear of breaching the provisions of the Agreement.

It seems the constraining effect of the Agreement on Trade, Industrial and Investment Policy was not appreciated early enough by Nigeria and other developing countries. Eventually however, its true nature was recognized. This recognition informed a response by Nigeria and other developing countries, led by India, for a review of the agreement to allow the use of TRIMs for development purposes. The best that has been achieved so far is that it has been included under implementation issues and as one of the 88 SDT proposals put forward by least developed countries.

Unless the Doha Round brings a change, as things stand presently, Nigeria is bound by its commitments under the TRIMs Agreement. Except she wants to run the risk of being brought before the Dispute Settlement Understanding by aggrieved members of the WTO, the prohibited TRIMs cannot feature in Nigeria's FDI Laws. Similarly, the prohibited TRIMs cannot be components of its trade and industrial; and investment policy.

However, it is crucial not to present a picture a picture of utter incapacitation or helplessness. The impact of the Agreement on trade, investment, and industrial policy should not be exaggerated. While it is true that the TRIMs Agreement does impose constraints, they are by no means insurmountable. There is still ample

policy space to achieve the objective of gearing FDI towards sustainable development, in spite of the Agreement. Consequently, the next chapter will examine the options available to Nigeria for gearing FDI towards sustainable development.

CHAPTER 4

AVAILABLE OPTIONS FOR GEARING FDI TOWARDS SUSTAINABLE DEVELOPMENT IN NIGERIA

4.1 Introduction

As intimated in the last chapter, the advent of the TRIMs agreement has not sounded the death knell to all options that can be employed towards steering FDI towards sustainable development. Irrespective of the constraints of the Agreement on Nigeria's ability to utilize its trade, industrial and investment regime, the objective of channelling FDI towards sustainable development must remain unchangeable. FDI must be geared towards sustainable development through policy instruments embodied in laws, regulations and other mechanisms.[198] What the TRIMs agreement has changed is the *means* by which the same objective can be achieved.

Theoretically, attempting to secure a review of the TRIMs Agreement to allow the use of the proscribed TRIMs in certain circumstances is an option. Actualizing that objective is a different matter altogether. However, there are more viable options which Nigeria can deploy towards gearing FDI towards sustainable development, without contravening the provisions of the TRIMs Agreement. These issues will be examined in more details below.

4.2 Review of the TRIMs Agreement

The review of the TRIMs Agreement was one of the issues provided for in the document itself. However, what was in contemplation of the Agreement was reviewing it with a view to ascertaining whether to complement the Agreement with rules on investment and competition policy.[199] The review was indeed done and nothing concrete was achieved, except the resistance of the extension of the scope of the TRIMs

[198] *Addo KM (ed.) (1999) 139.*
[199] *Das LB (1999) 31.*

Agreement. Since then a different kind of review is being advocated.[200] One which is hoped would allow for policy autonomy to allow developing countries use of the prohibited TRIMs.[201]

From the perspective of most developing countries, a review of the TRIMs agreement to allow the use of the proscribed TRIMs under certain circumstances would ideally be the most preferred option.[202] This approach has already been attempted without success, with some balking at the idea of a roll-back of obligations which had already been secured.[203] Nevertheless, it has not been completely jettisoned, as the issues is one of the 88 proposals on Special and Differential Treatment in the Doha Development agenda. The Uruguay Round occasioned a change in the concept to the detriment of developing countries.[204] The Doha Development Round represents an opportunity to address this and other imbalances of previous rounds.[205]

The Round provides a tremendous opportunity for actualizing the right to development beyond mere rhetoric.[206] It can also demonstrate a real commitment to the desire to work towards the goal of sustainable development contained in the preamble to the Agreement establishing the WTO.[207] For the Round to truly be termed a development Round, the searchlight must also be beamed on the character of the rules to ensure that they promote development. Special and differential treatment must be made operational and enhanced to take account of the development needs of developing countries.[208] Mere transition periods, technical assistance and aid would no longer do.

Furthermore, there has to be a re-orientation from the inflexible mercantilist and neoliberalist approach to one which promotes sustainable development.[209] It is not just enough to admit that current substantive

---

[200] *Njinkeu D & English P (eds) (2008) 81*. Njikeu and Soludo suggested the TRIMs to be reviewed to allow sufficient flexibility for African countries to channel FDI in a manner that fulfils their developmental needs and national priorities.
[201] *Oyejide TA & Lyakurwa W (eds) (2005) 316-17.* Here Elbadawi contended that African ownership, as well as sustainable development would be advanced if, all multilateral institutions see beyond macro-economic basics, backed off and allowed African governments additional policy room. He further contended that locally-owned policies would better promote sustainable development in Africa, rather than efforts to foist external visions of policy perfection.
[202] *Njinkeu D & English P (eds) (2008) 9.*
[203] See WTO, WT/WGTI/W/148, October 2, 2002. India's submission to the Working Group on Trade and Investment.
[204] See T *Njinkeu D & English P (eds) (2008)* 17-25; *See also Gallagher PK (ed) (2005) 233-260*.
[205] *Stiglitz EJ & Charlton A (2004) 46.*
[206]For a discussion of the right to development, see Senona MJ (2009) 8 *Journal of International Trade Law and Policy 60 at* 60-65.
[207] See Preamble to the Marrakesh Agreement Establishing the World Trade Organization (15 April 1994); WTO, Ministerial Declaration, WT/MIN(01)/DEC/W/1,www.wto.org
[208] Some scholars denigrate the principle of Special and differential treatment, see for example *Matsushita M, Schoenbaum JT & Mavrodis CP (2006)777.* However, there is no doubt that the principle is immensely useful as it takes into account genuine differences in economic development and capacity between members of the WTO. See *Commission for Africa (2005) 99.*
[209]Stiglitz J, Knowledge for development economic science, economic policy and economic advice, 1998, www.worldbank.org.

rules perpetuate bias against developing countries.[210] A more constructive approach would be take genuine steps towards redressing it. All WTO Agreements, including the TRIMs Agreement should be examined with a view to ensuring the overarching goal of promoting development.[211]

Admittedly, the above is approach is fraught with difficulties. One such problem is that Nigeria cannot actualize the review of the Agreement unilaterally. It would require concerted effort on the part of developing countries. This might be difficult having regard to the heterogeneity of developing country members in the WTO in terms of interests and capacity. In addition, notionally there is no successful precedent of a review of any of WTO Agreements. A previous attempt to review the Agreement was strongly opposed by some developed countries, especially the USA.

However, the need to make the latest round of negotiations a true development round may be a crucial success factor. Another will be the extent to which developing countries are able to take advantage of coalitions. Refreshingly, developing countries are increasingly becoming cognizant of their negotiating power.[212] With the voting pattern of one voting right per member and the preponderance of WTO members being developing countries, the WTO can be made to further their interests.[213] Utilization of groupings such as the G77 to secure sufficient support would be vital if such a move would come to fruition.[214] Civil society groups would also be useful ally.

On the other hand, the virtual near-collapse of the Doha Development Round does not bode well for the prospects of this approach. Only time would tell if the Round will really be one in truth and not in mere hortatory terms.

---

[210] *Janow EM, Donaldson V & Yanovich (2008) 5-9.*
[211] See *Das KD (2007) 79*; *Njiinkeu D and English P (eds.) (2008) 8.*
[212] *Janow EM, Donaldson V & Yanovich (2008) 149.* Other groupings formed at different times are the G20, G-33, and G90.
[213] *Das LD (1999) 2.*
[214] The G77 group of developing countries was the bloc through which sub-Saharan countries acted in previous rounds of the WTO. See *Oyejide TA & William Lyakurwa W (eds) (2005) 43*. See also *See Das BL (2003) 214-216.* Here Das highlighted the importance of coordination and coalition of developing countries on promoting their agenda. For more on the groupings, see Jones *E & Whittingham P (1998) 85-88; Das KD (2007)123-130.*

4.3 Adoption of non-trade-related investment measures

As discussed in the preceding chapter, the TRIMs Agreement concerns itself only with *trade-related* investment measures.[215] This leaves outside its ambit a vast array of measures which can be used to regulate FDI which are not trade-related.[216] Consequently, Nigeria is at liberty to deploy any or a mix of those measures as they deem fit to generate the greatest possible benefit from FDI.

4.4 Adoption of non-Prohibited TRIMs

It was also established in the preceding chapter that the agreement prohibits *only* TRIMs which violate the national treatment principle and the provision on quantitative restrictions as enshrined in Art III:4 and XI respectively of the GATT 1994. Examples of these TRIMs are given in the illustrative list contained in Annex 1 of the Agreement.

Clearly, TRIMs which do not violate those two principles are not caught by the provisions of the TRIMs Agreement. Since they are not caught by the Agreement, Nigeria is at liberty to also utilize these TRIMs. This ample policy space left untouched by the Agreement was not lost on promoters of the TRIMs Agreement. Consequently, they unsuccessfully sought to increase the scope of the Agreement through a multilateral agreement on investment.[217] The original intention was to proscribe a wider range of TRIMs. This intention is already been actualized through bilateral treaties and investment chapters of Regional Trade Agreements which prohibit a wider range of measures.

4.5 Utilizing the Exceptions provided by the Agreement

As discussed earlier, the exceptions to national treatment principle and quantitative restrictions as embodied in GATT 1994 are equally applicable to the TRIMs Agreement. Accordingly, should circumstances warrant it, Nigeria could rely on some of the exceptions in the Agreement. The balance of

[215] See *Hoekman B & Martin W (eds.) (2001) 205*. Here Hoekman and Saggi cited examples such as licensing, approval regimes, and prohibition of FDI from some sectors.
[216] *Das LB (1999) 139*. Here Das gave examples of non-trade-related measures to include measures restricting repatriation of profits and equity ownership restrictions.
[217] For more on the MAI, see *Trebilcock JM & Howse R (2005) 457-460.*

payment exception seems to be a rather interesting and defensible option for African countries considering it is one of its perennial problems.

However, this option by its very nature, is bound to be of temporary duration, and cannot be made a part of any serious trade, industrial or investment policy. Nevertheless, it may prove immensely useful in certain circumstances.

4.6 Other mechanisms for gearing FDI

Apart from the above options, there are mechanisms that can be utilized to attune FDI more closely with Nigeria's developmental objectives. These mechanisms can be made an integral components of trade, industrial and investment policy. Some of these have been and are still being utilized to good effect by different countries, and Nigeria will do well to borrow a leaf from their experiences. They can be given expression through law, regulations or administrative procedures. Some of these tools are discussed below.

4.6.1 Targeting FDI

Targeting FDI is an extremely useful device which has been used successfully by countries.[218] These entail countries actively seeking to attract specific type of FDI, and into particular sectors of their economy in line with their development objectives. This would necessarily demand that countries fashion a broad development strategy, having a clear sense of the kind of FDI that would advance that strategy. The strategy would then become the basis of the type of FDI which the country would pursue.

At different phases of development countries may require different types of FDI. A well-devised incentive scheme may also be used as a complement to this procedure to encourage FDI into the desired sectors of the economy. This mechanism seems to be already embodied in the Nigerian Investment Promotion Act.[219]

---

[218] Addo KM (ed.) (1999) 139.

[219] See S. 22 & 23. The former section deals with the giving of special incentives for strategic or major investment. While the latter section empowers the Nigerian Investment Promotion Commission to specify priority areas of investments for which incentives and benefits would be given.

This mechanism is however not without its challenges. A notable problem is that of challenging "winners" or the right foreign investment which would promote rather than impair the success of the strategy.

4.6.2 Screening Mechanisms

This is an administrative mechanism which is a useful component of the investment regime of some countries. It is a process whereby foreign investment proposals are scrutinized with a view to ensuring consistency with national developmental and other objectives. Criteria for evaluation of a foreign investment proposal could include contribution to exports; transfer of technology; employment generation; environmental impact;[220] and contribution to domestic industry.[221] The stage at which this mechanism is utilized is before the foreign investment proposal is accepted into the host economy.

Screening is done on an individual case basis by an administrative body, following laid down criteria. Proposals that do not fit in with national objectives as stipulated in the specified criteria are rejected. An example is the Exon-Florio Act in the United States which enables the rejection of foreign investment proposals based on national security grounds.

It might be counterproductive by impeding the free flow of investment.[222] However, its usefulness in ensuring the right quality of FDI is received into the economy makes a strong case for its continuance.

4.6.3 Ensuring sufficient competition between foreign investors

FDI can generate greater benefits and contribute more sustainable development in a host economy where an atmosphere of intense competition is created. Nigeria would greatly benefit from stimulating competition between foreign investors in relevant sectors.

Competition does not necessarily have to be restricted among foreign investors alone. Rather, it should also be between domestic and foreign investors. This is perhaps the greatest antidote to welfare-reducing

[220] *Bruno K (1994) 7.*
[221] *Morton K & Tulloch P (1977) 221.*
[222] *Morton K & Tulloch P (1977)* 222.

anti-competitive behaviour on the part of foreign investors.[223] In relation to FDI in the services industry for example or in infrastructure projects, greater benefits would accrue where intense competition is promoted.

A strong competition regime with strong enforcement mechanism will be crucial in this regard.[224] Such a law will help combat restrictive business practices which MNEs are notorious for engaging in, and which minimizes the gains derivable from FDI.[225] Fortunately, some progress is already being made towards enactment of a competition law in Nigeria.

4.6.4 Proper Bargaining with foreign investors

Depending on the type of FDI, the need may arise for negotiations between the foreign investors and the host economy. This is another area which must be carefully managed by the host economy. Too often than not the desperation with which FDI is sought could result in the host economy unnecessarily displaying weaknesses and unduly yielding too much ground during negotiations. This may be for fear of not scaring away foreign investors. Ultimately, this may result in the foreign investor making excessive profits at the detriment of the host economy. A good illustration of this is in resource-seeking FDI where unduly lengthy and excessive concessions are granted. A reorientation is needed in this respect in the interest of sustainable development.

Accordingly, negotiations with foreign investors have to be handled more skilfully. It is of utmost importance that negotiators with the requisite and knowledge are utilized. Sufficient preparation and attention to detail is also crucial. A keen awareness of strengths, weaknesses, BATNA (Best Alternative to Negotiated Agreement), WATNA (Worst Alternative to Negotiated Agreement) and negotiating position is also immensely beneficial. Without doubt MNEs, being powerful entities are usually in a stronger negotiating position.

However, there are circumstances when the host economy has a greater bargaining position.[226] This is especially so in the case of resource-seeking FDI. Unlike other types of FDI where the investor has several

[223] A good example of this is the Telecommunications Sector in Nigeria where the presence of greater competition has resulted in greater overall benefits to the economy.
[224] See *Hoekman B and Will Martin W (eds) (2001) 177.*
[225] For how Competition policies can influence MNEs to source locally and counter anti-competitive behaviour where local supplies are cheaper, see *Raghavan C (1996) 35.*
[226] *Muchlinski PT (1999) 104-107.*

choices of investment location, resource-seeking FDI requires the investor to locate where the resource can be found. Here the customary scenario of competition for foreign investors can be replaced by one with intense competition by foreign investors for the limited resource-rich investment locations. This gives host economies a potentially stronger negotiating position to maximize the benefits from such FDI.[227]

Nigeria apart from having a huge market potential of about 150 million people is also extremely rich in natural resources. The most notable is crude oil, with Nigeria being one of the leading oil-producers in the world. However, Nigeria is also rich in natural gas, bitumen and several other solid minerals. These puts the country at strong vantage point to secure vigorous competition amongst foreign investors and get the best possible bargain that will conduce to sustainable development.

4.6.5 Utilizing the Procurement Process

There is an increasing trend towards procuring public works, and services through FDI.[228] This is a change from the conventional approach under which the provision of these services used to be the exclusive preserve of governments. Within this new context the Public Procurement legislation can be another vital tool for promoting the quality of FDI received into the economy. This has been described as procurement linkages.[229]

At the multilateral level, the Agreement on Government Procurement (GPA) is the WTO's code which deals with public procurement. The GPA's coverage does not extend to all government procurement.[230] Some of

[227] *Muchlinski PT (1999) 106.*

[228] Nigeria's Procurement Procedures Manual defined public procurement as "the process by which governments buy inputs for vital public sector investments. Those investments, both in physical infrastructure and in strengthened institutional and human capacities, lay foundations for national development. In procurement terms, those inputs are generally grouped into three categories :
• civil works — for example, bridges and buildings, highways and basic physical infrastructure ;
• goods — typically equipment, material and supplies, commodities, textbooks, medical supplies ; and
• services — expert advice and training, as well as such things as building maintenance, computer programming, etc." See: Bureau of Public Procurement (BPP) (2008)

[229] See for a more extensive discussion McCrudden's article in *Corder H (ed) (2009) 123-167.*

[230] The obligations under the Agreement are limited to the procurements of goods; and all services and construction services that are specified in positive lists, set out respectively in Annexes 4 and 5 of Appendix I to the GPA; for which the contract value exceeds a certain threshold. These thresholds are specified by each Party as minimum thresholds applicable to procurement of goods and services under Annexes 1, 2 and 3 entities
(Article I:4)

its provisions cater for the development concerns of developing countries.[231] Most notable are Article X and XVI of the Agreement.

The former provision deals with selective tendering procedures obligating countries to invite tenders from maximum number of suppliers, both domestic and from signatories to the GPA. This kind of competition will ensure that where a foreign investor is eventually successful in procurement, it would bode well for sustainable development. The latter provision deals with offsets, which provides an even more interesting leeway for developing countries. The GPA defines offsets as measures targeted at encouraging local development or improving the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements.[232]

While the Agreement generally prohibits offsets, it makes an exception, on policy grounds, including development, in the case of developing countries. However, for them to take advantage of it, they must have negotiated for its usage at the time of acceding to the GPA. Further, it can only be used as criteria for qualification to participate in the procurement process and not for awarding contracts.[233] In addition, the offsets must be objective, clearly defined, non-discriminatory, and contained in each members' Appendix 1. So while the TRIMs Agreement prohibits local content; the GPA provides opportunity for its limited usage.

However, the GPA as earlier highlighted is a plurilateral agreement applicable only to parties that are signatories to it.[234] Nigeria is not a signatory to the GPA, and therefore is neither bound by its disciplines, nor can she derive benefits from it.[235] To be able to take advantage of this, Nigeria would have to accede to the GPA. Nonetheless, Nigeria has her own domestic procurement law, the Public Procurement Act 2007,[236] which also has similar flexibilities.

[231] The preamble to the GPA recognized the need to take into account the development, financial and trade needs of developing countries, in particular the least-developed countries. Art V. also gives special and differential treatment to developing countries for balance of payment problems; development of domestic industries; and support of industrial units wholly or substantially dependent on government procurement
[232]See Footnote 7, Agreement on Government Procurement
[233] Art 16 (2) GPA
[234] See *Hugh Corder (ed.) (2009) 150.*
[235] See *Oyejide A & Njinkeu D (eds) (2007)261.*
[236] Public Procurement Act 2007, Vol. 14, Cap P.44, Laws of the Federation of Nigeria

The Act has provisions which relates to pre-qualification of bidders, whether they are suppliers of goods,[237] contractors,[238] or service providers.[239] It empowers the procuring entity to set out precise criteria upon which it will give consideration to applications by from bidders.[240] It also has provisions relation to open competitive bidding.[241] Perhaps the most significant are the sections of the Procurement Act and Manual which deal with consultancy services. This service could also be supplied through FDI, by commercial presence (Mode 4, GATS). The Act and the manual allow the benefits of the services to be maximized through the nature of the criteria for evaluation of proposals.

The Act and the Manual set out criteria such as the impact of the acceptance of the consultancy proposal on balance of payments position and foreign reserves of the government; the extent of participation by local personnel; the economic development potential offered by the proposal, including domestic investment or other business activity; boosting of employment; technology transfer; development of managerial, scientific and operational skills; counter trade arrangements offered by consultant or service providers ; and national defence and security considerations.[242] These would allow this kind of service, if supplied through commercial presence to make a significant contribution. There cannot be any issue of conflict with WTO provisions because even the WTO's GPA recognizes these flexibilities, though under the conditions given above.

Such is the utility of Procurement legislation that where national or development interest warranted it, it can be ingeniously used to keep out FDI. A period of economic malaise is one such circumstance which could

[237]Goods was described in S.60, the interpretation section of the Act as "objects of every kind and description, including raw materials, products and equipment and objects in solid, liquid or gaseous form and electricity as well as services incidental to the supply of the goods." Since electricity could be the subject of procurement, and such procurement is open to both foreign and domestic suppliers, FDI could therefore find its way into the Nigerian economy through public procurement. Through the Independent Power Projects being introduced, this is in fact the case.

[238] The Interpretation section (s.60) defines the word 'contractor or supplier' as 'any potential party to a procurement contract with the procuring entity and includes any corporation, partnership, individual, sole proprietor, joint stock company, joint venture or any other legal entity through which business is conducted". This interpretation is broad enough to encompass foreign investors and FDI. The inclusion of joint ventures which is both corporate vehicle and a type of TRIMs makes the case even more compelling.

[239] See S.23. See also Bureau of Public Procurement (BPP), Procurement Procedures Manual for Public Procurement in Nigeria, 1st edition, January 2008. Art 41

[240] Art 23(1)

[241] Art 24

[242] *See Bureau of Public Procurement (BPP) (2008) Art 80:1.* See also S. 49 Public Procurement Act, Vol 14, Cap 44, LFN

prompt this.[243] The global economic crisis prompted some countries to use their procurement legislation ingeniously by favouring products with high local content in respect of huge public infrastructure projects.[244] Technically, they have not flouted any of WTO's law. They only world within the letter of the law and explored the grey areas or, better still 'gaps' as UNCTAD described it.[245]

It is not just about ensuring that FDI that is received contributes to sustainable development. It is equally important that where FDI could endanger that objective, it should be kept out of the economy. More is not necessarily better. The quality and not the quantity of FDI received is the most crucial factor.

In sum, the Procurement legislation can be quite invaluable in channelling some type of FDI towards sustainable development.[246] Nigeria only needs to ensure that as much FDI that can be routed through the procurement mechanism is properly channelled using the relevant provisions of the Act. If deemed beneficial, negotiating the use of offsets and acceding to the WTO's GPA could allow the use of some of the TRIMs which was prohibited under the TRIMs Agreement.[247]

4.6.6 Ingenious Use of Local Content

As already discussed in chapter 3, local content is one of the species of performance requirements proscribed by the TRIMs Agreement. As already explained above, local content can still be validly utilized in public procurement. However, this is not the only circumstance where local content can be used. Local content can still be utilized through rules of origin, incentives, and in conjunction with performance mechanisms.

---

[243] Even the GPA recognizes that certain circumstances where domestic preferences could be given. That is the purpose of putting a threshold level for procurement in the GPA. Domestic preferences are also recognized under Nigerian Law. See s.34, Public Procurement Act, Vol 14, Cap 44, LFN

[244] See *UNCTAD, World Investment Report (2009) 3.*

[245] *Ibid.*

[246] *Oyejide A and Njinkeu D (eds) (2007) 260.* Here, Ogunkola observed that governments as the biggest single purchasers utilize their procurement policies and practices to obtain the best products and service at the lowest price, as well as promoting various domestic, political, social and economic policies.

[247] It would only be used a pre-qualification criteria and not as a criteria for awarding the contract. However, this could still be enough in terms of maximizing the contribution of FDI obtained through the procurement mechanism

Rules of origin essentially have the same effect as local content.[248] As already mentioned earlier, United States of America and the European Union, through the NAFTA and EU Rules of origin respectively, stipulate very high local value-added content for products.[249] It is allowed because regional trade agreements and their provisions constitute an exception to the national treatment principle. Nigeria and other African countries can toe the line of these countries by ensuring the desired level of local content in their Regional Trade Agreements.[250] The extent to which this can be exploited would however be limited to goods produced by foreign investors for export market.

Local content can also be used where it is linked to incentives.[251] There is presently no discipline on incentive mechanisms of countries. Therefore countries are at liberty to use it to encourage firms to source inputs locally. The way it operates is to allow only firms, whether domestic or local, who meet the stipulated ratio to be entitled to the incentives provided by the country.[252] However, the incentive system has to be well-defined and properly crafted, if it is not to be counter-productive.[253]

The third way by which local content can be validly used is where it is linked to control mechanism.[254] Amsden submitted that the use of local content in this way does not violate the TRIMs Agreement. She however warned that such a system must be carefully devised and properly monitored to enable maximization of the gains of FDI.

The foregoing shows the different ways in which local content is still being retained within the policy framework of countries. These approaches do not amount to a violation of the WTO Agreements as they currently stand.

---

[248] See *UNCTAD (2007) Elimination of TRIMs: The experience of selected developing countries* 5 & 10. Here UNCTAD cited an example of Argentina using the rules of origin of the MERCORSUR FTA to circumvent the TRIMs Agreement's prohibition on local content. At page 10, UNCTAD contended that this could still be utilized to promote development.

[249] *ibid*

[250] The Economic Partnership Agreement between the ECOWAS negotiating block and the EU presents an auspicious opportunity to do this.

[251] The Indonesian Autos case does not seem to permit this in the case of performance requirements linked to subsidies. The Panel in that case found that the Agreement could be applied to prohibit local content requirements, even when the conditions or advantages conferred were generally applicable and not specifically targeted at foreign investors [par. 14.73.]. It is submitted that this does not affect incentives.

[252] *Oyejide A & Njinkeu D (eds) (2007) 248. Here* Ogunkola observed that the fact that the incentives were not applied on a discriminatory basis distinguished them from subsidies. In his view, it also explained why they were not notified to the WTO.

[253] The incentive framework of most developing countries could themselves hamper development by giving unto foreign investors super-profits at the expense of consumer welfare. Nigeria's incentive structure is presently under review with a view to ensuring they achieve the desired goals and to make them more goal-oriented.

[254] *Gallagher PK (ed.) (2005) 220.*

4.6.7 Creation of Industrial Clusters

The formation of industrial clusters is a viable way of enhancing industrial competitiveness and promoting economic development. Industrial clusters are created through the aggregation of interdependent or complementary industries within a specific location or region.[255] The attraction of strategic attraction of key foreign investors into that particular region could promote the development of an intricate web of suppliers, customers and services connected to the MNEs.[256] The development of industries in this manner would enhance the development prospects of the country.

4.6.8 Guarding available policy space from further erosion

Policy space is crucial if a country is to be able to channel FDI towards sustainable development. The TRIMs Agreement does impose some constraints on national policy space. However, the greater danger is the erosion of policy space through the investment chapters of regional trade agreements and the multiplicity of BITs entered into by countries. These agreements restrict the policy autonomy of countries by proscribing a more elaborate list of TRIMs.

A multilateral agreement on investment has the potential to further limit this policy space. Utmost care must therefore be taken to ensure that sufficient policy space is retained in the event that multilateral agreement on investment is eventually negotiated. The same caution should also apply in the case of future BITs and RTAs.

4.6.9 Making voluntary codes exert greater influence on MNEs

Another vital factor which may help in attuning FDI more closely with national development goals is mainstreaming of voluntary codes produced by the private and public sector in an attempt to positively influence MNE behaviour.[257] The nexus between business and human rights has been expansively

[255] *Trebilcock M & Howse R (2005) 444.*
[256] Targeting of foreign investors would be vital in the creation of industrial clusters.
[257] *Subedi PS (2008) 42-45.* Here Subedi listed examples of these codes to include: the OECD's 1976 Declaration on International Investment and Multinational Enterprises (including guidelines for multinational enterprises); International Labour Organization's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977,as amended in 2000); United Nations Global Compact; Global Reporting Initiative (GRI) of 1997;UNDP's Growing Sustainable Business (GSB);

discussed.[258] The spawning of a number of non-binding codes to guide MNE behaviour serves to buttress the fact that the business of businesses is not just profits. Human development issues and corporate social responsibility are issues which firms can no longer ignore.[259]

If only all MNEs took these issues more seriously, there would be greater prospects of FDI's contribution to sustainable development. Unfortunately, this is not the case.[260] Most MNEs only pay lip-service to them. Greater commitment must be shown by MNEs to these codes which aim to promote better corporate responsible behaviour.

However the voluntariness of these codes may mean fewer firms will display this desired kind of corporate responsible behaviour. A concerted effort by Nigeria and other countries at exploring ways of making these codes binding would be a more ideal option. Failure of previous attempts in this direction such as the United Nation's Code on Transnational Corporations is indicative of how difficult this approach is going to be.

4.7 Conclusion

From what has been discussed above it is clear that there are several options which can be utilized by Nigeria to gear FDI towards sustainable development. These tools, mechanisms and measures can legally be made a part of the trade, industrial and investment policy of Nigeria. Furthermore, they can be incorporated into the various FDI laws, regulations, or administrative procedures without any fear of contravening the TRIMs Agreement or other WTO Agreements.

Economic and practical considerations will undoubtedly make some of these tools more preferable than the others. It is important to weigh them carefully, before deciding on which particular tools will best further the desired objective of maximizing the benefits of FDI.

The next chapter will sum up the key points of this thesis. It would also make some recommendations as a prelude to bringing this dissertation to a denouement.

Voluntary Principles on Security and Human Rights for the Extractive and Energy Sectors(as developed by the US and UK governments); Amnesty International's 1998 Human Rights Guidelines for Companies; Equator Principles (2003); and Extractive Industries Transparency Initiative (EITI).

[258] Jagers N (2002)99-132

[259] *Feyter DF (2001) 182*

[260] *Subedi (2008) 45.*

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Summary of key points

The central preoccupation of this paper has been to examine the role of the TRIMs Agreement on Nigeria's ability to direct FDI towards sustainable development. In developing this theme, the first chapter, being introductory in nature presented a broad overview of the thesis, as a prelude to more elaborate discussion in subsequent chapters.

Chapter 2 of this thesis considered salient issues touching on the nexus between FDI and sustainable development. It examined the concepts of FDI, development and sustainable development. It also stressed the increasing significance being attributed to the potential role that FDI could play in promoting sustainable development. However, it established both from empirical and case studies that that FDI could bring both benefits and dangers to a host economy.

Predicated on the foregoing salient fact, the importance of host country policy in generating net benefits from FDI was articulated. This led to the discussion of TRIMs as key tools in the trade, industrial and investment policy framework of countries towards achieving the end of gearing FDI towards sustainable development in host economies. The chapter was brought to an end by an observation of the increasingly hostile international regulatory environment which inhibited the ability of host governments to freely use TRIMs to channel FDI for developmental purpose. The TRIMs Agreement was singled out for more extensive discussion.

Chapter three of the thesis examined the impact of the TRIMs Agreement on Nigeria. It discussed a whole range of issues such as type of TRIMs, distinction between TRIMs and the TRIMs Agreement, overview of the TRIMs Agreement, and scope of the TRIMs Agreement. A critique of the Agreement was also ventured before the impact or role of the Agreement on Nigeria was discussed. It was established that the TRIMs Agreement had a constraining effect on Nigeria's trade, industrial and investment policy. In other words it made TRIMs which were formerly legally deployable by Nigeria unemployable.

The TRIMs Agreement therefore demanded a change in Nigeria's Trade, Industrial and Investment Policy, as well as her FDI Laws, in order to comply with the TRIMs Agreement. The influence of the Agreement motivated the elimination of TRIMs which were not even proscribed by the Agreement. It was also contended in this thesis that notwithstanding the constraints of the Agreement of trade, industrial and investment policy, there were still a lot of options which Nigeria could deploy towards gearing FDI towards sustainable development.

Chapter Four examined some of the available options for generating net benefits from FDI. It was contended that all measures and mechanisms that were not trade-related could still be employed. Furthermore, it was also submitted that all TRIMs which did not violate the national treatment and quantitative measures provisions of the GATT 1994 could still be used by Nigeria. In addition, it was also argued that even the exceptions allowed by the TRIMs Agreement can be utilized, albeit on a temporary basis.

The chapter also examined *inter alia,* options such as screening of investments, investment targeting, product sharing agreements, joint ventures, utilization of procurement process and legislation, proper bargaining, and the use of local content through rules of origin, linkage with performance mechanism, and linkage with incentives. The discussion of these options were to buttress the contention that the TRIMs Agreement, though constraining, still left several options for regulating FDI in Nigeria.

5.2 Recommendations

Flowing from the available options articulated in this thesis, particularly in chapter four, the following recommendations are adduced:

- Nigeria working in concert with other developing countries (through existing groupings or coalition of groupings), leverage on the sentiments of a Development Round, to push for a review of the TRIMs Agreement to ensure it supports sustainable development.

- While, it is heart-warming that some of the options discussed in this thesis have been integrated into Nigeria's trade, industrial and investment policy framework, more can still be done.

Consequently, efforts should be made to ensure that other options are included, subject of course to a careful consideration of their viability.

- Developed nations should in the spirit of cooperation, promotion of a better humanity and towards the attainment of the millennium development goals ensure that the issue of sustainable development is decisively addressed and promoted within BITs; the investment chapters of regional trade agreements, and agreements dealing with investment at the WTO. This could mean a review of these agreements to ensure policy space for channelling FDI towards sustainable development.

- Nigeria should have a strategic approach towards FDI. This approach should have a modest appreciation of the contribution that FDI can make towards sustainable development. FDI is not an economic elixir. While it can be useful towards development, it is important not to overly rely on what FDI can do.

  FDI should form part of a broader integrated development strategy which ensures that the right macro-economic policies, enabling environment for businesses to thrive; diversification of economy; investment in good infrastructure are ensued. The Nigerian government can utilize the FDI in the extractive sector to facilitate a more broad-based or development. For example, it can use the proceeds from its extractive industry to facilitate diversification and building of infrastructures.

- To address environmental issues, environmental laws should be strengthened to ensure that issues like the devastation of the environment due to the activities of Shell BP in the Niger-Delta do not recur. The Equator principles would be immensely helpful in this regard.

- The United Nations and its agencies; the World Bank, International Labour Organization; OECD and other key supranational institutions should collaborate towards exploring ways of making the codes of conduct which had been devised exert a greater influence on MNEs.

5.3 Conclusion

There are other issues which are pertinent to the discussion on the nexus between FDI and sustainable development. Bradlow listed these issues to include conditions for establishment; human rights, labour rights; environment; corruption and transparent procedures; cultural policies; public safety and security; public health; social policy; industrial policy; and sub-national government rights and obligations. The preoccupation of this thesis with the TRIMs Agreement has not afforded opportunity for consideration of these issues.[261] However, they are very important and Nigeria will do well to give due consideration to researching on this issues and addressing them decisively in the interest of ensuring FDI contributes positively to sustainable development.

The TRIMs Agreement has had a constraining effect on Nigeria's FDI laws and policy framework. However, several tools remain within the policy toolbox of Nigeria. It is crucial that these policies and mechanisms are appropriately deployed, carefully monitored so that FDI can make an overall positive contribution to Nigeria's quest for sustainable development.

[261] Bradlow D, Foreign Direct Investment and the Promotion of Sustainable Development: What Role for BITs?, Presentation at Bilateral Investment Treaty Review Workshop Sponsored by Department of Trade and Industry, 20 August 2009.

Bibliography

Books

Bhagirath LD (1999) *Strengthening developing countries in the WTO* Malaysia: Third World Network

Bhagirath LD (1999) *The world trade organization – A guide to the framework of international trade* Malaysia: Zed Books & Third World Network

Bhagirath LD (2003) *The WTO and the multilateral trading system – Past, present and future* London: Zed Books & Third World Network

Bruno K (1994) *Screening foreign investments – An environmental guide for policy makers and NGOs* Malaysia: Third World Network

Chang H (2003) *Globalisation, economic development and the role of the state,* London: Zed Books and Third World Network

Chang H (2005) *Kicking away the ladder – Development strategy in historical perspective* London: Anthem Press

Commission for Africa (2005) *Our common interest – An argument* United Kingdom: Penguin Books

Commonwealth Business Council (2001) *Developing countries and the WTO trade debate: Compelling case for full participation in the new round* London: Commonwealth Business Council

Correa MC & Kumar N (2003) *Protecting foreign investment – Implications of a WTO regime and policy options* United Kingdom: Zed Books

Croome J (1999) *Reshaping the world trading system – A history of the Uruguay round* The Hague: Kluwer Law International

Dilip KD (2007) *The evolving global architecture* United Kingdom: Edward Elgar Publishing Ltd.

Dunning HJ & Lundan MS (2008) *Multinational enterprises and the global economy* United Kingdom: Edward Elgar Publishing Ltd.

Easson A (2004) *Tax incentives for foreign direct investment* The Hague: Kluwer Law International

Feyter DF (2001) *World development law – Sharing responsibility for development* Oxford: Intersentia

Gilpin R, (2000) *The challenge of global capitalism – The world economy in the 21st century* Princeton: Princeton University Press,

Ijeoma OE (2008) *Globalization and nation building in Africa – Nigeria lessons of experience,* Pretoria: Africa Development Watch

Jones E & Whittingham P (1998), *Understanding the world trade organization: Implications and possibilities for the South,* South Africa: The Foundation for Global Dialogue

Kasto J (1996) *The function and future of the World Trade Organization* Kingston: Kall Kwik

Khalid R, Ley P & Saleem M (1999) *The world trade organization and developing countries* Vienna: OPEC Fund for International Development

Khor M (2005) *Implications of Some WTO Rules on the Realisation of the MDGs Malaysia:* Third World Network

Matsushita M, Schoenbaum JT & Mavrodis CP (2006) *The world trade organization - Law, practice, and policy* Oxford: Oxford University Press

Meir M.G (1989) *Leading issues in economic development* Oxford: Oxford University Press

Morton K & Tulloch P (1977) *Trade and developing countries* Great Britain*:* Croom Helm Ltd

Muchlinski PT (1999) *Multinational enterprises and the law* Oxford: Blackwell Publishers

Patrick Grady & Kathleen Macmillan (1999) *Seattle and beyond: The WTO millennium round,* Canada: Global Economics Ltd. And International Trade Policy Consultants, Inc., Canada

Raghavan C (1996) *The new issues and developing countries* Malaysia: Third World Network

Schott JJ & Buurman WJ (1994) *The Uruguay round – An assessment* Washington: Institute for International Economics

Shahin M (1996) *From Marrakesh to Singapore: The WTO and developing countries* Malaysia: Third World Network

Smith R (2001) *Developing countries, the WTO and a new round: A perspective* Malaysia: Third World Network

Sornarajah M (2004) *The international law on foreign investment* Cambridge: Cambridge University Press

Stiglitz EJ & Charlton A (2004) *An agenda for the development round of trade negotiation* Britain: Commonwealth Secretariat

Stiglitz EJ & Charlton A (2005) *Fair trade for all – How trade can promote development* Oxford: Oxford University Press

Stiglitz J (2002) *Globalization and its discontents* London: Penguin Books

Subedi PS (2008) *International investment law – Reconciling policy and principle* Oxford: Hart Publishing

Trebilcock JM & Howse R (2005) *The regulation of international trade* Great Britain: Routledge

UNCTAD (2007) *Elimination of TRIMs: The experience of selected developing countries:* Switzerland: United Nations Publications

UNCTAD (2009) *World investment report: Transnational corporations, agricultural production and development - FDI trends, policies and prospects*

UNCTAD, *Investment policy review – Nigeria (2009)* Switzerland: United Nations Publications

Voigt C (2009) *Sustainable development as a principle of international law – Resolving conflicts between climate measures and WTO Law* Boston: Martinus Nijhoff Publishers

Whalley J (1989) *The Uruguay round and beyond – The final report from the ford foundation project on developing countries and the global trading system* Great Britain: Macmillan

Chapters in books

Amsden H.A (2005) "Promoting industry under WTO Law" Gallagher PK (ed) *Putting development first – The importance of policy space in the WTO and international financial* institutions United Kingdom: Zed Books

Amsden H.A (2005) "Promoting industry under WTO law" in Gallagher PK (ed) *Putting development first – The importance of policy space in the WTO and international financial institutions* United Kingdom: Zed books

Anderson K *(2000)* "The future agenda of the WTO" in WTO Secretariat (ed) *From GATT to the WTO: The multilateral training system in the new millennium"* The Hague: Kluwer Law International

Boer B (2001) " Implementation of international sustainability imperatives at a national level" in Ginther K, Denters E & de Wart JIMP (eds) *Sustainable development and good governance* Boston: Martinus Nijhoff Publishers.

Bora B (2002) "Trade-related investment measures" in Hoekman B, Mattoo A & English P (eds) *Development, trade and the WTO – A handbook* Washington: World Bank

Bora B, Lloyd JP & Pangestu M (2001) "Industrial policy and the WTO in Hoekman B & Martin W (eds) *Developing countries and the WTO – a proactive agenda,* United Kingdom: Blackwell publishing

Chang H (2005) "Kicking away the ladder: "good policies" and "good institutions" in historical perspective" in Gallagher PK (ed) *Putting development first – The importance of policy space in the WTO and international financial institutions* United Kingdom: Zed books

Cho HA & Dubash KN *"Will investment rules shrink policy space for sustainable development? evidence from the electricity sector"* in Gallagher PK (ed) *Putting development first – The importance of policy space in the WTO and international financial institutions* United Kingdom: Zed books

Elbadawi AI (2005) "African development in the context of new world trade and financial regimes: The role of the WTO and its relationship to the World Bank and the IMF" in Oyejide TA & Lyakurwa W (eds) A*frica and the world trading system - selected issues of the Doha agenda (vol 1)* Eritrea: Africa World Press Inc.

English P & Njinkeu D (2008) "African countries' proposals and objectives in the post-Seattle framework of WTO trade negotiations in Njiinkeu D & English P (eds)*'Africa and the world trading system- interests, options and challenges (vol 3)* Eritrea: Africa World Press Inc.

Evans P (2005) "Neoliberalism as a political opportunity: Constraint and innovation in contemporary development strategy" in Gallagher PK (ed) *Putting development first – The importance of policy space in the WTO and international financial institutions* United Kingdom: Zed books

Gallagher PK (2005) "Globalization and the nation state: Reasserting policy autonomy for development" in Gallagher PK (ed) *Putting development first – The importance of policy space in the WTO and international financial institutions* United Kingdom: Zed books

Gehring WM & Segger CM (2005) "Introduction" *in* Gehring WM & Segger CM (eds) *Sustainable development in world trade law, global trade and finance series* Netherlands: Kluwer Law International

Ginther K, Denters E & de Wart JIMP (1995) "Sustainable development as a matter of good governance" in Ginther K, Denters E & de Wart JIMP (eds) *Sustainable development and good governance* Boston: Martinus Nijhoff Publishers.

Hoekman B & Saggi K (2001) "From TRIMs to a WTO agreement on investment?" in Hoekman B & Martin W (eds) *Developing countries and the WTO – a proactive agenda,* United Kingdom: Blackwell publishing

Hoekman B & Saggi K (2002) "Multilateral disciplines and national investment policies" in Hoekman B, Mattoo A & English P (eds) *Development, trade and the WTO – A handbook* Washington: World Bank

Hossain K (1995) "Evolving principles of Sustainable development and good governance" in Ginther K, Denters E & de Wart JIMP (eds) *Sustainable development and good governance* Boston: Martinus Nijhoff Publishers.

Jebuni DC & Wangwe WS "Development policy options for Africa in the context of the world trade organization (WTO) agreements in Oyejide TA & Lyakurwa W (eds) A*frica and the world trading system - Selected issues of the Doha agenda (vol 1)* Eritrea: Africa World Press Inc.

Kousari K (2005) "Africa's Development and External Constraints" in FONDAD (ed) *From: Africa in the World Economy - The National, Regional and International Challenges* The Hague: FONDAD

Kumar N (2005) "Performance requirements as tools of development policy: Lessons from developed and developing countries" in Gallagher PK (ed) *Putting development first – The importance of policy space in the WTO and international financial institutions* United Kingdom: Zed books

Lall S (2005) "Rethinking industrial strategy: The role of the state in the face of globalization" in Gallagher PK (ed) *Putting development first – The importance of policy space in the WTO and international financial institutions* United Kingdom: Zed books

Lamy P (2008) "The WTO Doha development agenda: Working for a fairer trading global trading system" in Janow EM, Donaldson V & Yanovich A (eds) *'The WTO: Governance, dispute settlement, and developing countries* New York: Juris Publishing

Low P (2005) "Africa and "the new issues" in the world trade organization" in Oyejide TA & Lyakurwa W (eds) *Africa and the world trading system,* Eritrea: Africa World Press Inc.

Low P (2008) "Developing countries in the world trade organization: What are the issues?" in Janow EM, Donaldson V & Yanovich A (eds) *'The WTO: Governance, dispute settlement, and developing countries* New York: Juris publishing

Malanczuk P (2001) " Sustainable development: Some critical thoughts in the light of the Rio Conference" in Ginther K, Denters E & de Wart JIMP (eds) *Sustainable development and good governance* Boston: Martinus Nijhoff Publishers.

Malanczuk P (2001) "The road to sustainable development: Evolution of the concept of development in the UN" in Ginther K, Denters E & de Wart JIMP (eds) *Sustainable development and good governance* Boston: Martinus Nijhoff Publishers.

McCrudden C (2009) "Social policy choices and the international law of government procurement: South Africa as a case study" in Corder H (ed) *Global administrative law: innovation and development* Cape Town: JUTA

Njinkeu D & Soludo CC (2008) "Industrialising Africa using WTO framework" in Njinkeu D & English P (eds) *Africa and the world trading system- interests, options and challenges (vol 3)* Eritrea: Africa World Press Inc.

Ogunkola O (2007) "Nigeria and the world trading system" in Oyejide A & Njinkeu D (eds) *Africa and the world trading system - Country case studies (vol 2)* Eritrea: Africa World Press Inc.

Ojo JBO (1988) "Nigeria: The political economy of dependent industrialization and foreign policy in Carlsson J & Shaw MT (eds) *Newly industrializing countries and the political economy of South-South relations'* New York: St. Martins Press

Ortiz MR (2005) "Trade and development law" in Gehring WM & Segger CM (eds) *Sustainable development in world trade law, global trade and finance series* Netherlands: Kluwer Law International

Ostry S (2002) "The Uruguay Round North-South Grand Bargain: implications for future negotiations" in Kennedy MLD & Southwick DJ (eds) *The political economy of international trade law* United Kingdom: Cambridge University Press

Oyejide T.A (2008) "Special and differential treatment" in Njinkeu D & English P (eds) *Africa and the world trading system- interests, options and challenges (vol 3)* Eritrea: Africa World Press Inc.

Oyejide TA (2005) "Costs and benefits of special and differential treatment for developing countries in GATT/WTO: An African perspective" in Oyejide TA & Lyakurwa W (eds) A*frica and the world trading system - selected issues of the Doha agenda (vol 1)* Eritrea: Africa World Press Inc.

Pangestu EM (2008) "The world trade organization an developing countries: An Indonesian perspective" in Janow EM, Donaldson V & Yanovich A (eds.) *"The WTO: Governance, dispute settlement, and developing countries* New York: Juris Publishing

Sigue PS & Musila WJ (2006) "Challenges of foreign direct investment flows to Africa" in Smith SM (ed.) *Beyond the African tragedy – Discourses on development and the global economy* England: Ashgate Publishing Ltd.

Singh A (2005) "Special and differential treatment: the multilateral trading system and economic development in the twenty-first century" in Gallagher PK (ed) *Putting development first – The importance of policy space in the WTO and international financial institutions* United Kingdom: Zed books

Stiglitz EJ (2005) "Development policies in a world of globalization" in Gallagher PK (ed) *Putting development first – The importance of policy space in the WTO and international financial institutions* United Kingdom: Zed Books

Wade HR (2005) "What strategies are viable for developing countries today? The world trade organization and the shrinking of development space" in Gallagher PK (ed) *Putting development first – The importance of policy space in the WTO and international financial institutions* United Kingdom: Zed books

Woodroffe (1999) "Regulating multinational corporations in a world of nation states" in Addo KM (ed.) Michael K. Addo (ed) *Human Rights Standards And The Responsibility Of Transnational Corporations,* The Hague, Kluwer Law International

Yeo S (2005) "Trade policy in sub-Saharan Africa: Lessons from the Uruguay round experience" in Oyejide TA & Lyakurwa W (eds) A*frica and the world trading system - selected issues of the Doha agenda (vol 1)* Eritrea: Africa World Press Inc.

Journal Articles

Brooks HD, Fan XE & Sumulong SR "Foreign direct investment: Trends, TRIMs, and WTO Negotiations" (2003) 20 *Asian Development Review* 1

Dicaprio A & Gallagher PK "The WTO and the shrinking of development space how big is the bite?" (2006) 7 *The Journal of World Investment and Trade*

Dutse AY "Nigeria's economic growth: Emphasizing the role of foreign direct investment in transfer of technology" (2008) 3 *Communications of the IBIMA* 76

Ekwueme K "A Nigerian perspective on a forward-looking multilateral agreement on investment" (2006) 7 *Journal of World Investment and Trade* 165

Goldin AI & Reinert AK "Global capital flows and development" (2005) 14 Journal of International Trade and Development 453

Kumar PS "Rethinking the linkages between foreign direct investment and development: a third world perspective" (2009) *NALSAR Student Law Review* 31

Newcombe A (2007) "Sustainable development and investment treaty law" 8 *Journal of World Investment and Trade* 356

Sachdeva A "International investment: a developing country perspective" (2007) 8 *Journal of World Investment and Trade* 533

Seifu G ""Regulatory Space" in the Treatment of Foreign Investment in Ethiopian Investment Laws" (2008) 9 *Journal of World Investment and Trade* 405

Senona MJ "EPAs and the Doha round: Development or discontent (2009) 8 *Journal of International Trade Law and Policy* 60

International treaties, Instruments and documents

World Trade Organization, Agreement on Government Procurement in *WTO Analytical Index: Guide to WTO Law and Practice, Ist Edition (2003)*

World Trade Organization, Agreement on Subsidies and Countervailing Measures in *WTO Analytical Index: Guide to WTO Law and Practice, Ist Edition (2003)*

World Trade Organization, Agreement on Textiles and Clothing in *WTO Analytical Index: Guide to WTO Law and Practice, Ist Edition (2003)*

World Trade Organization, Agreement on Trade in Civil Aircraft in *WTO Analytical Index: Guide to WTO Law and Practice, Ist Edition (2003)*

World Trade Organization, Agreement on Trade-Related Aspects of Intellectual Property in *WTO Analytical Index: Guide to WTO Law and Practice, Ist Edition (2003)*

World Trade Organization, General Agreement on Trade and Tariffs in *WTO Analytical Index: Guide to WTO Law and Practice, Ist Edition (2003)*

World Trade Organization, General Agreement on Trade and Tariffs in *WTO Analytical Index: Guide to WTO Law and Practice, Ist Edition (2003)*

World Trade Organization, General Agreement on Trade in Services in *WTO Analytical Index: Guide to WTO Law and Practice, Ist Edition (2003)*

World Trade Organization, International Bovine Meat Agreement in *WTO Analytical Index: Guide to WTO Law and Practice, Ist Edition (2003)*

World Trade Organization, International Dairy Agreement in *WTO Analytical Index: Guide to WTO Law and Practice, Ist Edition (2003)*

World Trade Organization, Marrakesh Agreement Establishing the World Trade Organization in *WTO Analytical Index: Guide to WTO Law and Practice, Ist Edition (2003)*

World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes in *WTO Analytical Index: Guide to WTO Law and Practice, Ist Edition (2003)*

Case Law

Canada – Certain Measures Affecting the Automotive Industry (WT/DS139 and WT/DS142)

India – Measures Affecting the Automotive Sector (WT/DS146 and WT/DS175)

Indonesia – Certain Measures Affecting the Automobile Industry (WT/DS54, WT/DS55, WT/DS59 and WT/DS64)

European Communities – Regime for the Importation, Sale and Distribution of Bananas, (WT/DS27/AB/R)

Nigerian Legislation

Nigerian Investment Promotion Commission Act of 1995

Nigeria Export Processing Zones Act, Vol. 14 Cap. N107. Laws of the Federation of Nigeria

Public Procurement Act of 2007 Vol. 14, Cap P.44, Laws of the Federation of Nigeria