AN ANALYSIS OF THE REGULATORY LEGAL FRAME WORK FOR FOREIGN INVESTMENT IN NIGERIA: ISSUES AND CHALLENGES

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LLM/LAW/1897/2009 – 2010

DEPARTMENT OF COMMERCIAL LAW
AHMADU BELLO UNIVERSITY, ZARIA
NIGERIA

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NIGERIA

MARCH, 2015

DECLARATION

I, declare that the work in this Thesis entitled "An Analysis of The Regulatory Legal Frame Work For Foreign Investment in Nigeria: Issues and challenges" has been carried out by me in the Department of Commercial Law. The information derived from other literary publications have been duly acknowledged in the text and a list of references provided. No part of this thesis was previously presented for another degree or diploma at this or other Institutions.

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LL.M/LAW/1897/2009-2010	**Signature**	**Date**

CERTIFICATION

This Thesis entitled "An Analysis of The Regulatory Legal Frame Work for Foreign Investment in Nigeria: Issues and Challenges" by **VITALIS IHEJIRIKA NNOROM** meets the regulations governing the award of the degree of Master of Laws (LL.M) of the Ahmadu Bello University, and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This work is dedicated to the memories of my late father, Mr. Gabriel Nnorom and my grand mother Mrs. Mary Mgbafor Okwu

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First on the list of acknowledgement is my creator, God Almighty who granted me the grace to successfully complete this study.

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I am most appreciative of my beloved wife, Mrs. Benardine Nkemdirim Nnorom and children, UcheChukwu Vitalis Nnorom, KeleChukwu Timothy Nnorom for their understanding and prayers in the course of this work.

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ABSTRACT

What provoked this research is the visibilly wanning national Sovereignty and Jurisdiction of developing Countries to make choice from options in economic, social and cultural policies due to globalization. The need to unravel the challenges the regulatory Legal Frame Work for Foreign investment in Nigeria faces, its impact on our national policies and policy making mechanisms and finding solutions. The methodology employed in this research is the doctrinal research. Primary and secondary materials sourced are analyzed. Foreign investment involves the transfer of a package of resources including capital, technology, management and marketing expertise. This can generally be divided into, Foreign Direct Investment (FDI) and Portfolio Investment (PI) although loans to government (i.e. foreign debts) have also been seen as a third category. The purpose of FDI is to acquire a lasting interest and effective control in the management of an enterprise without necessarily having majority shareholding. Portfolio Investments on the other hand, are directed at earning dividends, interests, capital gains and so on without participating in management.
The Multinational Corporations (MNCs) are major sources of foreign direct investment (FDI).
The regulatory Legal Frame Work is the power of host country through its law and regulatory bodies, authorities, and agencies to control investment activities by providing conditions that affect the behaviour of investors and development of investment to ensure fair and beneficial operations. These agencies including the Nigerian Investment Promotion Commission (NIPC), National Office for Technology Acquisition and Promotion (NOTAP) and Nigeria Oil and Gas Industry Content Development. The regulatory Legal Frame Work for foreign investment in Nigeria is confronted with many issues and challenges which make it impossible to achieve the objectives of government to regulate foreign investment, such as globalization of policy-making which has led to the erosion of national sovereignty, narrowed the ability of governments and people to make choices from options in economic, social and cultural policies; negative influence of the multinational corporations (MNCs) over government policies, lack of commitment on the part of government, non enforcement of penalties and inadequate penalty regimes, ineffective administrative systems and blind adoption of economic terms "dictated" by global markets and international institutions amongst others.
Considering that the regulatory legal frame work plays a crucial role in the economic life of the nation, government should pay adequate attention to it. Consequently, investment policies and regulations should be backed by law to enhance enforcement. The findings indentified in this work show that the penalties in Nigerian Investment Regulatory Frame Work such as Section 55 CAMA and Section 15 (1)(2) NOTAP are inadequate and do not have the force of deterrence. Procedure for exemption of Foreign Company from registration in Nigeria under Section 56 (1)(a)-(d) to the effect that such application should be made to the Council of Ministers through the Secretary to the Government of the Federation. The procedure is unnecessarily cumbersome and time wasting and will discourage donor international organizations and countries willing to undertake specialist projects under contract with any of the Governments in the Federation or their agencies. The National Office for technology Acquirsion and promotion (NOTAP) Act provides for the agency to vet agreements to be submitted to it by Nigerian Companies after negotiating and concluding with the Foreign technical partners and leaves much to be desired in the quest for maximum benefit from technology transfer and Foreign Investment in Nigeria.

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LIST OF ABBREVIATIONS

ABU	-	Ahmadu Bello University
AGOA	-	African Growth Opportunity Act
AHFE	-	Association of Head of Federal Establishments
BPO	-	Business Process Outsourcing
CAC	-	Corporate Affairs Commission
CAMA	-	Companies and Allied Matters Act
CAP	-	Common Agricultural Policy
CBN	-	Central Bank of Nigeria
C of O	-	Certificate of Occupancy
ECOWAS	-	Economic Community of West African States
EPZ	-	Export Processing Zone
FAO	-	Food and Agricultural Organization
FEMMA	-	Foreign Exchange (Monitoring and Miscellaneous) Act
FDI	-	Foreign Direct Investment
FPI	-	Foreign Private Investment
GATT	-	General Agreement Tariffs and Trade
GDP	-	Gross Domestic Product
HDP	-	Human Development Report
IDDC	-	Industrial Development Coordination Committee
IMM	-	Immigration
IMF	-	International Monetary Fund
IPRs	-	Intellectual Property Rights
IR	-	Immigration Responsibility
ISA	-	Investments and Securities Act
JCA	-	Justice of the Court of Appeal
LDCs	-	Least Developing Countries
LRN	-	Law Report of Nigeria
MIA	-	Multilateral Investment Agreement
MNCs	-	Multinational Corporations

MPJFIL	-	Modern Practice Journal of Finance and Investment Law
NEP	-	Nigerian Enterprises Promotion
NEPB	-	Nigerian Enterprises Promotion Board
NGOS	-	Non – Governmental Organizations
NEPC	-	Nigerian Enterprises Promotion Act
NIPC	-	Nigeria Investment Promotion Commission
NIPCA	-	Nigerian Investment Promotion Commission Act
NWLR	-	Nigeria Weekly Law Report
NOTAP	-	National Office for Technology Acquisition and Promotion
OECD	-	Organization for Economic Cooperation and Development
P.I.	-	Portfolio Investment
PUR	-	Permanent Until Reviewed
SAP	-	Structural Adjustment Programme
STR	-	Subject to Regularization
TDR	-	Trade and Development Report
TRIPS	-	Trade – Related Aspects of Intellectual Property Rights
TRIMS	-	Trade – Related Investment Measures
TNCs	-	Transnational Corporations
TWP	-	Temporary Work Permit
UNCTAD	-	United Nations Conference on Trade and Development
USA	-	United States of America
WTO	-	World Trade Organization

CHAPTER ONE

GENERAL INTRODUCTION

1 BACKGROUND OF THE STUDY

In the course of an indept consideration of this research topic "An Analysis of The Regulatory Legal Frame Work for Foreign Investment in Nigeria: Issues and Challenges," the researcher's mind flashed on what Martin[1] Khor referred to as "globalization" of national policies and policy making mechanisms. National policies that until recently were under the jurisdiction of states and people within a nation have increasingly come under the influence of international agencies and processes or of big private corporations and economic/financial players.

This has led to the erosion of national sovereignty and narrowed the ability of governments to make choices from options in economic, social and cultural policies. Martin Khor observed that most developing countries' independent policy making capacity had been eroded while they now have to adopt policies made by other entities, which might be detrimental to them. While on the other hand the developed countries, where the major economic players reside which also control the processes and policies of international economic agencies, are better able to maintain control over their own national policies as well as determine the policies and practices of international institutions and the global system.[2]

1. Khor M. Globalization and the South: Some Critical Issues Spectrum House, Ibadan [2005] PP.4 - 5
2. Ibid PP. 24 – 25

In his study "The New Global Economy and Developing Countries: Making Openness Work", Rodrik observed that developing nations must participate in the world economy on their own

terms, not the terms "dictated" by global markets and multilateral institutions. While noting the premise that reducing barriers to imports and opening to capital flows would increase growth and reduce poverty in developing countries, Rodrik's study concludes:

> The trouble is, there is no convincing evidence that openness, in the sense of low barriers to trade and capital flows, systematically produces these results. The lesson of history is that ultimately all successful countries develop their own brands of national capitalism. The states which have done best in the Post – War period devised domestic investment plans to kick – start growth and established institutions of conflict management. An open trade regime, on its own, will not set an economy on a sustained growth path. [3]

Governments the world over from time to time assess the quantum of foreign investment in their countries directly or indirectly depending on their policy

objectives and desire in availing the dividend of good governance to their citizenry. The role of foreign investment in the economic development of countries especially developing nations has prominently assumed an important dimension in recent times.

Consequent upon this, the regulatory legal frame work for foreign investment in Nigeria should reflect aspirations of the country for the common good of its citizens. The legal instruments must as a matter of necessity be the basis for entering into any venture as the consequences of flouting the law could at times be grave, hence the absence of regulations to human activities could be a direct invitation to anarchy and chaotic environment will in a matter of time result.

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3. *Washington DC, Overseas Development Council (1999) P.15; Also see Khor M. Globalization and the South: some Critical Issues, Spectrum House, Ibadan (2005) PP. 24 – 25.*

It is in view of this that laws have been enacted from time to time to regulate the business and investment environment so that parties could have clearer policy directions with a view to fostering growth and economic development of the society. It also gives some measure of control and direction, without which there cannot be a sustained economic growth. The level of participation by

foreigners in the economic development of a country is often times dictated by the state of that nation in focus in terms of its social – political development; economic policy amongst others.

These instruments do not work in isolation, and there must be some kind of balancing in order to achieve the expected growth. [4]

Over the years especially from independence the successive governments in Nigeria had grappled with major problems that have hindered investment in this country which include inconsistent policies, and unfriendly investment laws amongst others.

In the world today the process of deepening and widening markets had produced new global and national institutions and new behavioural patterns amongst international investors. The global competition for limited global capital is fiercer and the challenge for attracting and retaining foreign capital very great. [5]

Consequent upon these global challenges, in 1986, Nigeria began implementing the Structural Adjustment Programme [SAP] with liberalization and deregulation of the economy. This policy shifts and institutional changes were targeted at inflow of foreign capital.

This puts the regulatory environment for foreign investment in Nigeria in perspective.

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4. Sofowora, M.O Foreign Private Investment – Legal Regimes. A Paper Presented at the Conference of the Central Bank of Nigeria, held at Hamdala Hotel, Kaduna from September 1 – 5, *(2003) PP. 137 - 138*

5. Garba A.G. The Impact of Globalisation on Foreign Private Investment in Nigeria. A Paper Presented at the Conference of the Central Bank of Nigeria, held at Hamdala Hotel, Kaduna from September 1 – 5 (2003) P. 175.

This research work is designed to examine the phenomenon of globalization of national policies and policy making mechanisms and its effect on foreign investment regulation in Nigeria.

The inspiration to choose this research topic is borne out of the visibilly wanning national sovereignty, and jurisdiction of developing countries to make choices from options in economic, social and cultural policies due to globalization.

The study is on the challenges the regulatory legal frame work for foreign investment in Nigeria faces, its impacts on our national policies and policy making mechanisms. It involves a review of legislations, the work of some known scholars, researchers, authors and so on in this area.

1.1 THE CONCEPT AND DEFINITION OF FOREIGN INVESTMENT; AND REGULATORY LEGAL FRAME WORK

Foreign Investment according to Guobadia[6] can be generally divided into two thus, Foreign Direct Investment [FDI] and Portfolio Investment [PI] [although loans to government [i.e. foreign debts] have also been seen as a third category], and also defined as involving the transfer of a package of resources including capital, technology, management and marketing expertise. Such resources usually have the effect of extending the production capabilities of the recipient country. [7]

According to the same writer, "the purpose of direct foreign investment is to acquire a lasting interest and effective control in the management of an enterprise without necessarily having majority shareholding".

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6. Guobadia D.A Issues In Facilitating Investment For National Development in Nigeria. In Jimoh AA. [e.d*]* Modern Practice Journal of Finance and Investment Law *MPJFIL. Lagos October [1998] Vol.2. No. 2 P.39*

7. Odozie V. *An Overview of Foreign Investment in Nigeria 1960 – 1995. CBN, Research Department Occasional Paper No. 11*

and so on without participating in management. Quoting Robert Pritchard, Guobadia stated that when Portfolio Investment carries control, it becomes foreign direct investment [FDI]. [8]

In the same vein, according to Krishna Foreign Private Investment can be classified as Foreign Direct Investment [FDI] and Foreign Portfolio Investment [FPI].

FDI is an investment in real assets where real assets consist of physical things such as factories, land, capital, goods, infrastructure and inventories. The Multinational Corporations [MNC_S] is chief source of FDI.

FPI has two major components: Portfolio investment and direct investment. Portfolio investment is the form of equity capital which empowers its owner to flow dividends. On the other hand, foreign direct investment enables the foreigner to own physical productive assets, which operates. Large multinational or transnational corporations essentially carry out this flow of resources with headquarters in developed nations.

Foreign Private Investment [FPI] is a major component of international capital flows. Oyeranti quoting Thirlwall observes that FPI refers to investment by multinational Companies with headquarters in developed countries. [9]

From the perspective of Development Assistance Committee [DAC] of the Organization for Economic Co-operation and Development [OECD], FPI is conceptualized as net financing by an entity in a developed country; which has the objective of obtaining or retaining a lasting interest in an entity resident in a developing country.

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8. Robert Pritchard*: The Transformation in Foreign Investment Law – More than a Pendulum Swing. [1997] 7 /CCLR. 233/234 quoted by Guobadia, D.A. in Guobadia D.A. Issues in Facilitating Foreign Investment for National Development in Nigeria, Modern Practice Journal of Finance and Investment Law (1998) Vol. 2 No*. 4 P. 39
9. Oyeranti OA. *Foreign Private Investment: Conceptual and Theoretical Issues.* A Paper Presented at the Conference of the Central Bank of Nigeria, held at Hamdala Hotel, Kaduna from September 1 – 5, (2003) p. 11

This consequently explains why the International Monetary Fund's Balance of Payments Manual defines foreign direct investment as 'investment made to acquire a lasting interest in a foreign enterprise with the purpose of having an effective voice in its management'.

Another institution, the World Trade Organization [WTO] also observed that FDI occurs when an investor based in one country [the home country] acquires an asset in another country [the host Country] with the intent to manage that asset. [10]

All the conceptualizations given above in respect of FDI and FPI are the same. These show that the management dimension is what differentiates FDI from Portfolio investment in foreign

stocks, bonds and other financial instruments. FPI consequently, should be seen as the sum of the following components: [11]

a. New equity from the foreign Company in the home country to the Company in the host country;

b. Reinvested profits earned from the Company; and

c. Long – and short – term net loan from the foreign to the host Company.

1.1.1 REGULATORY LEGAL FRAME WORK:

According to Oxford Advance Learner's Dictionary of Current English, "Regulatory" is defined as 'Having the power to control an area of business or industry and make sure that it is operating fairly and enforced by regulatory bodies /authorities / agencies'. [12] In the same vein "Legal Frame Work" is defined as 'a system established for the protection of'. [13]

10. *World Trade Organization (1996) Annual Report: Trade and Foreign Direct Investment, Vol. 1, WTO, Geneva, quoted by* Oyeranti OA. *In Foreign Private Investment: Conceptual and Theoretical Issues.* A Paper Presented at the Conference of the Central Bank of Nigeria, held at Hamdala Hotel, Kaduna from September 1 – 5 (2003) PP. 11 - 12
11. Oyeranti AO. Loc cit P.12

To contextualize Regulatory Legal Frame Work in relation to Foreign Investment in Nigeria it can be defined as the power of the country through its regulatory bodies, authorities and agencies to control investment activities by providing conditions that affect the behaviour of investors and development of investment to ensure fair and beneficial operations.

The Nigerian Investment Promotion Commission (NIPC) Act amongst others is government's response to the regulatory legal frame work for foreign investment in Nigeria[14]. This enabling statute in section 17 specified four areas in which a non Nigerian cannot invest in Nigeria.[15]

1.2 STATEMENT OF THE PROBLEM

The statement of the problem is to examine the negative effect of globalization on national policies and policy making mechanisms in Nigeria.

1.3 JUSTIFICATION / SIGNIFICANCE OF THE STUDY

Current trends have established that the regulatory legal frame work forforeign investment in Nigeria and other developing nations are faced with daunting challenges thrown up by globalization of national policies and policy making mechanisms. National policies that were until recently under the jurisdiction

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12. *Oxford Advance Learner's Dictionary of Current English, New 7th Edition.* P. 1227
13. *Ibid P. 591*
14. *Cap NI 17 LFN 2004*
15. *Section 17 Cap. NI 17 LFN 2004; see also Guobadia DA. Issues in Facilitating Foreign Investment for National Development in Nigeria, Modern Practice Journal of Finance and Investment Law (1998) Vol. 2 No. 4 p. 42*

of states and people within a nation now under the influence of international agencies and big private corporations and economic / financial players.

Furthermore, the challenge is that most developing countries' independent policy making capacity had been eroded hence they now adopt policies made by other entities, which can be detrimental to them.

This research work is useful to the Nigerian Investment Promotion Commission, [NIPC] and all other Investment regulatory agencies in Nigeria which should come to the knowledge of the fact that developing nations must participate in

the world economy on their own terms, not those dictated by global markets and multinational institutions.

Also through its findings cause Nigeria to learn the lesson of history that ultimately all successful countries developed their own brands of national capitalism and foreign investment regulations.

The work is also very useful to the government and regulatory agencies for foreign investment by alerting that an open trade regime, on its own, will not set any economy on a sustained growth path instead it may harm domestic producers and cause instability. The work will apparently assist government to come up with policies and reforms that tilt towards protectionism.

Finally, the research findings will serve as literature to teachers and students of law, corporate practitioners and all other stakeholders who have interest in the dynamics of the regulatory legal frame work for foreign investment which focus should be national interest.

1.4 THE AIM AND OBJECTIVES OF THE STUDY

The Objectives of this study are to examine the phenomenon of globalization of national policies and policy making mechanisms, its effects on foreign investment regulation in Nigeria presently and in the future.

1.5 LIMITATIONS /SCOPE OF STUDY

The scope is limited to the stated objectives consequently the examination of the phenomenon of globalization of national policies and policy making mechanisms, its effects on foreign investment regulation in Nigeria presently and in the future. The work refers to some specific regulations and laws such as Nigerian Enterprises Promotion Acts of 1972 and 1977, Nigerian Enterprises Promotion (Issues of non-Voting Equity Shares) Act 1987(now repealed) used for the purpose of this work. Also the research work covers some contemporary laws on foreign participation in business in Nigeria such as the Companies and Allied Mattes Acts,2004 Nigerian Investment Promotion Commission Act (NIPC),2004 Immigration Act,2004 Investments and Securities Act,2007 National Office For Technology Acquisition and Promotion Act,2004 Nigerian Oil and Gas Industry Content Development Act,2010 amongst others, World Trade Organization (WTO) policies and works of authors that are relevant to this research topic.

1.6 LITERATURE REVIEW

The regulatory environment is pivotal to foreign investment in Nigeria. This is because the impact of globalization and the challenges it exacts on the legal regimes of developing nations like Nigeria are enormous. Despite the importance of this subject not many writers have ventured to contribute to the subject. This makes this research pertinent and creates opportunity to contribute to knowledge in this area.

Materials related to this topic are scattered in different books and write ups. For instance Odife in his book entitled "Structural Adjustment and Economic Revolution in Nigeria,"[16] made some contributions on some issues related to this research topic.

He dealt with the second phase of Indigenization and Foreign Direct Investment [FDI] in Nigeria, encouraging Foreign Private Investments in the eighties, advantages of FDI and prospects for Nigeria's performance in FDI.

Under these he asserted the following:

He concluded that government policy measures should be evaluated for effect on other national objectives before implementation.

He also pointed out that a proper industrial policy would require that Nigeria evaluates every project from the point of view of Nigeria and not of the foreign investors hence not every FDI would be accepted from this point of view.

The writer observed that some FDI could consist of the export of technology fast – turning obsolete in its country of origin while some others may consist of the export of industries which require large scale governmental subsidies.

He concluded that some of the investors may prevent Nigeria from moving ahead to industrialize in required areas by their presence and effective lobbying power. [17]

His work is partly relevant to this study even though it failed to touch on the challenges of globalization on our regulatory environment. Badmus in his book

16. *Odife D. Structural Adjustment and Economic Revolution in Nigeria. Heinemann Educational Books Nigeria, Ibadan, [1989] pp. 84 – 85.*
17. Ibid

entitled, "Corporate Law Practice" discussed some issues that are relevant to this research topic. He devoted two chapters of his book under the following headings; Foreign participation in business in Nigeria and incentives and reliefs available to investors in Nigerian Economy.[18]

He highlighted major laws affecting foreign participation in business in Nigeria.[19.]

Also, he enumerated incentives and reliefs available to foreigners who invest in Nigeria.[20] However his work failed to cover a very vital aspect of this study, globalization and other challenges on the regulatory legal frame work.

Furthermore, Oyeranti in his paper on "Foreign Private Investment: Conceptual and Theoretical Issues,"[21] discussed how developing economies can maximize their benefit of FDI to their advantage.

He believes that developing economies could maximize the advantages of foreign direct investment by parallel and equivalent stimulation of domestic private investment,

stable low inflation macroeconomic environment which is more fundamental than special incentive to attract FDI.

He concluded that developing countries should become more competitive to strengthen their bargaining position in the emerging globalized world economy.

Though relevant to the study, the work failed to highlight how developing countries could strengthen their position in the emerging globalized world economy. Aremu in

18. Bhadmus Y.H. *Corporate Law Practice in Nigeria, Chenglo Publishers,* Off Maryland, Enugu [2009] pp. 85 – 107
19. *Ibid*
20. *Ibid*
21. Oyeranti O.A. *Foreign Private Investment: Conceptual and Theoretical Issues.* A paper presented at the Conference of Central Bank of Nigeria, held at Hamdala Hotel, kaduna from September 1 – 5, (2003) p. 33

his paper on "An overview of Foreign Private investment in Nigeria".[22] stated that though FDI through Transnational Corporations [TNC_S] are capable of bringing into Nigerian economy sizeable resources, this same TNC_S are chief villians in many international commercial conflicts and tensions.

He further asserted that what foreign investors are bringing into Nigeria are paramount, but the potential access of such capital resources, technology, skills and

their global strategies should be equally evaluated.

The writer urged that in drafting agreements with the TNC_S, the regulatory agency in Nigeria must make sure that such agreements are properly drafted and adequately secure the interest of the parties, while at the same time develop a good negotiating strategy for the economy to use in negotiating foreign direct investment.

This work is relevant to the study. Other relevant works consulted include Sofowora,

"Foreign Private Investment - Legal Regime".[23] who stated that legal regulations are

a necessary prerequisite to instill confidence in foreign private investors. This work failed to highlight how legal regulations can instill confidence in foreign private investors consequent upon the challenges thrown up by globalization.

Garba, the Impact of Globalization on Foreign Private Investment in Nigeria[24]

He stated that in strategies for dealing with globalization, the focus must not be just

creating enabling condition for FDI in Nigeria but on enhancing Nigeria's overall

competitiveness in global international relations. This work is relevant to the study.

22. Aremu J.A *An Overview of Foreign Private Investment.* A paper presented at the conference of Central Bank of Nigeria, held at Hamdala Hotel, Kaduna from 1 -5 September, (2003) pp. 124 – 125
23. Sofawora M.O. *Foreign Private Investment – Legal Regime,* A paper presented at the Conference of Central Bank of Nigeria, held at Hamdala Hotel, Kaduna from 1 – 5 September, (2003) P. 137
24. Garba A.G. *The Impact of Globalization on Foreign Investment in Nigeria.* A Paper Presented at the Conference of Central Bank of Nigeria, held at Hamdala Hotel, Kaduna from 1-5 September, (2003) pp. 167 - 168.

Bello, in his Seminar Paper on the Role and Achievements of Nigerian investment promotion commission, highlighted benefits of FDI [25] which included transfer of technology to individual firms and technological spill – over to the wider economy; increase in exports, increase in savings and investment; faster growth of output and employment amongst others.

He also enumerated challenges hindering investment into the country; as including inconsistent government policies, unfriendly business laws, uncompetitive incentives, frequent labour crises, poor state of infrastructure and high cost of doing

business in Nigeria. The work is relevant to the study but the challenges it enumerated fail short of the focus of the study. Osinubi., Amaghionye in their paper titled "Foreign Private Investment and Economic Growth in Nigeria[26] "pointed out that the exact nature of the impact of FDI varies between industries and countries, depending on country characteristics and policy environment. But they did not elaborate on the policy environment. Though the work did not elaborate on the policy environment, it is relevant to the study.

Khor, [27] in his research concludes: "A global investment regime that took away a

developing country's ability to select among FDI projects would hinder development and prejudice economic stability". He explained that it is common knowledge that

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25. *Bello M. The Role and Achievements of Nigerian Investment Promotion Commission. A paper presented at the conference of the Nigeria Institute of Industrial Management Held at Lagos Sharaton Hotel from April 6 – 7 (2005) p. 18*

26. Osinubi T.S., Amaghionye Odiwe L.A. *Foreign Private Investment and Economic Growth in Nigeria. Review of Economic Business Studies, June (2010) Vol. 3 Issue 1. p. 107*

27. Khor M; *Loc Cit pp. 79 - 80*

for foreign investment to play a positive role, government must have the right and powers to regulate its entry, terms of conditions and operations.

Also the learned researcher failed to state how the global investment regime anomaly could be corrected, yet it is relevant to the study.

Another major text reviewed in the course of this work is Aswathappa on International Business. [28]

The text treated the case for protectionism under two broad categories: Political and Economic. Under political protectionism the text laid emphasis on National Security, Retaliation, Jobs protection and Human Rights protection. While economic protectionism covered Infant Industry and Strategic Trade Policy.

This work is very relevant to the study considering its emphasis on protectionism and the challenges of globalization on the regulatory environment.

Yakubu- "The Regulatory Environment and Foreign Private Investment in Nigeria: Issues and Challenges". [29]

He discussed investment environment in Nigeria from economic and infrastructural development points of views. He further looked at issues and challenges of the

Regulatory Environment, talking about Nigeria's friendly investment laws, Anti – Corruption Commission and concluded by stating that Nigeria needs to be proactive in formulation and implementation of policies to bring about a conducive investment legal

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28. Aswathappa K. International Business, 2nd Edition Tata Mac Graw Hill New Delhi (2006) pp. 169 - 171

29. Yakubu Sura J.B. *The Regulatory Environment and Foreign Private Investment in Nigeria:* Issues and Challenges. A Paper Presented at the Conference of the Central Bank of Nigeria, held at Hamdala Hotel, Kaduna from September 1 – 5 (2003) pp. 310 - 313

frame work. The approach of the work is slightly different from that adopted in this study.

In all, the literature considered are expository on certain aspects of the study but did not discuss the impact of globalization and its challenges on the regulatory legal frame work and its effects on foreign investment in Nigeria.

Generally, the above examination could lead to a conclusion that the regulatory legal frame work and foreign investment in Nigeria: issues and challenges have not been given due attention. Legal Practitioners, authors and academics that have written on foreign investments, regulatory legal frame work and challenges of globalization failed to completely or extensively discuss the subject.

Even if these experts highlighted on investment laws and or globalization they only discussed it peripherally. Also the books and papers failed to point out the adverse effects of globalization on regulatory legal frame work presently and in future and foreign investment in Nigeria. Furthermore, the work of Odife was written in 1989 i.e. 23years ago hence it is devoid of discussing many contemporary issues related to regulatory legal frame work in relation to globalization and foreign investment. Consequently, there is a serious need to make a research specifically on this subject area particularly when developed nations are influencing globalization mechanisms with some hidden negative agenda on the regulatory legal frame work for foreign investment in developing countries like Nigeria.

1.7 METHODOLOGY OF RESEARCH

The research method used is doctrinal research. Primary and Secondary materials sourced and analyzed in this work are classified thus :

1. The Primary Sources of material used include; Statues/Legislations and Case laws.
2. Secondary Sources of materials used consist of the following: Books, Journals, Internet articles, Articles, Seminars and Workshop papers, News

papers, International materials (treaties and protocols).

1.8 ORGANIZATIONAL LAYOUT

This work is made up of five chapters which are written in the following order: Chapter one focuses on the general introduction and preliminary issues such as the concept / definition, statement of the problem, objectives of the study, Limitations/ Scope of the study, Literature review, Justification / Significance of the research, Research Methodology and Organizational Layout.

Chapter two discusses the historical perspective of regulatory environment for foreign investment in Nigeria, from Colonial period to the present day.

Chapter three analyses the contemporary laws on foreign participation in Business in Nigeria and protectionism in regulatory policies. Chapter four examines whether or not Nigerian Foreign Investment Regulations have been negatively influenced by globalization of national policies and policy making mechanism. Chapter five concludes the research by summarizing the work, highlighting the conclusion, (observations/ finding) and recommendations.

CHAPTER TWO

HISTORICAL PERSPECTIVE OF REGULATORY LEGAL FRAME WORK FOR FOREIGN INVESTMENT IN NIGERIA

2.1 INTRODUCTION

The basic concept of regulatory Legal Frame Work and foreign investment have been defined in chapter one of this research work. In order to facilitate a better understanding of the work, it is imperative to re – capitulate briefly the concepts earlier defined in the previous chapter thus: regulatory Legal Frame Work can be defined as the power of the country through its regulatory bodies, authorities and agencies to control investment activities by providing conditions that affect the behaviour of investors and development of investment to ensure fair and beneficial operations.

In the same vein foreign investment can be generally divided into foreign direct investment [FDI] and portfolio investment [PI] [1].

Foreign direct investment [FDI] and foreign private investment [FPI] are used interchangeably; FDI is the sum of the following components:

a. New equity from the foreign Company in the home country to the Company in the host country;

b. Reinvested profits earned from the Company; and

c. Long – and short – term net loan from the foreign to the host Company.[2]

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1. Guabadia, D.A. Issues In Facilitating Foreign Investment For National Development in Nigeria. In Jimoh AA. (e.d) Modern Practice Journal of Finance and Investment Law MPJFIL Lagos, October (1998) Vol. 2 p. 39
2. Oyeranti, OA. In Foreign Private Investment: Conceptual and Theretical Issues. A Paper Presented at the Conference of the Central Bank of Nigeria, held at Hamdala Hotel Kaduna from September 1 – 5 (2003) p. 12

The history of Nigerian regulatory legal frame work for foreign investment can be discussed under four main headings;

a. The Colonial Period

b. The Post Colonial Period

c. The Indigenization Period

d. The SAP Period to date

2.2. THE COLONIAL PERIOD

Towards the end of 19th century the Nigerian economy was integrated into the world capitalist system through the colonial masters, the British government which established the necessary environment conducive for capital accumulation that made it simple to consolidate the economic interest of merchants of British extraction. [3]

Initially the large internal Nigerian economic market attracted these British Merchants towards extracting mineral and agricultural produce and exporting them to the United Kingdom.

During this period the Nigerian economy became a safe haven for British merchants.

To ward off competition from merchants from other European countries, the colonial government granted generous incentive packages to infant firms of British origin. At the same time it imposed stringent marketing regulations as well as highly discouraging trading and agent licensing measures on Nigerian merchants.[3a]

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3. Aremu, J.A. Attracting and Negotiating FDI with TNC[S] in Nigeria, Market Links Communication, Lagos [2005] p. 112 – 114, Also Aremu JA. An Overview of Foreign Private Investment in Nigeria. A Paper Presented at the Conference of the Central Bank of Nigeria, held at Hamdala Hotel, Kaduna from September 1 – 5 [2003] at pp. 11 – 12

3a Ibid at P.113

Independence, towards the last years of British colonial administration several regulations for foreign investment were introduced, such as:

The Aid to Pioneer Industries Ordinance and the Income Tax [Amendment] Ordinance of 1952, the Industrial Development [Import Duties Relief] Acts of 1957; Industrial Development [Income Tax Relief] Act of 1958; the Custom Duties [Dumping and Subsidized Goods] Act 1958; the Custom Drawback Regulations Act of 1959; and the Income Tax [Amendment] Act of 1959.

These legislations, which offered British Companies generous fiscal and financial concessions, were meant to strengthen the imperial economic power in Nigeria even after political independence.

During this period the regulatory environment for foreign investment introduced by the colonial masters, though expected, expatriate dominance of the Nigerian economy became so widely manifest that the nationalist leaders at that time were convinced of alien collusion and exploitation of the economy.

This made some of the nationalist leaders to demand for a reversal of these policies after independence.

However, recognizing the importance of FDI to complement the domestic savings for investment, and knowing fully well that application of restrictive measures against alien entrepreneurs could be catastrophic than beneficial, Nigeria on the eve of independence opted for more liberal economic policies towards external capital injection. There were also assurances that the Nigerian government would not engage in nationalization unless it became inevitable and that such a development will never fall short of the minimum standard as spelt out by international law.

Consequently, the incentives toward FDI in the immediate post colonial period were not only carbon copies inherited from the colonial administration which were equally further strengthened.

2.3 THE POST COLONIAL PERIOD

This was first decade of Nigeria's political independence when there was a complete absence of a well structured and thought out industrial and economic policy for the nation, especially with regard to foreign participation and investment in the economy.[4]

The precarious position in which the country stood reached its peak during the Nigerian civil war years 1967 – 1970, when foreigners totally controlled the nation's economy.

The concern of the emerging political class after independence was to open Nigerian economy up for external capital and modern technological inflow.

Such desire (of the political class) coincided with the ambition of the TNCs that

wanted to enter and buy into the Nigerian market. As the desire to industrialize became mutually beneficial to both the TNCs and the economy, high degrees of protection were accorded foreign investors in the nation's *lassez fair economic policy.* The Industrial Development (Income Tax Relief) Act, 1958 became very effective as it provided relieves for foreign companies operating in Nigeria by granting them pioneer status. The status qualified these companies for tax holidays of a maximum of five years from the commencement date of their operation. It is

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4. Shyllon, Y. *The Matrix of Nigeria's Indigenization Polities and the Inflow of Foreign Investments. In Iyama .O (e.d) Modus International Law and Business Quarterly, Ikeja, Lagos December (1998) Vol. 3 No. 4 p. 97*

allowed *accelerated depreciation rate* on capital assets so that these companies can amortize such resources within a short time.

When the rest of the world were still assessing the policy direction of the relatively new independent Nigerian economy, the political class turned around and argued that the high degree of protection accorded foreign investors was leading them to enjoying excessive monopoly profit as well as capital repatriation to the detriment of the country. As the voice of dissent grew louder and louder, *schizophrenic attitudes* towards foreign investment continued to mount on daily basis. Whether by design or otherwise, foreign investors themselves aggravated the opposition by their insisting on complete control of their Nigerian affiliates, ignoring some government

regulation, unwilling to train Nigerians in their top management cadre, and in some instances disallowing Nigerian manufactured goods from being exported to neighbouring countries within West African Sub-region even after the Economic Community of West African States (ECOWAS) was established in 1975. Consequent upon this undesirable state of affairs, the government then had to move towards an economy, controlled for the most part by Nigerians. Indeed, the need to effect a change moved the government to put in place a mechanism of control and regulation of the Nigerian economy by a process known as the *Indigenization Policy* as symbolized by the promulgation of the Nigerian Enterprises Promotion Acts of

1972 and 1977 respectively.[5] *In 1962*, the Exchange Control Act was put in place by Sir Abubakar Tafawa Belewa's government to alter its liberal principles[6]. In Section 7 of the Act, *"nobody within Nigeria could make any payment to anybody outside Nigeria or make such payment on behalf of anybody outside Nigeria or make such payment on behalf of anybody resident outside Nigeria without the permission of the Minister of Finance[7]".* In addition, there were fears in the mind of the new ruling class that FDI possessed some degree of neo-colonialist connotations as foreign investors continued to wield power which was assumed withdrawn at independence. Consequently, there were national campaigns that Nigerians must occupy prominent positions in the ownership, control and management of factors of production within its territory before our independence can be meaningful. In spite of Nigeria's earlier declaration in the Constitutional Conference of 1957 (and endorsed by the regional governments), concerning foreign investors and the 1963 Republican Constitution that promised generous treatment to foreign investors in line with International Law, the Immigration Act of 1963 was put in place and it imposed some restrictions in the

employment of foreigners in Nigeria's work force. This perhaps followed various debate since November 29th 1961 which centred on the fact that while encouraging foreign investment, foreign monopoly must be prevented in line with what other developing countries such as India, Burma, Ceylon and Indonesia were doing at that time. The 1963 Act provides *Status*' and permit to a specified number of expatriate staff that upon entry into Nigeria an alien for business purposes must receive permission from the Minister of Internal Affairs a '*Business Permit*' in addition to '*Approved status' and permit to a specified number of expatriate staff.*

2.4

5. Ibid at p. 97
6. Aremu J.A. Loc Cit at pp.114 – 115 7. Section
7 Exchange Control Act, 1962

made a representation to the World Bank Mission that came to Nigeria in 1953 [IBRD, 1955]. In their presentation they submitted that "*Nigerians must be protected against exploitation from abroad by making strategic industries not to fall into the hands of foreigners - - - and that in no industrial enterprise should more than 49%* of *capital be controlled by foreigners*[8]*".* The World Bank in its report directed the British government to put in place a national policy on foreign investment to be endorsed by the Federal and regional governments. The constitutional conference of 1957 addressed this issue to some extent as both the regional and federal governments made declarations to support FDI in Nigeria's future economic policies[9].

However, the 1970 to 1974 Second National Development Plan (FGN, 1970) spelt out that[10]

> Economic nationalism --- is directed at the progressive elimination of foreign dominance in the national economy, not merely in terms of managerial and technological control --- the validity of this statement derives from the fact that the interest of foreign private investors in the Nigerian economy cannot be expected to coincide at all times and in every respect with national aspirations --- a truly independent nation cannot allow its objectives and priorities to be distorted or frustrated by the manipulations of powerful foreign investors.

From these statements as well as other developments within Nigerian economy at that time, it was felt that Nigerian involvement in the decision making of the productive sectors (particularly industrial sector) is crucial for the survival of the country's political and economic independence. It was assumed that if the senior management cadre as well as the ownership structure of the existing investment enterprises in Nigeria at that time

8. Aremu J.A. Loc Cit at p. 115
9. Ibid at p. 116
10. Ibid at p. 116

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to a logical conclusion. This is why Achebe stressed that, Nigeria's indigenization comprises: (a) ownership or capital, (b) board of directors or control, (c) manpower or personnel, and (d) technology in terms of selection and absorption. Against this background, functional and sectoral needs were seen to be the guiding principles in the selection of areas that would be opened to foreign participation; while certain economic activities should be exclusively reserved for Nigerians. The demarcation of such areas where foreign investment and technology would be required became a question of statutory regulation that will (a) allow the prospective foreign investors to know in advance the level of opportunities and limitations awaiting them in Nigerian economy and thus save them time from unnecessary search, (b) provide a working tool for the Nigerian government to negotiate, monitor and supervise the foreign investment activities; (c) and allow the government to draw up an acceptable incentive package for foreign investors.

Before the commencement of indigenization policy, the Companies Act of 1968; Banking Act of 1969; the Petroleum Act of 1969; the Patents and Design Act of 1970; and the Copy Right Act of 1970 were put in place as a prelude to the Nigerian Enterprises Promotion (NEP) Act of 1972 [11]

The indigenization era actually came with three statutes namely: The Nigerian Enterprises Promotion Act 1972, The Nigerian Enterprises Promotion Act 1977; and The Nigerian Enterprises Promotion (Issues of Non-Voting Equity Shares) Act 1987[12].

11. Ibid at p. 11
12. Ibid.

The statutes classified all enterprises into three schedules. Enterprises in schedule 1 are exclusively reserved for Nigerians while foreigners could invest as much as 40% in the equities of enterprises in schedule 11 but up to 60% in schedule 111 particularly those enterprises with high level of technological sophistication.

For effective implementation of the indigenization, the Act 1972 NEP put in place Nigerian Enterprise Promotion Board (NEPB) at the national level and committees (NEPC) at state level so that they can: advise the minister on policy guidelines for the promotion of Nigerian enterprises; advise the minister on measures that will allow Nigerians to control the economy via these enterprises; and determine appropriate policy towards commerce and industry for the entire economy. Foreign investors were not very comfortable about the Nigerian indigenization implementation as it ran counter to the Governor General's March 1961 policy statement that the country had '*no plan for nationalization of industry'* and upon which they were encouraged to have committed sizable resources. While many of

them complied, many others wasted substantial amount of time searching for legal loopholes or re-arranging their activities to qualify being re-classified to either schedule 11 or better still schedule 111 and in other instances Nigerian names were used for compliance sake. The law makers thought it fit and proper to direct foreign investments in Nigeria into areas of Nigeria's competitive economic advantage, while giving Nigerians the opportunity to develop their own investments in areas of little technological demands and trade.

The case of Kehinde V[13] *Registrar of Companies* underscores the difference

13. Kehinde V Registrar of Companies [1979] 3 L.R.N. 213, 220 – 221 Paras. 7 - 1

between government policy formulation and implementation when not backed by the force of law and vice versa. In the above case, Anyaegbunam, President of the Federal Revenue Court, [as he then was] observed:

> It is not for the Court to interpret or question policy statements and it follows that the policy outlined in a budget speech to the effect that representation on the Board of Directors of joint venture Companies should adequately reflect in number and voting rights, the majority of Nigerians on such boards does not have the force of law.

In this case some Nigerians tried to enforce their perceived rights based on Government pronouncements on indigenization as contained in the Budget Speech of the Head of State which was not backed by the force of the Law.

The Plaintiffs did not succeed in the case because the policy on indigenization was not backed by law as at the time the suit was filed and determined.

The decision points out the need for every government policy to be backed by the force of law without which such policies no matter how well articulated can not be legally enforced. It is pertinent to observe that the greatest lesson to be learnt about Nigerian FDI policies and strategies uptill indigenization period is that the terms and conditions under which foreign investors operated in Nigeria were never negotiated. In the immediate post independence period, the political class opened the nation's economic doors to foreign investors with little or no regulatory control.

If there were adequate negotiation of the entry conditions, and re-negotiation of the existing agreements between Nigerians and foreign investors, issues such as: the choice of products to be processed; the granting of the use of property rights, the transfer of technology and payment for it; the ownership structure in different sectors; the supply of machinery components and materials; post expiry restraint use of technology, access to improvement issues; termination of

agreement clause; transfer of license in use; applicable jurisdiction to use; among others would have been settled and the question of nationalization in the cloak of indigenization would not have arisen. Remarkably, the second half of this phase of Nigeria's economic development marked the beginning of the country's economic challenges which brought the economy into ruins and introduced the process of debilitation and spasmodic economic planning and restructing, leading to the repeal of the Nigerian Enterprises Promotion Act1977 in 1989 and the promulgation of a new Act.

2.5 THE STRUCTURAL ADJUSTMENT PROGRAMME [SAP] PERIOD TILL DATE

The year 1986 marked the beginning of the period of Structural Adjustments of the Nigerian economy in the face of harsh economic recession and over – burdened debt payment and rescheduling programmes.

Shyllon in his article, "The Matrix of Nigeria's Indigenization Policies and the Inflow of Foreign Investments" in Iyama O. (e.d) Modus International Law and Business Quarterly notes that the position was further aggravated by demanding policies of the global financial institutions like the World Bank, the IMF [International Monetary Fund], the Paris club, among others, requiring an overhauling of the Nigerian economic policy which included economic divestment by Government in various economic sectors, a relaxation of all forms of Governmental controls and liberalization of the economy.

At that time the government felt it necessary to relax the investment policies in Nigeria, to encourage foreign investments by introducing a Structural Adjustment Programme [SAP]. This was done by opening up the economy in the spirit of an economy which promotes efficiency and development by way of unfettered market activities and fair competition among industries and Companies, operating in the economy and with little interference from Government.

It was in the context of the above social – economic atmosphere that the Nigerian Enterprises Promotion Act 1989 was promulgated with the objective of encouraging foreign capital inflow. [14]

In this Act, there was a list of scheduled enterprises exclusively reserved for Nigerians for 100% equity ownership. All other businesses not contained in the list of scheduled businesses were open for 100% Nigerian or foreign participation except in the area of banking, insurance, petroleum prospecting and mining, where the 1977

existing arrangements still subsisted. For this reason, both Nigerians and foreigners could freely negotiate levels of equity participation in the unscheduled enterprises.

Aliens were also free to participate in the scheduled businesses as provided in section

1 [2] of the Act:

(a) Such participation involved equity capital of not below ₦20,000,000.00 and that a

(b) Prior approval must have been obtained from the Nigerian Investment Promotion Commission [NIPC]. [15]

Along this trend of investment legal regimes, the work examines contemporary laws on foreign participation in business in Nigeria in the next chapter. This brings to the fore the regulatory legal frame work for foreign investment to date.

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14. *Shyllon, Y. The Matrix of Nigeria's Indigenization Policies And the Inflow of Foreign Investments. In Iyama O. (e.d) Modus International Law and Business Quarterly. Ikeja, Lagos December (1998) Vol. 3 No. 4 p. 101*

15. Section 1 [2] Nigerian Enterprises Promotion Act, 1989

CHAPTER THREE

CONTEMPORARY LAWS ON FOREIGN PARTICIPATION IN BUSINESS IN NIGERIA

3.1 INTRODUCTION

All over the world, governments particularly in developing countries try to attract foreign investment into their countries. This is due to the fact that such investments amongst others bring in capital and create employment opportunities. Therefore attention is devoted to political, social and legal incentives that will attract foreign investors. Nigeria as a developing country is no exception. It is common knowledge that Nigeria's economy is dependent on external aid, trade and foreign direct investment. It is also obvious that no multinational corporation, country or foreign national will invest in a country where it is not sure of the protection of the investment. Consequently, to ensure that the investment climate is conducive and friendly, countries enact relevant investment legislation aimed at attracting foreign investment and assuring the investors of the security of their investments. Nigeria has joined other countries in this respect and has put in place new investment legislation with the primary aim of providing a conducive and encouraging legal environment for foreign investors and investment.

An alien whether individual or corporate may invest and participate in the operation of any enterprise in Nigeria except those in the negative list.[1]

Subject to the provisions of any enactment regulating the right and capacity of aliens to undertake or participate in the trade or business, aliens or foreign companies may join in forming companies in Nigeria.[2]

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1. Section 17 Nigerian Investment Promotion Commission Act Cap. NI. 17 LFN. 2004
2. Section 20 (4) Companies and Allied Matters Act Cap. C. 20 LFN. 2004

in Nigeria.

These laws include:

a. The Companies and Allied Matters Act Cap. C. 20 LFN. 2004
b. Nigerian Investment Promotion Commission Act Cap. NI. 17 LFN. 2004;
c. Immigration Act Cap. I. 1 LFN. 2004;
d. Investments and Securities Act 2007 No. 29

e. Foreign Exchange [Monitoring and [Miscellaneous Provisions] Act Cap. F 34 LFN. 2004;

f. Industrial Inspectorate Act Cap. I.8 LFN. 2004

g. National Office for Technology Acquisition and Promotion Act Cap. N. 62 LFN. 2004

.Incentives and reliefs available to investors in Nigerian economy:

i. Incentives under Nigerian Investment Promotion Act [3]

ii. Incentives under Foreign Exchange [Monitoring and Miscellaneous Provisions] Act [4]

iii. Import and Export Incentives under Customs and Excise Management Act [5]

iv. Incentives under Export [Incentives and Miscellaneous Provisions] Act [6]

v. Incentives under Petroleum Profits Tax Act [7]

vi. Fiscal Reliefs:

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3. *Cap. NI. 17 LFN. 2004*
4. *Cap. F. 34 LFN. 2004*
5. *Cap. C. 45 LFN. 2004*
6. *Cap. E. 19 LFN. 2004*
7. *Cap. P. 13 LFN. 2004*

- These are reliefs provided under the Industrial Development (Income Tax Relief) Act, [8] Companies Income Tax Act [9] and Minerals Act [10] to encourage investors to invest in Nigeria.

3.2 COMPANIES AND ALLIED MATTERS ACT, 2004

Shortly after independence in 1960, it became very apparent that Companies Ordinance 1922 which became cap. 37 of the laws of Nigeria 1958 edition was inadequate and could no longer cope with the growth of the country's economic activities.

It was observed that a developing country like Nigeria needed modern Companies legislation to facilitate business and also give more protection to investors and creditors. Many years efforts in this direction gave birth to the Companies Act 1968.

Furthermore, the astronomical growth witnessed by the Nigerian economy accentuated

the need for a more vibrant and comprehensive Companies laws not rooted on the outdated United Kingdom Companies Act 1948.

In 1987 the Nigerian Law Reform Commission was directed by the Attorney General and Minister of Justice to undertake a review and reform of Nigerian Company law. The Consultative Assembly after exhaustive deliberations submitted its Report to the Attorney General.

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8. *Cap. I. 7 LFN. 2004*
9. *Cap. C. 21 LFN. 2004*
10. *Cap. M. 12 LFN. 2004*

The Report was considered by the Ministry of Justice and the Draft Decree was promulgated into law as the Companies and Allied Matters Decree 1990 [No. 1 of 1990] with effect from January 1, 1990; under the Laws of the Federation 2004, it can now be found in chapter C.20. This chapter, examines the provisions of the Companies and Allied Matters Act [CAMA] on foreign participation in business in Nigeria.

3.2.1 ALIENS TO FORM COMPANIES IN NIGERIA

Foreigners are free to participate in business in Nigeria but subject to the provisions. Subject to the provisions of any enactment regulating the rights and capacity of aliens to undertake or participate in trade or business.[11] All foreign companies or aliens wishing to carry on business in Nigeria are to take steps to incorporate themselves as a Nigerian Company and until this

is done, the foreign Company or alien must not have a place of business in Nigeria for any purpose other than receipts of notices and other documents, as matters preliminary to incorporation. [12] 3.2.2

CONSEQUENCES OF CARRYING ON BUSINESS WITHOUT REGISTRATION

Where any foreign Company fails to comply with the requirements of section 54 of CAMA as applicable to the Company, it shall be guilty of an offence and liable on conviction to a fine of not less than ₦2500.00 (Two thousand five hundred naira) and every officer or agent of the Company who knowingly and willfully authorizes or permits the default or failure to comply shall, whether or not

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11. Section 20 (4) Companies and Allied Matters Act Cap. C. 20 LFN. 2004; Bhadmus Y.H on Corporate Law Practice 2009 p 84.

12. *Section 54 (1) CAMA Cap. C. 20 LFN 2004; Unipetrol Nigeria PLC V Agip (Nig) PLC (2002) 14 NWLR 312 at 330 -*

₦250.00 (Two hundred and fifty naira) and where the offence is a continuing one, to a further fine of ₦25 (Twenty five naira) for every day during which the default continues. [13]

The significance of this provision was confirmed in *Unipetrol Nigeria PLC V Agip [Nigeria] PLC*[14] where it was observed that by virtue of S.54 (1) of the Companies and Allied Matters Act, subject to section 56 and 59 of the Act, every foreign Company incorporated outside Nigeria must take all necessary steps to obtain incorporation as a separate entity in Nigeria for that purpose, but until so incorporated, the foreign Company shall not carry on business in Nigeria or exercise any powers of a registered Company and shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other than the receipt of notices and other documents, as matters preliminary to incorporation under the Companies and Allied Matters Act.

3.2.3 INCORPORATION OF A FOREIGN COMPANY IN NIGERIA

To incorporate a Company in Nigeria the intending foreign investor, Company or individual shall locate a corporate Lawyer and give him or her all necessary instructions required for the incorporation such as particulars of the foreign investor; name of the Company, objects of the proposed Company, share capital; first directors, proposed registered office in Nigeria, subscribers to the Memorandum and Articles of Association, address of the directors and subscribers.

The Lawyer upon being briefed as above will take the following steps:

13. *Sections 54, 55 CAMA Cap. C. 20 LFN 2004, E. I. I. A V C. I.E Ltd (2006) 4 NWLR 114 at 127*.
14. *Supra p. 43; Bhadmus on Corporate Law Practice p. 85.*

1. Obtain a set of incorporation forms from the Corporate Affairs Commission (CAC).

2. Apply for the proposed Company name to the CAC. This is done by filing an availability form. If the CAC confirms that the name is available for use, it shall reserve it for 60 days within which the incorporation documents must be filed.[14b]

3. Incorporation documents will be prepared after the proposed Company name is confirmed and reserved.

4. Two copies each of the Memorandum and Articles of Association with two copies of statement of share capital must be filed for stamp duty at the Federal Board of Inland Revenue Office.

5. Incorporation documents prepared and stamped must be filed with the Corporate Affairs Commission.

6. The Certificate of incorporation must be obtained from CAC as a prima facie evidence of incorporation, including certified true copies of Form CAC 7

[particulars of directors], Form CAC 2 [statement of share capital and Return of Allotment], Form CAC 2.1 [particulars of a person who is the Company secretary] and Memorandum and Articles of Association.

14.b Section 35 CAMA Cap. C 20 LFN 2004

3.2.4 FOREIGN COMPANIES EXEMPTED FROM REGISTRATION IN NIGERIA

A foreign Company upon application to the National Council of Ministers may be exempted from registration, if it belongs to one of the following categories under section 56 (1) CAMA: [15]

(a) Foreign Companies invited into Nigeria by or with the approval of the Federal Government to execute any special individual project;

(b) Foreign Companies which are in Nigeria for the execution of specific individual project on behalf of a donor country or international organization;

(c) Foreign government owned Companies engaged solely in export promotion activities; and

(d) Engineering consultants and technical experts engaged on any individual specialist project under contract with any of the governments in the Federal or any of their agencies or with any other body or person, where such contract has been approved by the Federal Government.

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15. Section 56 CAMA Cap. C20 LFN 2004; Bhadmus on Corporate Law and Practice (2009) p. 87.

3.2.5 PROCEDURE FOR COMPANY EXEMPTION FROM REGISTRATION

A Company seeking for exemption from registration must forward an application in writing addressed to the Secretary to Government of the Federation setting out:-

(a) The name and place of business of the foreign company outside Nigeria;

(b) The name and place of business or the proposed name and place of business of the foreign company in Nigeria;

(c) The name and address of each director, partner or principal officer of the foreign company;

(d) A certified copy of the charter, statutes or Memorandum and Articles of association of the company, or other instrument constituting or defining the constitution of the company and if the instrument is not written in English Language, a certified translation;

(e) The name and addresses of some one or more persons resident in Nigeria authorized to accept on behalf of the foreign company service of process and any notices required to be served on the company;

(f) The business or proposed business in Nigeria of the foreign Company and the duration of such business;

(g) Particulars of any project previously carried out by the Company as an exempted foreign company; and

(h) Such other particulars as may be required by the Secretary to the Federal Government. [16]

If the National Council of Ministers when it receives an application for exemption is of the opinion, that the circumstances are expedient that such an application should be granted, the National Council of Ministers, may subject to such conditions as it may prescribe exempt the foreign Company from the obligations imposed by or under the CAMA. [17]

3.2.6 STATUS OF EXEMPTED COMPANIES

An exemption is not a license to disregard any enactment or rule of law except as provided in sections 55, 56, 57 and 58. [18]

Every exempted Company must deliver its annual report to the Corporate Affairs Commission every calendar year, in the form prescribed by the Commission. [19]

3.2.7 The Regulation of Foreign Companies

Under the Companies and Allied Matters Act (CAMA) foreign companies intending to carry on business in Nigeria subject to sections 56 and 59 shall take steps to obtain incorporation as a separate entity in Nigeria for that purpose Section

> Subject to this Act and save as may be stated in the instrument of exemption, a foreign Company exempted pursuant to this Act shall have the status of an unregistered Company and accordingly, the provisions of this Act applicable to an unregistered Company shall apply in relation to such an exempted Company as they apply in relation to an unregistered Company under the Act.

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16. *Section 56 (2) CAMA. Cap C.20 LFN. 2004; Bhadmus on Corporate Law Practice (2009) p. 88*
17. *Section 56 (3) CAMA. Cap C.20 LFN. 2004; Bhadmus on Corporate Law Practice (2009) p. 88*
18. *Section 60 (a) CAMA Cap. C.20 LFN 2004; Bhadmus on Corporate Law Practice (2009) page 89*
19. *Section 57 (a) CAMA Cap. C.20 LFN 2004; Bhadmus on Corporate Law Practice (2009) page 89*

55 CAMA prescribes penalties against foreign companies for non compliance with section 54. However it is observed that the penalties are inadequate.

It is observed that the penalty imposed against such defaulting foreign companies which in most cases are Transnational Corporations (TNCS) falls short of expected force of deterrence and

would rather encourage such breaches and preference for painlessly paying the penalty provided as fine. The penalties should be reviewed upwards to carry the force of deterrence.

On the other hand unless the foreign company falls within the limited exceptions provided under section 56 of the CAMA, if deeply considered, it would be observed that the provision under the Nigerian Investment Promotion Commission (NIPC) Act, giving a foreigner the liberty to freely invest in Nigeria, such could be said to be applicable to a foreign Company as a legal entity. That would ignore the complex rules governing directorship, meetings, capital and accounting, among others which are applicable to companies globally; and a desire to attract foreign investments would not justify a change in the demand by section 54 of CAMA on foreign companies having intention of carrying on business in Nigeria to be incorporated in Nigeria.

It is however observed that the validity of the demand may not substantiate the procedure for obtaining exemption which involves applying through the Secretary to the Government of the Federation after which the issue is then considered by the National Council of Ministers. There is no cogent reason for bringing the issue of the exemption to such high authorities which are not only politically busy but not particularly experienced in company matters. The importance of exemption having been identified in section 56 of CAMA the matter can be handled by the Minister of Trade and investments in the same way that the Minister of Interior through the Immigration Services handles issues of expatriate quota and business permits or in which appropriate organs handle incentive regimes. This would expedite action in the respective matters, and encourage foreign companies intending to carry on business in Nigeria over a given period or for specific objects or projects and allow a political body such as the National Council of Ministers to concentrate on other issues. It is suggested that section 56 of the CAMA should be amended in this respect.

3.3 THE NIGERIA INVESTMENT PROMOTION COMMISSION ACT.

The Nigerian Investment Promotion Commission [NIPC] was established by the NIPC Act No. 16 of 1995. This legislation replaced the Industrial Development Coordination Committee [IDCC] Act No. 36 of 1988 and now listed under the Laws of the Federation 2004.[19a] The IDCC itself was established as part of the institutional reforms necessary for the implementation of the Structural Adjustment Programme [SAP]. However, the IDCC was inhibited by daunting challenges including; lack of quorums at meetings, inadequate funding and intrusion into its statutory functions by some federal ministries.[2o]

Consequent upon this development, the Government, in 1995 came up with the NIPC Act No. 16 of 1995, and inaugurated its first Governing Council on the 30 September, 1997. The Commission commenced operation in 1999; [20 a]

A non – Nigerian may invest and participate in the operation of any enterprise in Nigeria except those in the negative list. [21]

The sectors of investment prohibited in the negative list are: [22]

19a. Cap. NI. 17 LFN. 2004

19b. Bello M. The Role and Achievements of Nigerian Investment Promotion Commission. A Paper presented at the Nigerian Institute of Industrial Management held at the Lagos Sheraton Hotel from April 6 – 7 2005 at p. 5.

20a. Ibid.

20 Sections 17 – 18 NIPC Act Cap. NI.17 LFN 2004, Bhadmus Y.H. on Corporate Law Practice (2009) p. 89.

21. Section 31 NIPC Act Cap. NI.17 LFN 2004.

22. Bhadmus Y.H. on Corporate Law Practice (2009) p. 90

(a) Production of arms, ammunition;

(b) Production of and dealing in narcotic drugs and psychotropic substances;

(c) Production of military and Para – military wears and accoutrement, including those of the police and the customs, immigration and prison services; and

(d) Such other items as the Federal Executive Council may, from time to time determine.

3.3.1 REGISTRATION AND OBTAINING OF LICENSE

An enterprise in which foreign participation is permitted must not start business in Nigeria unless it is incorporated or registered under the Companies and Allied Matters Act and such enterprise must in addition obtain any license, lease, permit or any other approval as may be required for establishment or operation of the enterprise.

The enterprise must in addition apply for registration with the NIPC before commencing business. [23]

3.3.2 GUARANTEE OF INVESTMENT

Further to liberalizing the economy, the NIPC Act contains a number of guarantees and incentives. The purpose of these guarantees and incentives is to make the economy attractive to foreign investors.

A foreign investor is guaranteed unconditional transferability of funds in freely convertible currency through an authorized dealer: [24]

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23. *Section 20 NIPC Act Cap. NI.17 LFN 2004,*

24. *Section 24 [1][2][3]NIPC Act. Cap NI.17 LFN 2004;*
In: Jimoh, A.A. (ed.) Modern Practice Journal of Finance and Law July/October (2003)
Vol. 7 No. 3 – 4, p.471.

(a) Dividends or profits [net of taxes] generated by the investment;

(b) Payments in respect of loan servicing where a foreign loan has been obtained;

(c) The remittance of proceeds [net of taxes] in the event of sale or liquidation of the enterprise.

Guarantees against expropriation: the Act also guarantee that no enterprise shall be nationalized or expropriated by any Government of the Federation; and no person who own, whether wholly or in part, the capital of any enterprise shall be compelled by law to surrender his interest in the

capital to any other person unless the acquisition is in the national interest or for a public purpose under a law which makes provision for-

(a) Payment of fair and adequate compensation; and a right of access to the Courts for the determination of the investors interest or right and the amount of compensation to which he is entitled.

Any compensation payable shall be paid without undue delay and authorization for its repatriation in convertible currency shall where applicable, be issued. [25]

3.3.3 SETTLEMENT OF INVESTMENT DISPUTES

The NIPC Act contains liberal provisions for settlement of investment disputes. This is intended to make the investment environment as conducive as possible.

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25. Section 25 [1][2][3] NIPC Act NI.17 LFN 2004

Where a dispute arises between [26] an investor and any Government of the Federation in respect of an enterprise, all efforts shall be made through mutual discussion to reach amicable settlement.

If the amicable settlement through mutual discussion is not possible the dispute may

be submitted at the option of the aggrieved party to arbitration as follows:

> in the case of a foreign investor, within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of which the investor is a national are parties; or in accordance with any national or international machinery for the settlement of investment disputes agreed on by the parties. Where in respect of any dispute, there is disagreement between the investor and the Federal Government as to the method of dispute settlement to be adopted, the International Centre for Settlement of Investment Disputes Rules shall apply.

3.4 IMMIGRATION ACT

No person other than a citizen of Nigeria shall –

(a) Accept employment [not being employment with the Federal or State Government] without the consent in writing of the Director of Immigration; or

(b) On his own account or in partnership with any other person, practice a profession or establish or take over any trade/business whatsoever or register or take over any Company with limited liability for any purpose, without the consent in writing of the Minister given on such conditions as to the locality of operations and persons to be employed by or on behalf of such person, as the Minister may prescribe [27]

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26. Section 26 (1)(2)(3) NIPC Act NI. 17 LFN 2004
27. Section 8 (1) (a) (b) Immigration Act Cap. I. I LFN 2004

Any person desirous of entering Nigeria for any of the purposes subsections (a) and (b) above shall produce the consent to immigration, and failure to do so shall be an offence liable on conviction to deportation as a prohibited immigrant. [28]

(c) Any person not a citizen of Nigeria, desirous of entering Nigeria for the purpose of residence shall, unless exempted, give security in such amount as the Minister may prescribe, and shall supply information, as Director of Immigration may reasonably require, and if the Director of Immigration is satisfied, he may issue residence permit accordingly. [29]

In the light of these provisions there are four [4] basic permits an alien may be required to obtain.

3.4.1 BASIC PERMITS REQUIRED BY AN ALIEN TO ENTER NIGERIA (OR ENTER) AND WORK IN NIGERIA

One of the important information a foreign investor requires or should have handy is the immigration requirements and formalities of the country in which he wishes to invest. The

knowledge of the various types of visa/entry requirement is of paramount importance both to the applicant and to the Company or organization sponsoring the applicant. This is owing to the fact that in the Nigerian visa system, the type that is given is tied to the purpose for which the journey is intended and any variation of the visa with the purpose of the journey will render such a visa inappropriate for entry, leading to either refusal of landing or deportation, in the case of a foreigner already in the country.

In an effort to encourage investors and investment, the Nigerian Immigration Act has become handy for necessary information to prospective investors and visitors to Nigeria.

3.4.2 ENTRY PERMIT/VISA

Broadly speaking, there are three main types of entry permit or visa viz:

1. Ordinary Visa
2. Diplomatic Visa
3. Gratis Courtesy Visa

The ordinary visa may be further sub – divided as follows:

(i) Transit

(ii) Single journey

(iii) Multiple journeys

Within the single journey category are also the following:

(a) Short Visit Visa

(b) STR Visa [Subject To Regularization – for Residence Work Permit];

(c) Temporary Work Permit [TWP].

In this work and for purposes of clarity, each of these types of visa will be briefly discussed.

3.4.2.1 ORDINARY VISA - TRANSIT

This type of visa is issued to applicants who are passing through Nigeria to a further destination. It can be obtained at a Nigerian Mission abroad and is given for a period not exceeding seven [7] days without reference to the Controller – General of Immigration.

An applicant who wants to obtain this type of visa must be in possession of an express approval [visa or any form of permission] to enter a specified third country, including a confirmed ticket or sufficient funds to pay for any means of transportation appropriate to reach that country. Where there is a specific approval given by the Controller – General of Immigration, this type of visa could also be issued at the port of arrival. [30]

3.4. 2.2 ORDINARY VISA – SINGLE JOURNEY VISIT

The single journey visit is valid for a single entry into Nigeria and as earlier stated could be categorized into short visit visa; STR Visa [Subject To Regularization – for Residence Work Permit, and T.W.P [Temporary Work Permit].

3.4.2.3 THE SHORT VISIT VISA

The short visit visa is a type of visa under the single journey category which is issued to applicants requiring a single entry into Nigeria for the purpose of tourism or visit friends and relations resident in Nigeria for business meetings with Companies and government organizations, or generally for the purpose of exploring business/investment opportunities in Nigeria. [31]

3.4.2.4 STR VISA [SUBJECT TO REGULARISATION]

This type of visa is required by foreigners seeking to take up employment in Nigeria. The Immigration Act provides that "No person, not being a citizen of Nigeria may take up employment in Nigeria other than employment with the Federal or State Government without the consent of the Controller – General of Immigration". [32]

30. *Abdulai Taiwo . Solicitors. Regulation of Foreign investments and Enterrises in Nigeria, Lagos (1999)p.64*
31. *Ibid. p. 65.*
32 *Section 8 [1] Immigration Act Cap. I.I LFN 2004;*

An [33] application must be made to the Controller – General of Immigration by the prospective employer, in writing, confirming that he/she has a vacancy and an expatriate quota and also stating the position in which the prospective employee is to be employed and confirming acceptance of immigration responsibility.

The STR Visa is issued at the Nigeria Mission abroad without reference to the Controller – General of Immigration provided that the applicant presents the following to the Visa Office:

- National passport or any other acceptable travel document valid for at least six months on presentation;
- Personal letter of Application on [IMM 22] in triplicate;
- Original letter of employment reflecting his job title [which must correspond with the expatriate quota position as granted to the employer Company] and the conditions of such employment dully issued by the prospective employer in triplicates;
- Three copies of the letter of acceptance of offer by the prospective employee;
- Originals and three certified copies of all relevant certificates, diplomas and other credentials;
- Certified translations of the certificates and diplomas [if originals are in a foreign Language];

- Letter of application from the prospective employers confirming acceptance of immigration responsibility [I.R.]

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33. Section 33 Immigration Act; Abdulai, Taiwo & Co. Solicitors Registration and Regulation of Foreign Investments and Enterprises in Nigeria (1999) p. 66 – 67.

- Photocopy of expatriate quota approval granted to the Company with job title of the employee reflected as one of the expatriate quota positions granted.
- Certified copies of marriage relationship documents in respect of accompanying spouses/fiancées/children.
- Some other documents, which vary depending on the nationality of the employee may be requested i.e. Testimonial of good conduct from the Municipal Authority of the employee's place of residence.

STR Visa are given for 60 days during which an application must be made to the Controller – General of Immigration to regularize the stay of the prospective employee, who may assume his employment only when such application is approved and a Residence Work Permit is granted.

3.4.2.5 REGISTRATION OF ALIENS

The aliens having undergone the required legal formalities for a residency status are expected to register their presence at the immigration offices closest to their places of residence or occupation.

In this regard, all the State Immigration Offices are representatives of the Controller – General of Immigration and applications for regularization should be made to them, which they would refer for approval to issue Residence Permit.[34]

3.4.2.6 TEMPORARY WORK PERMIT [T.W.P.]

Establishments and Companies wishing to employ the services of expatriates

for short period assignments are required to apply directly to the Controller –

34. *Ibid pp. 67*

General of Immigration at Abuja for visa/entry permits for such expatriates.

This is the Temporary Work Permit Visa.

The temporary assignments eligible for such approvals include:

1. Erection /installation work
2. Feasibility studies
3. Repairs of machinery/equipment
4. Auditing of Accounts
5. Research work and such other assignments as may fall in this category.

The Temporary Work Permit Visa is issued for a period of 3 months and may be extended for a further period, upon application to the Controller – General of Immigration. The Temporary Work Permit Visa is given outside the expatriate quota allocation of the establishment or Company. [35]

3.4.2.7 MULTIPLE JOURNEY VISA

It is a type of visa usually issued without reference to the Controller – General of Immigration by Nigerian Missions abroad for a period not exceeding 12 months, and may be for a specified number of journeys within the period granted. This is mostly given to non – resident Directors of Nigerian based Companies and other foreign business men and women for the purpose of attending meetings frequently and for other frequent visits to follow up business appointments, or consultations regarding investment projects.

It is important to note that both single and multiple journey visas are also issued in Nigeria to employees of Establishment/Companies whose stay have been duly

35. Ibid pp. 67 - 68

regularized, in order to enable them return to their employment whenever they travel out either for business or holidays.

This is called the Re – entry Visa. [36]

3.4.2.8 GRATIS COURTESY VISA

This is visa normally issued to persons who do not qualify for diplomatic visa, but who are government officials travelling on official business.

This could also be granted where it is considered undesirable to accede to an application for a diplomatic visa, but where it is desirable on grounds of international courtesy to facilitate a journey.[37]

3.4.3 **EXPATRIATE QUOTA**

It is the consent in writing granted to a Company to employ an alien to specifically designated job position. [38]

There are two types of expatriate quota viz:-

(a) "Permanent until Reviewed". [PUR] which is usually granted for the position of Chairman of a Company's Board of Directors, or the Managing Director of a Company;

(b) "Temporary" which is granted for directors and employees of a company. The maximum number of years granted in the first instance is five years renewable for a further period of two years.

It is the responsibility of the company and not that of the employee of the Company to obtain expatriate quota – *Oil Fields Supply Centre Ltd V Johnson*. [39]

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36. Ibid
37. Ibid p.69
38. Bhadmus Y.H Loc Cit; at p. 94
39. No. 2 [1987] 2 NWLR 625.

This was a case in which the company, *Oil Fields Supply Centre Limited* which employed the services of Mr. Johnson, the respondent submitted that there was no quota to accommodate the Respondent; Belgore J.C.A (as he then was) held-

> In this case there had been a firm and unambiguous application for consent to Federal Commissioner for Internal Affairs which was being querried. Mr. Asemota as a lawyer and then co-director pursued the matter on behalf of the Company. The consent was finally granted in 1975 long before compulsory acquisition. The company was still doing business of taking off rather than making money as it was still indebted to many persons. It was the duty of the company to apply for quota to cover the petitioner/respondent and if failure to obtain the consent makes the formation of the company a nullity, a fortiori the act of other directors between April 1974 and sometimes a last quarter of 1975 was a nullity. All would be in pari delicto. Certainly, a party to a bargain, who has benefited from it, cannot avoid his responsibility to the other party because he failed to apply for necessary legal consent in respect of the bargain and thus prevent the other party from enjoying the fruit of the bargain.

GRANT OF BUSINESS PERMIT AND EXPATRIATE QUOTA POSITION

All applications by Companies for Business Permit and Expatriate Quota are to be supported by the following documents:

(A) BUSINESS PERMIT

This is for Joint Ventures and wholly foreign owned Companies – [40]

i. Completed Immigration form T/ 1;

ii. Certificate of Incorporation;

iii. Memorandum and Articles of Association;

iv. Feasibility Report [certified or registered with the Corporate Affairs Commission [CAC];

v. Certified True Copies of Corporate Affairs Commission Form CAC 2.3 & 2.5 [CAC CO2 & CO7];

vi. Joint Venture Agreement for Partnership Ventures between Nigerians and foreigners [original to be presented for sighting];

40. Paragraph 3 (A) of Revised Guideline on Business Permit and Quota Administration. Federal Ministry Citizenship and Business Department, Abuja (2004) p. 2

vii. Company's Current Tax Clearance Certificate [original to be presented for sighting];

viii. Lease agreement for C of O for operating premises [original to be presented for sighting].

The authorized share capital of the Company must not be less than ₦10 Million Naira for such applicant Company.

Every enterprise, desirous of obtaining Business Permit and Expatriate Quota, is to submit to the Federal Ministry of Internal Affairs on Form T/I designed for that purpose. Companies are, however, to note that emphasis would be placed on employment of Nigerians to understudy the foreign experts for the purpose of training them, to enable the understudies acquire relevant skills for the eventual take – over of expatriate quota position. Renewal of quota granted will not be automatic but considered on merit based on submission of the required documents.

(B) GRANT OF EXPATRIATE QUOTA

All documents for grant of Business Permit are required for grant of expatriate quota detailed above, including the following:-[41]

i. Evidence of imported machinery, such as Form M, Proforma invoice, Shipping documents and clean Certificate of Inspection issued by Government appointed pre – shipping Inspection Agents;

ii. License /Permit/ Certificate from relevant Government Agencies /Department/Ministries for the operation or execution of projects if Company is engaged in oil services, health care service, fishing, mining,

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41. Ibid. p.3

constructions [Work Registration Board], [original to be presented for sighting];

iii. Evidence of work at hand, its duration and value attached to the contract [s] if the Company is engaged in building, civil engineering, construction, [original to be presented for sighting];

iv. Proposed annual salaries to be paid to the expatriate to be recruited indicating designation, names, job description and qualifications [C.V. and copies of credentials of expatriate to be attached.

Application for Business Permit and Expatriate Quota Positions can be made to the Nigerian Investment Promotion Commission through NIPC form 1. The requirements are the same as those of the Federal Ministry of Internal Affairs [now Federal Ministry of Interior. [42]

3.5 INVESTMENTS AND SECURITIES ACT [ISA]

The Act established the Securities and Exchange Commission with functions and powers to among others, keep and maintain a register of foreign portfolio investments. [43]

It is therefore mandatory for an alien wishing to invest in any sector of Nigerian economy to register with the Securities and Exchange Commission.

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42. Bhadmus YH; Loc Cit; Page 94 & 95

43. Sections 13 [L] Investments and Securities Act 2007 Act No. 29; Bhadmus YH. p. 96.

3.6 FOREIGN EXCHANGE [MONITORING AND MISCELLANEOUS PROVISIONS] ACT

In a bid to create a conducive and favourable investment climate in Nigeria sections of the Act tagged "investor friendly" sections were provided.

Any person may invest in any enterprise or security, with foreign currency or capital imported into Nigeria through an Authorized Dealer either by telegraphic transfer, cheque or other negotiable instruments and converted into Naira in the market in accordance with the provisions of the Act. [44]

The Authorized Dealer through which the capital is imported must within 24 hours of the importation, issue a certificate of capital importation to the investor and within 48 hours thereafter make returns to the Central Bank of Nigeria. [45]

One of the sections that has agitated the minds of most Nigerians is to the effect that foreign currency imported into Nigeria and invested in any enterprise shall be guaranteed unconditional transferability of funds through an Authorized Dealer in freely convertible currency, relating to –

(a) Dividends or profits [net of taxes] attributable to the investments;

(b) Payments in respect of loan servicing where a foreign loan has been obtained; and

(c) The remittance of proceeds [net of all taxes] and other obligations in the event of sale or liquidation of the enterprise or any interior attributable to the investment. [46]

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44. Section 15 [1] Foreign Exchange [Monitoring and Miscellaneous Provisions] Act Cap. F34 LFN. 2004; Bhadmus YH. P. 96 – 97

45. Section 15 [2]

46. Section 15 [4]

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a domiciliary account in foreign currency with an Authorized dealer. [47]

Also declaration of foreign currency at the port of entry is for reasons of statistics only. [48] where foreign currency is purchased from the market it may be repatriated from Nigeria without any further approval. [49]

Money imported into Nigeria for the purpose of the Act shall not be liable to seizure or forfeiture or suffer any form of expropriation by the Federal or a State Government. [50]

3.7 INDUSTRIAL INSPECTORATE ACT

This is one of the investment legislations in Nigeria that can be said to be well thought out but whether the agencies vested with the power of its implementation have the capacity to thoroughly verify the information is another question. A section of the Act provides that any person proposing to start a new undertaking involving the expenditure of not less than twenty thousand naira; or incur additional capital expenditure of not less than twenty thousand naira in respect of an existing undertaking shall give to the Director notice of his intention in the form specified in the first schedule to the Act. [51]

The Director on receipt of the notice will verify the information contained therein and if satisfied prepare and forward to the person carrying on the undertaking a certificate of acceptance. [52]

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47. Section 17 (1)
48. Section 12
49. Section 13
50. Section 17 (1)
51. Section 3 Industrial Inspectorate Act Cap. 1.8 LFN. 2004; Bhadmus YH. p. 97
52. Section 3 [3] Industrial Inspectorate Act

3.8 NATIONAL OFFICE FOR TECHNOLOGY ACQUISITION AND PROMOTION ACT.

The Act provides for registration of all documents or agreements involving the transfer of foreign technology to Nigerian parties. [53]

A contract or agreement involves transfer of technology if it includes the following:

(a) The use of trade – marks;

(b) The right to use patented inventions;

(c) The supply of technical expertise in the form of the preparation of plans, diagrams, operating manuals or any other form of technical assistance of any description whatsoever;

(d) The supply of basic or detailed engineering;

(e) The supply of machinery and plant; and

(f) The provision of operating staff or managerial assistance and the training of personnel.

3.8.1 **REGISTRATION OF CONTRACTS AND AGREEMENTS**

It is mandatory to register with National Office within six months after the commencement of the Act in case of agreement or contract before the commencement of the Act and in the case of agreement or contracts after the commencement of the Act,

registration must be done not later than 60 days from the execution or conclusion thereof such application must be supported by certified true copies of the agreement or contract and other related documents and information as may be specified in any particular case by the Director. [54]

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53. Section 4 [d] National Office for Technology Acquisition and promotion Act, Cap. N62 LFN 2004; bhadmus YH. p. 97.

54. Section 5 [1] – [3]

3.8.2 **EFFECT OF REGISTRATION OF CONTRACTS AND AGREEMENT**

Payments must not be made in Nigeria to the credit of any person outside Nigeria by or on the authority of the Federal Ministry of Finance, the Central Bank of Nigeria or any licensed bank in Nigeria in respect of any payments due under a contract or agreement involving the transfer of technology, unless a certificate of registration is presented by the party or parties concerned together with a copy of the contract or agreement certified by the National Office in that behalf. [55]

3.9 INCENTIVES AND RELIEFS AVAILABLE TO INVESTORS IN NIGERIAN ECONOMY

The wide range of incentives and reliefs introduced by the Federal Government are geared towards attracting and retaining foreign investment into Nigerian economy.

Some of the incentives had earlier been discussed under Nigerian Investment Promotion Commission Act and Foreign Exchange [Monitoring and Miscellaneous Provisions] Act.

3.9.1 IMPORT AND EXPORT INCENTIVES UNDER CUSTOMS AND EXCISE MANAGEMENT ACT

Under this Act, customs duty draw back/suspension scheme, refund on import duties are granted on the following: [56]

(a) Raw materials and packaging materials used in producing goods for export.

(b) Paper used in producing goods for educational purposes and educational establishment.

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55. Section 7.
56. Cap.C. 45 LFN 2004

(c) Goods exported in the same state as that in which they are imported.

Incentives are also available under Export [Incentives and Miscellaneous Provisions] Act. [57]

The following incentives are available under this Act:

a. A Nigerian exporter may retain all his export proceeds in foreign currency in his bank account in Nigeria under section 1 of the Act

b. All raw or unprocessed commodities, mineral or agriculture, shall be exportable on payment of a levy by order of the Nigerian Export Promotion Council – section 3 of the Act.

c. All exports from Nigeria are exportable without the production of an export licence upon compliance with existing foreign exchange regulations.

d. Provision of financial assistance to private sector exporting companies to cover part of their initial expenses in respect of export promotion activities through the Export Development Fund.

e. Provision of cash inducement for exporters-

(i) To increase their volume and value of exports;

(ii) and diversify export products and coverage.

f. Provision of supplementary export subsidy or additional fund for-

(i) high costs of production from infrastructural deficiencies,

(ii) other factors beyond the control of the exporter.

g. Grant of export draw-back for each export product.

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57. Cap.E. 19 LFN 2004

h. Reimbursement on excise duties paid in respect of all export products and components of export products.

There are also incentives under Petroleum Profit Tax for Companies engaged in the utilization of associated gas. [58]

In the same vein incentives under this Act are as follows:-

a. Investment required to separate crude oil and gas from the reservoir into usable products shall be considered as part of the oil field development;

b. Capital investment on facilities equipment to deliver associated gas in usable form at utilization or designated custody transfer points shall be treated for tax purposes, as part of the capital investment for oil development;

c. The assessable profit for any accounting period shall be the amount of the adjusted profit of that period after deduction of the amount of any loss incurred by that company during the previous accounting period.

d. All capital investments relating to the gas-to-liquid facilities shall be treated as chargeable capital allowance and recovered against the crude oil income;

e. Gas transferred from the natural gas liquid facility to the gas-to-liquid facilities shall be at zero percent tax and zero percent royalty.

3.9.2 **FISCAL RELIEFS**

These are reliefs introduced by the Federal Government under Industrial Development [Income Tax Relief] Act to Pioneer Companies, Pioneer Status is given to Companies that have invested in agro – allied products, export goods, solid minerals and so on the estimated cost of qualifying capital expenditure on or before production date is not less than ₦50, 000.00 for an indigenous controlled Company and ₦150, 000.00 in other cases.

The tax relief period of a Pioneer Company is three years but it may at the end of the three years be

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58. Cap.p. 13 LFN 2004

another period of one year commencing from the end of the first period of extension.

There are also reliefs under Companies Income Tax Act and these reliefs include:

I. First ₦6000.00 of total profit of the Companies; [60]

II. Common wealth income tax; [61]

III. From double taxation [if there is arrangement between Nigeria and another country for such]; [62]

IV. On foreign loans. [63]

V. Bank loan for agriculture. [64]

VI. Investment in export processing zone. [65]

VII. Investment in economically disadvantaged areas.

VIII. Local raw materials utilization;

IX. Locally run materials utilization;

X. Research and Development. [66]

XI. Rural investment. [67]

Under the Minerals Act, investment in solid minerals or mining is exempted from tax for the first three years of operation and may be extended for a further period of two years. [68]

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59. Section 10 Industrial Development [Income Tax Reliefs] Act Cap. 17 LFN 2004
60. Section 29 Companies Income Tax Act Cap. C. 21 LFN 2004
61. Section 33
62. Section 34 – 35
63. Section 9 [1]
64. Section 9 [7]
65 Section 28 [C] [3]
66. Section 22 [3]
67. Section 28 [b]
68. Cap.M.. 12 LFN 2004

Examples of incentives applicable to specific industries such as natural gas and solid minerals and general incentives under the Industrial Development (Income Tax Relief) Act, the Nigerian Investment Promotion Commission Act and the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act have been considered in this chapter. As enacted, these Acts seem, generally speaking, to go beyond crystallizing the emergence of investments in identified areas or generally.

One notable challenge is that some of these incentives, of which the ones relating to natural gas and the Nigerian exports processing zones are notorious, [68a] are enacted as perpetual with no time bar with a long duration.

This is to the effect that investors in the industry would continue to enjoy them long after they have established profitable undertakings.

This creates, unfortunately, modern times equivalent of notorious mineral or land concessions of olden days.

On the other hand, the United State of America under its African Growth and Opportunity Act (AGOA) offers an example of how incentives may be given with time limitation[68b]. It is a better example in that opportunity to review the operation and extend the tenure if necessary becomes possible. It also forecloses accusation of uncertainty and bad faith that could be made by foreign investors were Nigeria to rethink and alter the incentives which have been enacted without time bar.The modest higher development of Nigeria in relation to other African countries, has population and market, and her natural resources operate more in the mind of investors than her incentives regime[68c].

68.[a] *Section 2 of the Nigerian LNG (Fiscal Incentives Guarantees and Assurances) Act, Cap N87 Laws of the Federation of Nigeria 2004 provides a 10 years tax holiday for the Company. The benefit available to approved enterprises under section 18 of the Nigerian Export Processing Zones Act Cap. N107 Laws of the Federation of Nigeria 2004 have no time bar*

68[b] *See sections 106 and 114 of African Growth and Opportunity Act (AGOA (2000)).*

68[c] *Hadari; Y. The Role of Tax Incentives in Attracting Foreign Investments in selected Developing Countries and Desirable Policy; the International Lawyer, spring 1990, Vol. 24, No. 1 p. 121*

the concessions are not needed in order to invest abroad. In the oil and gas industry in Nigeria the relevant factors are availability and quality. Market and not incentives has expanded for, example the telecommunication industry in Nigeria.

3.10 PROTECTIONISM IN REGULATORY POLICIES

The regulatory authorities in Nigeria should note the time tested fact that an open trade regime, on its own will not set any econommy on a sustained growth path instead it may hamper domestic producers and cause instability.

Today's developed countries had made use of several policy tools to restrict the entry and operations of foreign investors and investments in earlier stages of their economic development. Therefore it will be unfair for the developed nations to insist on an multilateral investiment

agreement [MIA] for all countries irrespective of their development levels; as this would mean removing the bridge they have once passed.

These developed countries all took strategic approach to foreign investment, and such policy stances merely change according to changes in their economic structure and external conditions. Historically, experiences of today's developed countries, it is obvious that they embraced a well – devised set of restrictions and performance requirements on foreign investment as key ingredients in their receipe for current success. This is a sharp contrast to what they are recommending to today's developing countries as growth panaceas. [69]

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69. Aremu J.A. An overview of Foreign Private Investment in Nigeria. A Paper presented at the Conference of the Central Bank of Nigeria,held at Hamdala Hotel, Kaduna, from September 1 – 5 (2003) p. 39

3.10.1 ARGUMENTS FOR PROTECTIONISM

This shall be considered in this work from two broad perspectives viz:

Political and economic

i. The Political Perspective Covering:
   - (a) National Security
   - (b) Retaliation
   - (c) Protection of jobs

ii. The Economic Perspective Covers:
   - (a) Infant Industry, and
   - (b) Strategic Investment Policy

Most developing countries now have policies that regulate the entry of foreign Companies, and include various conditions and restrictions for foreign investors overall on sector by sector basis. [70] These are by way of protection. Protectionism from Political Perspective

(a) **National Security:**

Countries enforce barriers in the name of national security. In 1991 the government of India introduced an industrial policy in which it listed industries related to defence and stated that such were exclusively reserved for the government sector. The implication was that no foreign Company or even Indian private sector could venture in those areas. [71]

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70. Khor M. Globalization and the South: Some Critical Issues, Spectrum House, Ibadan (2005) p. 80
71. Aswathappa .K. International Business, 2nd Edition 2006 p. 170.

The Nigerian regulatory authorities should be cautious of the primacy of our national security. There is a similar policy in sections 17 and 18 of the NIPC Act where there are sectors of investment prohibited in the negative list. [72] there is however the problem of enforcement of laws in Nigeria. It is therefore suggested that Nigerian regulatory authorities should make concerted efforts in enforcing its investment regulations to protect our national security which comes above all other foreign investment benefits.

(b) **Retaliation**

Governments especially of the developed countries use threat to intervene in trade and investment policy as barganing tool in opening foreign markets and in forcing trading partners i.e. the weak undeveloped countries to provide free access.

The United States of American [USA] over the years has been seeking to gain control over trade and investment policy in all of Central, North and South America as well as the Caribbean basin. This is the main reason behind the free trade initiatives in the Americas which are strongly supported by the United States. In the same vein, Japan has maintained some level of influence in Asia. Many countries throughout Asia and Southeast Asia depend on Japan for a large amount of their foreign trade. Japan lent a huge amount of money to these countries to help them recover from financial

crises in recent years for this reason Japan generates goodwill among the neighbours through such assistance. On the other hand it is observed that it does not make sense for one nation to allow free trade if other nations actively protect their own industries. Countries often use threat to close their ports to another nation's ships, or impose extremely high tariffs on their goods if they do not concede on some trade and investment issues as being unfair [73].

It is observed that the developed economies through what they call assistance and foreigh loans to developing countries force certain trade and investment policies on them. In early January 2012 some European and American countries threatened to stop giving certain aid to Nigeria if the National Assembly refuses to make laws recognising same sex marriage in Nigeria. This demonstrates the fact that most of the so called foreign aid and loan are like "greek gifts". It is suggested that developing countries, especially Nigeria should not allow their trade and investment policies to be influenced by developed contries through threats to stop giving them foreign "aid" and loans.

(c) Protecting jobs: Governments intervene when imports threaten jobs created by domestic businness. Business process outsourcing [BPO] is an example to be given in this context. Many companies in the United States are outsourcing their functions out of India. Fearing loss of jobs for locals, many states in the US are legislating bans on such Business Process Outsourcing. Japan maintains quotas on rice imports which is aimed at protecting jobs in the country's agricultural sector. The same motives underlay the eatablishment of Common Agricultural Policy [CAP] by European Union. The CAP was formulated to protect jobs of farmers in Europe by restricting imports and guranteeing prices [74].

It has been observed that activities that bring about job losses in many countries especially developing countries are carried out by foreign companies in their host nations for obvious

74. Ibid;

reasons. It is therefore suggested that developing countries and Nigeria in particular should put investment policies that will protect jobs of her

citizens which was the bedrock of growth in the developed economies.

ii The Economic Perspective

Economic reasons have special place in government trade and investment polices i.e. the famous infant industry and strategic investment and trade policy.

(a) Protecting Infant Industries

According to this proposition, a country's emerging industries need protection from foreign competition during the early period of their development and until they can compete internationally. It is a fact that infant industries need protection because of a steep learning curve. That is to say, as an industry grows and matures, it gains the necessary capabilities to become more innovative, efficient, and competive. Till such time, the industry needs to be insulated from foreign competition. Alexander Hamilton, in 1792 propounded the infant industry argument which has appealed to most developing countries in the last four decades. This line of thought has been recongnised as legitimate reason for protectionism [WTO].

The Government of India has been protecting small scale industries through various subsidies and incentives and other policies[75]. This policy is justifiable considering that during the Colonial era, the economies of the developing countries were shaped to the advantage of foreign companies and financial institutions.

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75. Ibid p. 171

Induvidual and Corporate citizens of the developing countries of today were at a disadvantage and now require a considerable length of time where special treatment is accorded to them, before they can compete on more balanced terms with the multinational corporations [76].

In the light of the above observations, it is suggested that developing nations, especially Nigeria should through trade and investment policies protect their infant industries, provide platforms for their growth in the interest of their national economies.

(b) Strategic Trade and Investment Policy

According to this reasoning for protectionism, countries shall dominate in the export of certain products because of their first mover advantage enjoyed by some of their domestic industries. Given suitable protection such companies can capture foreign

markets, earn good profits, and plough the money back to the country of origin. This strategic policy helped South Korea build global conglomerates [77].

Protectionism was the key to the growth of the developed nations. This therefore still holds the key to the growth of developing countries of today.

An indiscriminate policy of opening up and of treating foreign companies on equal or better terms than local companies could lead to deindustrialization in a country where the local enterprises are too weak to compete on equal terms with foreign Companies. Thus, developing countries should continue to protect certain sectors or industries where there is considerrable local investment [or where the state is encouraging attempts to build up local capacity] [78].

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76. Khor Martin loc cit p. 81
77. Aswathappa K. Loc Cit p. 171
78. Khor Martin Loc Cit pp. 91 – 92

DEVELOPMENT ACT

Nigerian Oil and Gas Industry content Development Act is the [78a] accumulation of many years of agitation for more protectionist legislation for Nigerian citizens who have always desired to have a greater participation in the lucrative Oil and Gas sector of the Nigerian economy and enhance the

much talked about technology transfer in Nigeria .[79]

The provisions of the Oil and Gas Industry Act now supersedes similar provisions in the petroleum Act or in any other enactment or law relating to the development of local content in the Nigerian Oil and Gas Industry.

3.11.1 FIRST CONSIDERATION FOR NIGERIAN OPERATORS

The Oil and Gas Local content Act provides that Nigerian Independent operators shall be given the first consideration in the award of oil blocks, oil field licences, oil lifting licences and in all projects for which a contract is to be awarded in the Nigerian oil and gas industry, subject to such conditions as may be specified by the Minister.[80]

Compliance with the Act is a special criteria in considering companies for licenses,permits and other commercial interest in Nigeria oil and gas industry.

78a *Nigeria Oil and Gas Industry Content Development Act, 2010 Act. No.2.*

79 Nigerian Oil and Gas Industry Content Development Act,2010, Act No.2

80. Section 3 (1) (2) (3) Ibid.

3.11.2 NIGERIAN LOCAL CONTENT MONITORING BOARD

The regulator and enforcer of the Nigerian Oil and Gas Local content Development legislation is the Nigerian Content Development and Monitoring Board. This Board is empowered to make procedures that guide, monitor, coordinate and enforce the provisions of the Oil and Gas Local content Development Act. [81]

The Board is also to promote the measurable growth of the Nigerian content amongst others. [82] It is one thing to be empowered and another to demonstrate patriotism and capacity to carryout the mandate. Members of the Board should put Nigeria first in their duties to enhance success.

3.11.3 CONTENT PLAN

The Plan shall ensure first consideration is given to services provided from within Nigeria and to goods manufactured in Nigeria, including first consideration to Nigerians for training and employment in the work programme for which the plan is submitted.[83]

The power of enforcement is considered by the presenter to be enhanced by making written approval of the content by the Board a must before certain application such as expatriate quota position can be granted to companies.

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81. Section 4 Ibid.
82. Section 5 Ibid.
83. Sections 10 (1) (2) (3) (4) and 28 (1) (2) Ibid.

3.11.4 TECHNOLOGY TRANSFER PLAN AND SUPPORT FOR TECHNOLOGY TRANSFER IN NIGERIA

Each operator shall carry out a programme in accordance with Nigerian's own plan and priorities, to the satisfaction of the Nigerian Content Board for the promotion of

technology transfer to Nigeria in relation to its Oil and Gas activities[84]. This is necessary to accelerate the quest of Nigeria for technology transfer and development of the capacity of Nigerians.

3.11.5 PROFESSIONAL SERVICES

Operators and promoters engaged in the provision of engineering and other professional services in the Nigerian Oil and Gas Industry are to engage the services of only professionals registered with relevant professional bodies in Nigeria. This includes insurance and financial services.[85] This will generate employment for Nigerians and forestal the stress on the Naira and Strengthen the value of the Naira and so on.

3.11.6 OFFENCES AND PENALTIES

The Act provides that any operator or corporation which fails to comply with any of the provisions of the Oil and Gas Local content Act commits an offence and is liable on conviction to a fine of 5% of the contract sum or sums, in addition to a possible cancellation of the contract.[86] This penalty is an adequate deterrence and will encourage compliance among operators.

84. Sections 43, 44, 45, 46 Ibid.
85. Section 51 Ibid
86. Section 68 Ibid

The provisions of Nigerian Oil and Gas Industry Content Development act raises a fundamental question which answer is also fundamental and directional.

The Principles of the pre 1994 General Agreement on Tariffs and Trade, (GATT) and the World Trade Organization (WTO) such as Non-discrimination among members, reciprocity and binding and enforceable commitments are established trade policies of WTO which Nigeria is a member. The Nigerian Oil and Gas Industry content Development Act gives Nigerians an upper hand over other WTO member countries citizens in bidding for contract in this sector in Nigeria.

Is this Act not at variance with the World Trade Organization Trade Policies and agreements to which Nigeria is a signatory?

It will be noted that those citizens of other WTO countries are coming with advanced technologies and experience built over many years hence they cannot be said to be on the same level playing field with Nigerians.

Therefore, if Nigeria should follow the WTO Standard without encouraging her citizens in some ways such as the provisions of the Nigerian Oil and Gas Industry Content Development Act, she will never grow technologically. This Act therefore is a positive effort towards addressing the negative influence globalization of national policies and policy making mechanisms has had on Nigerian Investment Regulations.

The time to do this is now as the Nigerian Oil and Gas Industry Content

Development Act appers to have set the stage.

CHAPTER FOUR

ISSUES AND CHALLENGES OF GLOBALIZATION

4.1 INTRODUCTION

Globalization constitutes a mega trend in global political economy and has assumed a new phase in contemporary international economic relations. Consequent upon the emergent socio-political and economic transformation as well as the technological advancement in communication, information, transportation amongst others, the process appears to be irreversible. Nation States have actually consistently intensified efforts towards engaging in business across national borders and constructing production and distribution networks on a

global scale. Therefore, the world today is a 'global village' given the unprecedented level of inter-connectedness of political, economic, social and technological forces that permeate contemporary global system.[1]

Obviously the opportunities and benefits of this trend have been stressed by its proponents and supporters. Recently there has been increasing disillusionment among many policy-makers in the developing countries, analysts and academics, as well as the community of non-governmental organizations (NGOS) in both the developing and developed countries. The failure of the Seattle Ministerial Conference of the World Trade Organization (WTO) in December 1999 is a signal of this disillusionment.[2]

1. Solomon, O.A. Globalization and the challenge for Nigeria's Development in the 21st Century (2008) http://globalization.Icaap.org/content/v7.1/Akinboye.html 6/8/2012.
2. *Khor M. Globalization and the South: Some Critical Issues. Spectrum House, Ibadan (2005) p. 1*

The premises for the changing perception of and attitude towards globalization are many. Among the significant factors are the lack of tangible benefits to most developing countries from opening their economies, despite the well-publicized claims of export and income gains; the economic losses and social dislocation that are being caused to many developing countries by rapid financial and trade liberalization; and the perception that environmental, social and cultural problems have been made worst by the workings of the global free-market economy.[3]

This chapter examines the challenges of globalization on Nigeria. This chapter examines whether or not Nigerian Foreign Investment Regulations have been negatively influenced by globalization of national policies and policy making mechanisms.

4.2 PRESENT CHALLENGES OF GLOBALIZATION ON THE NIGERIAN REGULATORY LEGAL FRAME WORK

4.2.1 THE LIBERALIZATION OF TRADE, FINANCE AND INVESTMENT

Economic globalization is not a new process, for over the past five centuries firms in the economically advanced countries have increasingly extended their outreach through trade and production activities (intensified in the colonial period) to territories all over the world. However, in the past two to three decades, economic globalization has accelerated as a result of various factors, such as technological developments but especially the policies of liberalization that have swept across the world.

3. Ibid p.1

The most important aspects of economic globalization are the breaking down of national economic barriers; the international spread of trade, financial and production activities, and the growing power of transnational corporations and international financial institutions in these processes. While economic globalization is a very uneven process, with increased trade and investment being focused in a few countries, almost all countries are greatly affected by this process. For example, a low-income country may account for only a minuscule part of world trade, but changes in demand for or prices of its export commodities or a policy of rapidly reducing its import duties can have a major economic and social effect on that country. That country may have a marginal role in world trade, but world trade has a major effect on it, perhaps a far larger effect than it has on some of the developed economies.[4]

The external liberalization of national economies involves breaking down national barriers to economic activities, resulting in greater openness and integration of countries in the world markets. In most countries, national barriers are being removed in the areas of finance and financial markets, trade and direct foreign investment.

Of the three aspects of liberalization (finance, trade and investment), the process of financial liberalization has been the most pronounced. There has been progressive and extensive liberalization of controls on financial flows and markets. Due to the interconnectedness of

financial markets and systems and the vast amounts of financial flows, there is a general and increasing concern about the fragility and

vulnerability of the system, and the risk of breakdown in some critical parts or in the general system itself, as a fault developing in one part of the world or in the system can have widespread repercussions. This concern became a reality in the aftermart of the global financial meltdown which started in America.

The global financial crisis, brewing for a while, really started to show its effects in the middle of 2007 and into 2008. Around the world stock markets have fallen, large financial institutions have collapsed or been bought out, and governments in even the wealthiest nations have had to come up with rescue packages to bail out their financial system.[5]

On the one hand many people are concerned that those responsible for the financial problems are the ones being bailed out, while on the other hand, a global financial meltdown will affect the livelihoods of almost everyone in an increasingly inter- connected world.

A collapse of the US sub-prime mortgage and the reversal of housing boom in other industrialized economies have had a ripple effect around the world.

Furthermore, other weaknesses in the global financial system have surfaced. Some financial projects and instruments have become so complex and twisted, that as things start to unravel, trust in the whole system started to fail.

For the developing world, the rise in food prices as well as the knock-on effects from the financial instability and uncertainty in industrialized nations are having a compounding effect. High fuel costs, soaring commodity prices together with fears of global recession are worrying many developing country analysts.

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5. *Anup. S Global Financial Crisis. http:/www.globalissues. org/article/768/global-financial-crisis December 11, 2010*

Summarizing a United Nations Conference on Trade and Development report, the Third World Network notes the impacts the crisis could have around the world, especially on developing countries that are dependent on commodities for import or export: [6]

Uncertainty and instability in international financial, currency and commodity markets, coupled with doubts about the direction of monetary policy in some major developed countries, are contributing to a gloomy outlook for the world economy and could present considerable risks for the developing world, UN Conference on Trade and Development (UNCTAD) said.

Commodity-dependent economies are exposed to considerable external shocks stemming from price booms and bursts in international commodity markets.

Market liberalization and privatization in the commodity sector have not resulted in greater stability of international commodity prices. There is widespread dissatisfaction with the outcomes of unregulated financial and commodity markets, which fail to transmit reliable price signals for commodity producers. In recent years, the global economic policy environment seems to have become more favourable to fresh thinking about the need for multilateral actions against the negative impacts of large commodity price fluctuations on development and macroeconomic stability in the world economy.

The crisis is a result of the developments in the world since Neo-Liberalism became the major guiding philosophy in pecuniary reforms. It is the existence of the ingredients of globalization, particularly globalised capitals that mastermind the

6. *Kanaga Raja,* Economic Outlook Gloomy, Risk to South, say UNCTAD, Third World Network, September 4, 2008

financial institutions repeated borrowing, lending and collateralizing.

In these trying times, the economic meltdown has caused the crumbling of many businesses including otherwise formidable corporate giants across the world. In Nigeria, the crisis stumbled

on the existing pervasive and convoluted business environment. At the pinnacle is an intractable power crisis.

Other numerous factors astringent to business growth include rising cost of refined petroleum products, high interest rate, chaotic ports and intensifying crime rate. The public service sector was not immune to the destructive consequences of the global economic meltdown. As a developing country, the only attractive way the additional debt service payments resulting from the crisis can be made is to spend less on food, transportation, medical care and other expenditures that are deemed to be necessary[7].

Quoting Stiglitz he captures the sentiments of a number of people:

> We had become accustomed to the hypocrisy. The banks reject any suggestion they should face regulation, rebuff any move towards anti-trust measures – yet when trouble strikes, all of sudden they demand state intervention: they must be bailed out; they are too big, too important to be allowed to fail. American's financial system failed in its two crucial responsibilities: managing risk and allocating capital. The industry as a whole has not been doing what it should be doing… and it must now face change in its regulatory structures. Regrettable, many of the worst elements of the US financial system … were exported to the rest of the world[8].

There has also been a steady growth in liberalization of Foreign Direct Investment (FDI), although again on a smaller scale than in the case of international financial flows. Much of FDI and its increase is due to flows among the advanced countries.

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7. *Onyido .I.* Global Economic Meltdown: Implications for the Nigerian Public Service. The Maiden Lecture delivered to the Association of Heads of Federal Establishments (AHFE) in Aba, Abia State on 20 October, 2009
8. *Joseph S. The Fruit of hypocrisy; Dishonesty in the financial sector dragged us here, and Washinton looks ill-equipped to guide us out. The Guardian September 16, 2008.*

This coincides with the recent liberalization of foreign investment policies in most developing countries. However, much of this FDI has centred in only a few developing countries. Least developing countries (LDCs) in particular are receiving only a very small FDI flows, despite having liberalized their policies. Thus, FDI is insignificant as a source of external finance to most developing countries, and is likely to remain so in the next several years[9].

A major feature of globalization is the growing concentration and monopolization of economic resources and power by transnational corporations and by global financial firms and funds[10]. This process has been termed "transnationalization", in which

fewer and fewer transnational corporations are gaining a large and rapidly increasing proportion of world economic resources, production and market share. Where a

multinational company used to dominate the market of a single product, a big transnational company now typically produces or trades in an increasing multitude of products, services and sectors. Through mergers and acquisitions, fewer and fewer of these TNCs now control a large and larger share of the global market, whether in commodities, manufactures or services. The top 200 global corporations accounted for $3,046 billion of sales in 1982, equivalent to 24 percent of world GDP ($12,600 billion) that year. By 1992, their sales had reached $5,862 billion, and their equivalent value to world GDP ($21,900 billion) had risen to 26.8 percent [11].

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9. Ibid p.4
10. Ibid
11. Clairmon FF. The Rise and Fall of Economic Liberalism: The making of Economic Gulag. Penang, Malaysia, Southbound and Third World Network. Quoted by Khor M. in Khor M. Globalization and the South: Some Critical Issues Spectrum House, Ibadan (2005) p. 4

4.2.2 The globalization of policy-making

Perhaps the most important and unique feature of the current globalization process is the "globalization" of national policies and policy-making mechanisms. National policies (including in economic, social, cultural and technological areas) that until recently were under the jurisdiction of states and people within a country have increasingly come under the influence of international agencies and processes or of big private corporations and economic/financial

players[12]. This has led to the erosion of national sovereignty, narrowed the ability of governments and people to make choices from options in economic, social and cultural policies.

Most developing countries have seen their independent policy-making capacity eroded and have to adopt policies made by other entities, which may on balance be detrimental to the countries concerned. The developed countries, where the major economic players reside and which also control the processes and policies of international economic agencies, are better able to maintain control over their own national policies as well as determine the policies and practices of international institutions and the global system. However, it is also true that the large corporations

have taken over a large part of decision-making even in the developed countries, at the expense of the power of the State or political and social leaders.

Part of the erosion of national policy-making capacity is due to the liberalization of markets and developments in technology. For example, the free flow of capital, the large sums involved, and the unchecked power of big players and speculators, have made it difficult for countries to control the level of their currency and the flows of

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12. Ibid.

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resources, more than what many (or most) governments are able to marshal, that they are thus able to have great policy influence in many countries. Certain technological developments make it difficult or virtually impossible to formulate policy. For example, the establishment of satellite TV and the availability of small receivers, and the spread of the use of electronic mail and the Internet make it difficult for governments to determine cultural or communications policy, or to control the spread of

information and cultural products. However, an even more important aspect is the recent process by which global institutions have become major makers of an increasingly wide range of policies that were traditionally under the jurisdiction of national governments. Governments now have to implement policies that are in line with the decisions and rules of these international institutions. The key institutions concerned are World Bank, the International Monetary Fund (IMF) and the World Trade Organization (WTO).

There are also other influential international organizations, in particular the United Nations and its agencies, treaties and conventions and world conferences. However, in recent years, the UN has lost a lot of its policy and operational influence in economic and social matters, and correspondingly the powers and authority of the World Bank, IMF and WTO have expanded.

The Bretton Woods institutions (World Bank and IMF) wield tremendous authority in a majority of developing countries (and countries in transition) that depend on their loans. In particular, countries requiring debt rescheduling have to adopt structural adjustment programmes (SAPs) that are mainly drawn up in the Bretton Woods institutions. SAPs cover macroeconomic policies and have recently also covered social policies and structural issues such as privatization, financial policy, corporate laws and governance. The mechanism of making loan disbursement conditional on these policies has been the main instrument driving the policy moves in the indebted developing countries towards liberalization, privatization, deregulation and a withdrawal of the State from economic and social activities. Loan conditionalities have thus been

the major mechanism for the global dissemination of the macroeconomic policy packages that are favoured by governments of the North.

The Uruguay Round negotiations greatly expanded the powers of the GATT system, and the agreements under the GATT's successor organization, the WTO, have established disciplines in new areas that go beyond the mandate of the old GATT, including intellectual property rights, services, agriculture and trade-related investment measures. According to several analyses, the agreement that emerged out of the Uruguay Round establishing the WTO has been an unequal treaty, and the WTO agreements and system (including the decision-making system) are weighted against the interests of the South. The existing agreements now require domestic legislation and policies of member States to be altered and brought in line with them.

Non-compliance can result in trade sanctions being taken against a country's exports through the dispute settlement system, thus giving the WTO a strong enforcement mechanism. Thus, national governments have to comply with the disciplines and obligations in the already wide range of issues under WTO purview. Many domestic economic policies of developing countries are therefore being made in the WTO negotiations, rather than in the parliament, bureaucracy or cabinet at the national level [13].

There are now attempts by Northern governments to expand the jurisdiction of the WTO to yet more areas, including rights to be granted to foreign investors, competition policy, government procurement practices, labour standards and environmental standards. The greater the range of issues to be taken up by the WTO, the more will the space for national policy-making (and development options) in developing countries be whittled away.[14]

Another major development has been the proposal for a Multilateral Agreement (MAI). The attempts at an MAI in the Organization for Economic Cooperation and Development (OECD) have failed so far while attempts have been made to begin negotiations at the WTO for an international investment agreement. The original MAI model would require signatory States to

remove barriers to the entry and operations of foreign companies in almost all sectors, allow them full equity ownership, and treat foreign investors at least as well as local investors and companies. There would also be no controls over the inflow and outflow of funds, and requirements for technology transfer or other social goals would be prohibited.

The MAI and similar types of investment agreements would be another major instrument in getting developing countries to open up their economies, in this case in the area of investment[15].

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13. Ibid p.7
14. Ibid
15. Ibid p. 8

However, while the World Bank, IMF, WTO and Organization for Economic Co-operation and Development (OECD) are the most powerful, the United Nations and its agencies also form an alternative set of global institutions. Recent years have seen several UN World Conferences on Environment (1992), population (1994), Social Development (1995), Women (1995), Habitat (1996), Genetic Resources (1996) and Food (1996), and the UNCTAD Conferences (1996 and 2000). The UN General Assembly and its subsidiary bodies, its agencies, conferences and legally binding conventions, which are much more transparent and democratic, also influence the content of globalization as well as national policies, at least potentially.

The UN approach in economic and social issues is different from that of the WTO and Bretton Woods institutions. The latter promote the empowerment of the market, a minimal role for the State and rapid liberalization. Most UN agencies, on the other hand, operate under the belief that public intervention (internationally and nationally) is necessary to enable basic needs and human rights to be fulfilled and that the market alone cannot do the job and in many cases in fact hinders the job being done.

The Bretton Woods-WTO institutions have, however, become much more powerful than UN, whose authority and influence in the social and economic areas have been depleted in recent years. As a result, the type of globalization promoted by the Bretton Woods institutions and WTO has predominated, while the type of globalization promoted by the UN has been sidelined. This reflects the nature of the globalization process. The former institutions promote the principles of liberalization and the laisser-faire market model and give high priority to commercial interests; thus they are given the role of leading the globalization of policy-making. The UN and its agencies represent the principles of partnership, where the richer countries are expected to contribute to the development of the poorer countries and where the rights of people to development and fulfillment of social needs are highlighted. The kind of globalization represented by the UN is not favoured by the powerful nations today, and thus the UN's influence has been curtailed.

4.3 **Rising inequality and the effects of globalization**

"Globalization" is a very uneven process, with unequal distribution of benefits and losses. This imbalance leads to polarization between the few countries and groups that gain, and the many countries and groups in society that lose out or are marginalized. Globalization, polarization, wealth concentration and marginalization are therefore linked through the same process. In this process, investment resources, growth and modern technology are focused in a few countries (mainly in North America, Europe, Japan and East Asian newly industrializing countries (NICs).

A majority of developing countries are excluded from the process, or are participating in it in marginal ways that are often detrimental to their interests; for example, import liberalization may harm their domestic producers and financial liberalization may cause instability[16].

Globalization is thus affecting different categories of countries differently. This process can broadly be categorized as follows: growth and expansion in the few leading or fully participating countries; moderate and fluctuating growth in some countries attempting to fit into the globalization/liberalization framework; and

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16. Ibid p.10

problems such as low commodity prices and debt, unable to cope with problems of liberalization and unable to benefit from export opportunities.

The uneven and unequal nature of the present globalization process is manifested in the fast-growing gap between the world's rich and poor people and between developed and developing countries, and in the large differences among nations in the distribution of gains and losses. This trend over the years for example the last twenty years – 1989 to 2009 calls to question where the present globalization process will lead us to.

The United Nations Development Programme's (UNDP) Human Development Report 1992 estimated that the 20 percent of the world's population in the developed countries receive 82.7 percent of total world income, while the 20 percent of people in the poorest countries receive only 1.4 percent (UNDP, 1992). In 1989, the average income of the 20 percent of people living in the richest countries was 60 times higher than that of the 20 percent living in the poorest countries. This ratio had doubled from 30 times in 1950. The Human Development Report 1996 showed that over past three decades, only 15 countries have enjoyed high growth, while 89 countries were worst off economically than they were 10 or more years earlier[17]. In 70 developing countries, the present income levels were less than in the 1960s and 1970s. According to the report, "Economic gains have benefited greatly a few countries, at the expense of many", said the report.

Since 1980, 15 countries (mainly Asian) have had growth rates much higher than any seen during industrialization in the West.

17. *UNCTAD (1997) Trade and Development Report, 1997. New York and Geneva, United Nations quotedby Khor M. Globalization and the South: Some Critical Issues. Spectrum House, Ibadan (2005) pp. 10 – 11*

However, economic decline for most parts of the developing world has lasted far longer and gone deeper than during the Great Depression of the 1930s. While the rich countries mostly rebounded from the depression within four to five years, the "lost decade" of the 1980s is in effect still continuing for hundreds of millions of people in many countries of Asia, Africa and Latin America. In some cases people are poorer than 30 years ago, with little hope of rapid improvement[18].

Wider inequalities among countries as well as among income groups within countries, which are closely associated with globalization processes, have been examined in detail in UNCTAD's Trade and Development Report, 1997 (TDR. 97). It shows that since the early 1980s the world economy has been characterized by rising inequality, and North-South income gaps have continued to widen (UNCTAD, 1997: chaps. IV-VI). In 1965 the average per capital income of the Group of Seven (G7) leading industrial countries was 20 times that of the world's poorest seven countries; by 1995 it was 39 times as much. Polarization among countries has also been accompanied by increasing income inequality within countries[19]. The income

share of the richest 20 percent has risen almost everywhere since the early 1980s while those at the bottom have failed to see real gains in living standards (in many countries the percent capital income of the poorest 20 percent now averages less than one-tenth that of the richest 20 percent) and the share of the middle class has also fallen. The increasing inequality is noted in more and less successful developing countries alike, and in all regions, including East Asia, Latin America and Africa.

18. Ibid p.11
19. *Ibid*

In the analysis of TDR.97, these trends are rooted in a set of forces unleashed by rapid liberalization that make for greater inequality by favouring certain income groups over others. They include the following: growing wage inequality in both the North and the South between skilled and unskilled workers (due mainly to declining

industrial employment of unskilled workers and large absolute falls in their real wages); capital gaining in comparison with labour, with profit shares rising everywhere; the rise of a new rentier class due to financial liberalization and the rapid rise in debt (with government debt servicing in developing countries also distributing income from the poor to the rich); and the benefits of agricultural price liberalization being reaped mainly by traders rather than farmers.

There are some particularly disturbing aspects of the increased inequality. Firstly, the increased concentration of national income in the hands of a few has not been accompanied by higher investment and faster growth. "It is this association of increased profits with stagnant investment, rising unemployment and reduced pay that is the real cause for concern" (UNCTAD, 1997: chap. VI). Secondly, some of the factors causing greater inequality in a globalizing world at the same time deter investment and slow down growth. For example: the fast pace of financial liberalization has delinked finance from international trade and investment; higher interest rates due to restrictive monetary policies have raised investment costs and led entrepreneurs to focus, instead, on buying and selling second-hand assets; the premium placed by global finance on liquidity and the speedy entry into and exit from financial markets for quick gains has undermined the "animal spirits" needed for longer-term commitments to investment in new productive assets; while corporate restructuring, labour shedding and wage repression have increased job and income insecurity[20].

In 2009, food emergencies persist in 31 countries and it is estimated that between 109 million and 126 million people, most of them in sub-Saharan Africa and South Asia, may have fallen below the

poverty line since 2006 due to higher food prices. Despite plummeting international food prices in the second half of 2008, domestic food prices generally have remained very high, and in some cases at record highs [21].

4.4 Weaknesses of the Developing nations in facing the globalization challenge

Most developing countries have been unable to reap benefits from globalization because of several weaknesses. Nayyar examines this phenomenon of "uneven development", showing how globalization mainly benefits the developed world, while in the developing world, the benefits accrue only to a few developing countries .[21a] There were only 11 developing countries which were an integral part of globalization in late 20th century.

They accounted for 66 percent of total exports from developing countries in 1992 (up from 30 percent in the period 1970-1980); 66 percent of annual FDI inflows developing countries in 1981-1991; and most of these 11 countries have since been badly affected by financial crises, debt and economic slowdown, thus diluting further

the rate of success of the Developing nations in integration in the world economy[22].

The Developing nations' weaknesses stem from several factors. Developing countries were economically weak to begin with due to the lack of domestic

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20 Ibid p.3
21. UNCTAD (2009) Trade and Development Report, 2009 United Nations, New York and Geneva.
21a. Nayyar D(1997) Globalization: The past in our future. Penang. Malaysia, Third World Network quoted by Khor M.Globalization and the South, some critical Issues spectrum House, Ibadan (2005) p.13
22. Ibid p.14

economic capacity and weak social infrastructure following the colonial experience. They were made weaker by low export prices and significant terms-of-trade decline as well as the debt crisis and the burden of debt servicing[23].

The policy conditionalities attached to loan rescheduling packages hampered the recovery of many countries and led to further deterioration in social services. Given the unequal capacities of

North and South, the development of technology (especially information and communications technologies) further widened the gap. On top of these unfavourable international factors, many developing countries have also been characterized by dictatorships, abuse of power and economic mismanagement, which undermined their development process. All these factors meant that the South was in a weak position to take on the challenges of globalization, as the conditions for success in liberalization were not present. Given the lack of conducive conditions and preparedness, rapid liberalization caused more harm than benefit.

The South's weakness also stems from its lack of bargaining and negotiating strength in international relations. Being heavily indebted and dependent on bilateral aid donors and multilateral loan organizations, developing countries have been drained of their capacity to negotiate (even on the terms of loan conditionalities) [24].

The powers of the UN, in which the South is in a more favourable position, have been diminished, whereas the mandate and powers of the institutions under the control of developed countries (the IMF, World Bank and WTO) have been increased tremendously.

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23. Ibid p.13

24. Walter, R. How Europe underdeveloped Africa. Panaf Abuja (1972) 2009 edition pp. 26 - 27

The North has leverage in the Bretton Woods institutions and the WTO to shape the content of globalization to serve their needs and to formulate policies which the developing countries have to take on.

Although the North is in a dominant position and has been prepared to use this to further their control of the global economy, the South is also not helpless but can better organize its responses as well as its own proposals. However, the South as a whole has not done well in organizing itself to coordinate on substantial policy and negotiating positions, or on strategy in relation to the discussions and negotiations in the WTO and IMF as well as other fora.

The developed countries are well placed to determine the globalization agenda. They are well organized within their own countries, with well-staffed departments dealing with international trade and finance, and with university academics and private and quasi-government think-tanks helping to obtain information and map policies and strategies. They also have well organized associations and lobbies associated with their corporations and financial institutions, which have great influence over the government departments. The developed countries also have institutions and mechanisms helping to coordinate their policies and positions, for example the European Commission, the OECD and the Group of Seven Leading Industrial Countries (G7), and their subsidiary bodies and agencies.

In contrast, the developing countries are not well organized within their own countries. The government departments dealing with the interface with the global economy are understaffed, especially in relation to the rapid developments in globalization and in global negotiations. The academic sector and the few think-tanks which exist are not geared up to obtain and assess information on globalization trends, and less still to formulate policy proposals that governments can make use of. The links between these intellectual sectors, the NGOs and governments are also often weak. The business and financial community is not organized well enough to monitor global trends or to lobby governments on global issues. At the regional level, there is increasing collaboration among the countries through regional groupings. However, cooperation is still not as sophisticated as in the European Union. At the international level, the South is organized through the Group of 77 and the Non-Aligned Movement. These groupings often perform reasonably effectively within the UN framework and at UN meetings and conventions. However, they are not adequately staffed and are unable to keep track adequately of events and developments, or to formulate longer-term policies and strategies. At the WTO, IMF

and World Bank, the collective strength of developing-country members has yet to be manifested in a strong way, although there are encouraging signs of more collaboration, for example at the WTO.

4.4.1 The Repeal of Indigenization laws

Despite its so called positive effects, many people and nations still fear that globalization posses tension and dilemma to countries integrated to the global economy. It is seen as a process of creating global market place in which increasingly all nations are forced to participate.[25]

The challenges of globalization brought about the repeal of the Nigerian indigenization policy which was provided by the Enterprises promotion statutes

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25. *Yusuf, .A.Globalization and Nigerian Economic Development.. A paper presented at the 4 National Conference of the Social Studies Association of Ngeria (SOSAN) held at the Faculty of Education, University of Ibadan (2003) pp.3 and 7* S

Promotion Act of 1989. The 1989 Act retained schedule one as contained in the 1977 Act and abolished schedules two and three.

Schedule one contained businesses in which Nigerians had acquired sufficient enterprise. The 1989 Act preserved the existing equity holding of Nigerians in the unscheduled enterprise.

It was in a bid to further comply with the demands of globalization that government repealed the 1989 Act and promulgated the Nigerian Investment Promotion Commission Act and the Foreign Exchange (Monitoring and Miscellaneous Provision) Act.

This has given foreigners unhindered access to certain areas of the Nigerian economy. A foreigner may therefore, invest in and participate in the operation of any enterprise in Nigeria except enterprises listed in the negative list.

In the same vein, the Foreign Exchange ((Monitoring and Miscellaneous Provision) Act repealed the Exchange Control (Anti-Sabotage) Act. Section 1 (1) of the Act established an Autonomous Foreign Exchange Market for the conduct of transactions in foreign exchange. It

authorized any person including a non-Nigerian to deal in, acquire or dispose of, create, or transfer any interest in securities and other money market instruments whether denominated in foreign currencies in Nigeria or not.[26]

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26. S.26 (1) Foreign Exchange (Monitoring and Miscellaneous) Act 1995; Also Offornze D.A. Recent Trends in Nigeria's Investment Legislations: An Appraisal. In : Jimoh.A.A. (ed) Modern Practice Journal of Finance and Investment Law July/Octomber (2003) Vol. 7 No. 3-4 p. 478

It further provides that any person may invest in securities traded on in the Nigerian capital market or by private placements in Nigeria. These investments referred to belong to the category of portfolio investments. Any person may invest in any enterprise or security with foreign currency or capital imported into Nigeria through an authorized dealer[27].

There is also a guarantee of unconditional transferability of funds, through an Authorized dealer in freely convertible currency in respect of:

a. Dividends or profits (net of taxes) attributed to the investments,

b. Payment in respect of loan servicing where a foreign loan has been obtained; and

c. The remittance of proceeds (net of all taxes) and other obligation in the event of sale or liquidation of the enterprise or any interest attributable to the investment.

The provision of section 15 raised some disturbing questions. The effect of the section is that a foreigner can invest in any enterprise or security with foreign currency of capital imported into Nigeria. Such an investment may involve the actual buy-over of the Nigerian Company to the detriment of Nigerians.

To further compound the problem, no restriction is placed on the level of investment a foreigner may make. This fear has been voiced out by the president of Nigerian Shareholders Solidarity Association, Chief Akintunde Asalu. According to him, about 60% take-over has been carried out through an aggressive take-over bid, by foreign parent companies of some Nigerian

Multinationals namely, Liver Brothers PLC, John Holt Nigeria PLC, Nigerian Breweries PLC amongst others.

27. *Section 15 (1) FEMM Act. Also Attornze D.A. Ibid pp. 478 - 479*

This he noted was made possible by both the Nigerian Investment Promotion Act (NIPCA) and the Foreign Exchange (Monitoring and Miscellaneous) Act (FEMMA). He alleged that the parent companies intend to pull them out of the stock market and convert them to private companies, thereby shutting out Nigerian shareholders[28].

It is suggested that section 15 be amended to provide a limit to the level of investment a foreigner may have in an enterprise.

The guarantees of unconditional transferability of funds may be exploited by an unscrupulous foreign investor to the detriment of Nigeria. To further encourage foreign investors, the Act in Section 17 provides that any person including a foreign investor may maintain and operate a domiciliary account designated in foreign currency with an Authorized dealer. Also, no money imported into the country for the purpose of the Act shall be liable to seizure or forfeiture or suffer any form of expropriation by Federal or a State Government. It must be pointed out however, that this should not be applied to funds which are from illegal sources, such as money made from illicit drug transactions.

This will prevent dubious people from buying into the Nigerian economy. Care must be taken in the implementation of Foreign Exchange (Monitoring and Miscellaneous) Act (FEMMA) to ensure that foreign investors do not take undue advantage of its liberal provisions to milk Nigeria dry[29].

28. *"Local Investors Decry New Acquisition Strategies" THIS DAY, Magazine Monday, June 28, 1999 p.3 No. 45 of 1999. Also Affornze . D.A. Ibid p. 479*

29. Affornze D.A. Ibid p. 479
29. Affornze D.A. Ibid p. 479

4.4.2 The introduction of privatization, commercialization deregulation (liberalization) in the Nigerian economy

Commercialization is an economic principle of factoring the total cost of production of social goods and /or services into the pricing mechanism, in which case government no longer subsidizes the price charged for the provision of such public goods or services.

Privatization is the total transfer of ownership and control of public enterprises to the private-investing public; and deregulation (liberalization), subsuming the earlier two underpins the economic principle of a free market in which equilibrium price arising from the forces of demand and supply determines price and not government. This is a concept of an invisible hand enunciated by Adam Smith.

The disturbing impact of these principles that were borne out of an aristocratic economic concept knows no bound and spares no area of our economic sectors in Nigeria today. It is unfortunate that the danger of policies do not come to the attention of an average Nigerian until an adventurous deregulation of oil energy sector[30].

However, commercialization, privatization and deregulation (liberalization) started in Nigeria with the introduction of the Structural Adjustment Policy (SAP) in 1986. The main tenet of SAP as an economic policy was devaluation of currency, as the overall objective of SAP was targeted at import substitution and export promotion, an upshot of globalization.[31]

30. Owolabi .U. Relevance of Privatization, commercialization, deregulation to Nigerian economy. (2010) http://tribume.com.ng/index.php/component/content/article/84-management/2638-relevance 6/8/2012
31. 1bid p. 3

The benefits and costs of these policies for Nigeria and other developing countries constitute an increasingly controversial issue.

The conventional view that these policies of commercialization, privatization and deregulation (liberalization) are necessary and have automatic and generally, positive effects for development is being challenged empirically and analytically. There is a paradox in the approach developing countries in general and many scholars take towards the issue. On the one hand, it is almost invariably repeated that "we are committed to trade liberalization, which is positive for and essential to growth and development". On the other hand, Nigerians and many developing countries also notice and are now actively complaining that trade liberalization has produced negative results for their economies or has marginalized them.[32]

These policies can (and often do) cause imports to surge without a corresponding surge in exports. In fact, trade liberalization has been accompanied by deindustrialization in many developing countries, especially Nigeria.

The Academic Staff Union of Universities in 2002 declared that: [33]

> as Nigerian economy has been taken over by the forces of globalization, no serious and conscientious effort is made to initiate the process of economic growth and development through internal resource utilization and capacity building. This has persistently undermined the transformation of the Nigerian economy from an underdeveloped productive base to a significantly developed economy. Even though Nigeria has all the requisite resources for economic development, its over-reliance on the dictates of the "global economic order" has made it a good source of development for other economies mainly in Europe and America.

Little wonder, globalization has been described as the integration of national economies through trade and capital flows between nations, made possible by trade

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32. ***Khor M***. *Loc Cit p. 22*
33. *Asuu, (March 2002) The State of the Nation, Ile-Ife: Academic Staff Union of Nigerian Universities; And also Murtala M. Globalization Crises and Ntional Security: A Reflection on Nigeria Textile Industry. Jorind (9) 1, June, (2011) ISSN 1596- 8308.wwwtranscampus.org./journals.*

liberalization, the removal of capital control and the advancement of technology [34].

It is therefore evident that the low level of industrialization is due to lack of internal protection policies. These have placed Nigeria in this helpless circumstance where the country lacks direct control over the crises in her economy because her hands are tied by terms and dictates of globalization. What has been happening in Nigeria since the 1996 WTO agreement is the consolidation of the recolonization agenda. [35.] Dell provided justification for protection stance which is canversed in this work in chapter three. He argues that there is not a single industrialization country that did not employ vigorous protection at some stage in its history. Among the much-applauded newly industrializing countries the most important have highly regulated economies. Even Japan, a highly industrialized country, and the miracle economy of the century, continues to this day to protect its industrial development in a variety of ways. The European Union and the US had protected some of their high-cost industries, such as textiles, to save jobs in their own countries. Consequently, this protected them from globalization.[36]

4.5 Future Challenges of Globalization on Nigerian Regulatory Legal Frame Work.

Globalization produces more domestic losers in the developing countries than winners and diminished the ability of the State in its inability to compete

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34. *Awolabi. E.N Globalization, Liberazation, and The Rise of Marginalization of Nigeria, Central Bank of Nigeria CBN Reearch Department Publications (1998)5 (1); And also JORIND (9) Ibids.p.90*
35. *Ayagi, I. The Trapped Economy, Ibadan: Heinemann (1990); And also JORIND (9) Ibid p. 90*
36. ***Dell, S**. Stabilization: The Political Economy of overkill, World Development (1982) 10 (8):597-612 And also JORIND (9) Ibid p. 90*

with others. It has undermined ethical equity and concerns to support market considerations. It wipes out sovereignty and autonomy of states in the periphery in the economic and political sense. It is perhaps the most significant trend shaping national

economies worldwide with the developing economies at the receiving end of the negative impacts.

4.5.1 Job Loss in Nigeria

Globalization tightens the Nigerian economy rather than reinforcing it, thereby creating a new menace to human security and development. The increasingly unified and borderless Nigeria comes out in a difficult position. Whereas Nigeria has made and is still making enormous contributions to the global economy, it remains at the receiving end of the side effects rather than through the gains of globalization.

4.5.2 Impact of job loss on national security

The relevance of security in our present day society can be said to have been addressed only briefly. Security is the basic ingredient in the survival strategies and development plans of any given society. Security means the assurance of future well being and freedom from threat. National security should ideally be seen as the ability of the Nigerian state to successfully achieve her national interests. It is a fact that when jobs are not secure, the individual is not secure. When the individual is not secure the state is under attack from an external force the state and the individual cannot be secured.

A one time Chief of Defense Staff, Air Marshal Paul Dike, opined that the growing incidence of unemployment in the country constitutes a grave threat to national

security.[37] It is clear that globalization and all that accompanies it is not something to be accepted without question. It is suggested that it should be embraced with wisdom and reservations because from all indications, there are challenges and costs, and there are adverse implications for Nigeria's economic stability.

It is obvious that it has potential benefits but the risks and cost associated with globalization appears to outweigh its potential benefits.

4.6 Costs and benefits of foreign investment to the Nigerian economy

The proponents of foreign investments have argued that most developing countries are expected to derive several number of benefits from foreign direct investment flows. The following are identified as the plausible benefits of Foreign Direct Investment (FDI) in any economy: [38]

- The transfer of technology to individual firms and technological spill-over to the wider economy;
- Increased productive efficiency due to competition from multinational subsidiaries;
- Improvement in the quality of the factors of production including management in other firms and not just the host firm;
- A healthy balance of payments through the inflow of investment funds;
- Increases in exports;
- Increases in savings and investment

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37. Ibid p. 92; And also wwwthenationon/imeng.net

38. ***Oyeranti O.A.*** *Foreign Private Investment: Conceptual and Theoretical Issues. A Paper Presented at the Conference of the Central Bank of Nigeria, held at Hamdala Hotel, Kaduna from September 1 – 5, (2003) pp. 29 - 30*

- Faster growth of output and employment;
- and welfare improvement due to lower prices of goods and the introduction of new or better quality goods.

On the other hand costs of foreign private investment FDI will be presented in this work from two angles in general and the activities of the multinational corporation (MNCs) in particular.

The arguments against the backdrop of the MNCs are as follows: [39]

a. While it is true that MNCs provide capital, they may lower domestic savings and investment rates by stifling competition through exclusive production agreements with the host governments, failing to reinvest much of their profits, generating domestic incomes for groups with lower savings propensity.

b. MNCs can exacerbate balance of payments crises in the host countries consequent upon their practice of substantial importation of intermediate products and capital goods, and the capital account may worsen because of the overseas repatriation of profits, interest, royalties, management fees, and other funds.

c. Contribution of MNCs to public revenue in the form of corporate taxes is likely to be less than anticipated as a result of liberal tax concessions, the practice of transfer pricing, excessive investment allowances, disguised public subsidies and tariff protection provided by the host government.

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39. Ibid pp. 30 - 31

d. The impact of MNCs on development is most often uneven, thus reinforcing dualistic economic structures and exacerbates income inequality.

e. Multinationals sometimes use their economic power to influence government policies in directions unfavourable to the development of their host economies.

In the same vein arguments against foreign private investment are that it may cause capital flight which may lead to net capital outflow and thus create balance of payment difficulties, it also creates income distribution problems when it competes with home investments. It may actually be capital intensive, which may not fit in the factor proportions of the recipient country.

Since the 1980s, flows of investment have increased all over the world. Despite the increased flow of investment to developing countries in particular, sub-sahara Africa (SSA) countries are still characterized by low per-capital income, high unemployment rates and low and falling growth rates of gross domestic product (GDP), problems which foreign private investment are theoretically supposed to solve.

The Nigerian government is putting so much effort into attracting foreign investors, yet the economy is still dwindling.[40]

What all this lead to is the fundamental truth that while the host country may hope for certain goals in the promotion of foreign investment, it is not reasonable to expect that they will necessarily flow.

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40 ***Osinubi TS; Amaghionyeodiwe LA.*** Foreign Private Investment and Economic Growth in Nigeria. Review of Economic Business Studies, June (2010) Vol. 3 Issue 1. pp.106 - 107

investment would lead to transfer of technology.

No foreign investor would truly wish to equip a host country with the "know how" that eventually removes the investor from his vantage position vis-à-vis the host country.

In the final analysis, it should be the responsibility of Nigeria as the host country to try to get the maximum benefit out of any policy of encouraging foreign investment. One of the methods can be by way of serious interventions by government aimed at directing the way foreign investment should go.

Consequently, Nigeria may need to re-examine for example, her current policy on foreign investment. What for example is the advantage to Nigeria of the export processing zone EPZ. Under the present arrangement, foreign investors can bring in their work force. Thus, it does not do much for the problem of unemployment in the country. The foreign investor can repatriate his profits to virtually any extent – so what really does Nigeria gain? [41]

As pointed out earlier, the solution to some of the problems identified would still lie in appropriate intervention by government. First such intervention should begin by

identifying specific goals to be achieved within a given time frame and then working

assiduously towards attaining those goals. It may be a lot more difficult to achieve several goals at once. Good sense suggests that these things are taken one step at a time. For an example, if the goal is first to achieve a targeted reduction in unemployment over a specific time frame,[42] perhaps, the kind of industry to be encouraged at that

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41 ***Guobadia D.A.*** *Issuess in Facilitating Investment for National Development in Nigeria.In Jimoh AA. (e.d) Modern Practice Journal of Finance and Investment Law MPJFIL. Lagos October (1998) Vol. 2. No. 2 p 53*

42. ***Ibid*** *P. 53*

labour from abroad. The attainment of subsequent goals can be targeted to build upon the first. This is also what proper planning should be about.

The success stories of Europe and America as hosts to Japanese foreign investment have been said to be hinged on this kind of clear identification of national goals accompanied by meticulous planning to achieve same. One scholar has observed that Japanese foreign investment in these countries is marked by "the consistent objective of Japanese multinationals to own an uncontested majority of the equity shares in their foreign subsidiaries".[43]

In so accommodating them, one may state that the host countries clearly understand that the object for them (i.e. the host countries would not be ownership) but some other goals, which, in the light of this discussion would have to be determined by the host country.

In determining such goals, due cognizance must be taken of what motivates foreign investors to invest in a particular country. Apart from what has been mentioned so far, the Japanese for example have always been known to look out for host countries where they can have skilled work force available. The issue is that if a host country can provide skilled labour that is cheap, this can in turn

result in a reduction in unemployment. Using this particular index as an example, the question is, does Nigeria have that kind of skilled workforce? This is relevant because we do have a serious problem of unemployment which was alluded to in this chapter. As the facts stand, we cannot boast of a skilled workforce[44]. This raises some other fundamental issue- i.e. that there is a need to train our workforce which then means that we must return to the basics before we can seriously embark on any policy or programme of encouraging foreign investment.

There is the urgent need to return to the drawing board and plan appropriately for the education of the populace–education that is directed at clear goals – of acquiring the skills that can attract the kind of foreign investment that we seem to be interested in.

This point made in respect of education becomes as valid for every other index determining our preparedness for foreign investment in Nigeria[45]. The other issue is identifying key areas in which such investments should be encouraged and in which the host country would participate. Due emphasis must also be placed on investment in joint research project between Nigeria and foreign investors. All of these would build the necessary linkages and provide both lasting impetus for development as well as returns on investments.

4.7 Use of Multilateral Framework for Foreign Investment

4.7.1 General View

The failure of the World Trade Organization's (WTO's) Ministerial meeting in Seattle in December 1999 presents an opportunity for all countries, especially developing countries, to review the framework, rules and effects of the multilateral trading system from the viewpoint of development and the interests of developing countries. The collapse of the Seattle meeting had its roots in both the system of decision-making and the substance of the negotiations. In the many months of the

preparatory phase towards Seattle, developing countries generally were more concerned about their non-benefits from the WTO agreements and about the need to

correct the problems of implementation of the agreements. Most of them were not in

45. *This is logical progression from **Jon Galbraith's** Seven Basic Principles which he considers essential for the development of the "poor lands of the planet" i.e. the South. See The South Centre: Facing the challenges Responses to the Repeal of the South Commission, 1993. Zed . Books Chap. 25*

The latter, on the other hand, were strongly promoting several new issues, such as investment, competition policy, transparency in government procurement, a new round of industrial tariff cuts, and labour and environmental standards. At Seattle, the United States push for labour standards led by President Clinton (who linked the issue to the use of trade sanctions) seemed to confirm the fears of developing countries that the WTO was sought to be tilted even more against them by the major powers.

The clash of interests over substance was worsened by the organization of the meeting and the lack of transparency in the multitude of talks held in small groups that the majority of developing-country members had no access to. Many developing-country delegations made it clear, including through open statements and media conferences that they would not join in a "consensus" on any Declaration which they had little or no part in formulating. The talks had to be abandoned without the issuing of Declaration by Ministers.

The tasks ahead in the needed reform of the multilateral trading system include the need to address both substantive and procedural issues[46]. The grievances of developing countries-that they have not benefited from the Uruguay Round and

that the problems of implementation of the WTO agreements have to be rectified – must be urgently and seriously tackled. The process of decision-making and negotiations in the WTO has

to be democratized and made transparent. “Green Room” meetings that are not mandated by the general membership should be

46. ***Khor M;*** Loc Cit p. 28

discontinued. Every member, however small, must have the right to know what negotiations are taking place and to take part in them. The following sections cover some of these issues in more detail.

4.7.2 Lack of Realization of Anticipated Benefits for Developing Countries From The Uruguay Round

When the Uruguay Round was concluded and the WTO established, developing countries had expected to benefit significantly from increased access to the markets of developed countries for products (especially in the textiles and agriculture sectors) in which they had a comparative advantage. However, several years later, officials from many developing countries are complaining that their countries have not benefited and the expected benefits to them have not materialized due to the non-implementation of the commitments of the developed countries[47].

The main problems include the following:

(a) Tariff peaks remain

A lowering of Northern countries’ industrial tariffs is supposed to benefit those Southern countries with a manufacturing export capacity. However, “tariff peaks” (or high import duties on certain products) remain in the rich countries for many industrial products that developing countries export. This means that some potential exports of developing countries are still blocked.

(b) No gains yet from the supposed phasing – out of textiles quotas

The Uruguay Round's Agreement on Textiles and Clothing was aimed at phasing out the special treatment of the textiles and clothing sector, in which the developing

47. Khor M (1999). Foreign Investment Policy, the multilateral agreement on investment and development issues. Paper contributed to the UNDP Human Development Report 1999. New York, United Nations

countries for the past quarter-century had agreed to subsidize the North by allowing quotas to be placed on their exports in this sector. This 10-years phase-out was supposed to be the aspect of the Uruguay Round to most immediately benefit the South, or at least the Southern countries that export textiles, clothing and footwear. However, textile-exporting developing countries have been disappointed and frustrated that years after the phase-out period began, they have not yet seen any benefits. This is due to the "end loading" of the implementation of developed countries' commitments (that is, the liberalization with regard to most of the products they buy from developing countries will take place only in the final year or years), and the benefits will accrue only at the end of the 10-year phase-out period. Although developed countries have legally complied with the agreement by phasing out quotas proportionately, in fact they have chosen to liberalize on products that are listed but which they have not actually restrained in the past. As a result, developing countries have not benefited. They have made proposals several times that the developed countries improve the quality of their implementation of the Agreement on Textiles and Clothing.

(c) Increase in non-tariff barriers such as anti-dumping measures

Developing countries are also concerned that the supposed improvement of market access through tariff reductions is being offset by an increase in non-tariff barriers in the rich countries. A major problem has been the use (or rather misuse) of anti-dumping measures, especially by the United States and the European Union, on products of developing countries, including on textiles.

Many countries have proposed that the misuse of these measures be curbed by amendments to the Anti-Dumping Agreement.

(d) Continued high protection in agriculture

The Agriculture Agreement was supposed to result in import liberalization and reduction of domestic support and export subsidies for agricultural products especially in the rich countries, and this was expected to improve the market access of those Southern countries that export agricultural products. As it turned out, however, the protection and subsidies have been allowed to remain very high. For example, in the initial year of the agreement, there were very high tariffs in the United States (sugar 244 percent, peanuts 174 percent); the EU (beef 213 percent, wheat 168 percent); Japan (wheat 353 percent), and Canada (butter 360 percent, eggs 236 percent)[48]. The rich countries have to reduce such high rates by only 36 percent on average to the end of 2000.

The tariffs have thus still been very high, making it impossible for developing countries' exports to gain access.

Also, the agreement has allowed the developed countries to maintain most of the high subsidies that existed prior to the Uruguay Round conclusion. For example, they are obliged to reduce their very high domestic subsidies by only 20 percent. In contrast, most developing countries had little or no domestic or export subsidies earlier. They are now barred by the Agriculture Agreement from having them or raising them in future. There is a great imbalance in this odd situation[49].

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48. ***Das BL***. WTO Agreements: Deficienes, Imbalances and Required Changes. Penang, Malaysia, Third World Network (1998), quoted by ***Khor M***. *Loc Cit p. 31*

49. Khor M. Ibid.

4.8 "Implementation challenges" Faced By Developing Countries From The Uruguay Round

Developing countries generally are also facing challenges in their having to implement their obligations in the WTO agreements. The Uruguay Round resulted in several new legally binding agreements that require them to make changes to their domestic economic policies in such diverse areas as services, agriculture, intellectual property and investment measures. Many developing countries did not have the capacity to follow the negotiations, let alone participate actively, and did not fully understand what they committed themselves to. Some of the agreements' grace period and implementation had expired. This had complicated the challenges arising from implementation of those agreements.

(a) Major challenges

The Major challenges include the following:-

- Having to liberalize their industrial, services and agriculture sectors may cause dislocation to the local sectors, firms and farms of many developing countries as these are generally small or medium-sized and unable to compete with bigger foreign companies or cheaper imports. This could threaten the jobs and livelihoods of local people.
- The Uruguay Round removed or severally curtailed the developing countries' space or ability to provide subsidies for local industries and to maintain some investment measures such as requiring that investors use a minimum level of local material in their production. This could affect the viability of some local firms and sectors.
- The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) will severally hinder or prevent local firms from absorbing some modern technologies over which other corporations (mainly foreign firms) have intellectual property rights (IPRs); this would curb the adoption of modern technology by domestic firms in developing

countries. Also, the prices of medicines and other essential products were expected to rise significantly at the take off of the new IPR regime.

The concerns of some of the developing countries with respect to some of the agreements are as follows:

(b) The Agriculture Agreement

The Agriculture Agreement could have severe negative effects on many Third World countries. Most of them (excepting the least developed countries) will have to reduce domestic subsidies to farmers and remove non-tariff controls on agricultural products, converting these to tariffs and then progressively reducing these tariffs. This will impose global competition on the domestic farm sector and may threaten the viability of small farms that are unable to compete with cheaper imports. Many millions of small Third World farmers could be affected. There is also a category of developing countries which are net food importers. As subsidies for food production are progressively reduced in the developed countries, the prices of their exports may increase; the net food importers may thus face rising food import bills.

A Food and Agriculture Organization (FAO) study of the experience of 16 developing countries in implementing the Uruguay Round Agriculture Agreement concluded that[50]:

50. *FAO (1999). Experience with the implementation of the Uruguay Round Agreement on Agriculture, synthesis of country case studies. Rome, Food and Agriculture Organization of the United Nations, Common and Trade Division*

> A common reported concern was with a general trend towards the concentration of farms. In the virtual absence of safety nets, the process also marginalized small producers and added to unemployment and poverty. Similarly, most studies pointed to continued problems of adjustment. As an example, the rice and sugar sectors in Senegal were facing difficulties in coping with import competition despite the substantive devaluation in 1994.

Many developing countries, during the preparations for the WTO's Seattle Ministerial meeting, had proposed to amend the Agriculture Agreement to take into account their concerns on implementation, especially the effects on rural livelihoods and food security. Several

developing countries have proposed that developing countries be given flexibility in implementing their obligations on the grounds of the

need for food security, defense of rural livelihoods and poverty alleviation.

They proposed that in developing countries, food produced for domestic consumption and the products of small farmers shall be exempted from the Agriculture Agreement's disciplines on import liberalization, domestic support and subsidies. These proposals were pursued by the developing countries through series of negotiations at the WTO's Ministerial Conference which gave rise to the following decisions:

By September, 2003 modalities for special treatment for least-developed countries members were established in accordance with Article XIX:3 of WTO's General Agreement on Trade in Services (GATS). The Hong Kong Ministerial Declaration of December 2005 called upon members to establish appropriate mechanisms to give effect to the modalities.

The Ministerial Conference in Geneva on 17 December, 2011 adopted a waiver to enable developing and developed-country members to provide preferential treatment to services and service suppliers of least-developed country (LDC) members. Of the 153 WTO Members, 31 are LDCs. This waiver will last for 15 years from the date of adoption and releases developing and developed – country members from their legal obligation to provide non-discriminatory treatment to all partners.

Other decisions of the Ministerial Conference that addressed the concerns of developing countries included:

- Extending the moratorium on "non-violation" complaints in intellectual property
- Special provisions for small economies
- Extending the deadline for least developed countries to protect intellectual property

- Speeding up LDC Membership negotiations [51].

(c) **The Agreement on Trade-Related Investment Measures (TRIMs)**

In the TRIMs Agreement, "investment measures" such as the local-content requirement (obliging firms to use at least a specified minimal amount of local inputs) and foreign exchange balancing (limiting the import of inputs by firms to a certain percentage of their exports) now prohibited for most developing countries. Such measures had been introduced to protect a country's balance of payments, promote local firms and enable more linkages to the local economy. The prohibition in these investment measures have made the attainment of developing goals much more difficult and cause developing countries to lose some important policy options to pursue their industrialization[52].

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51. *World Trade Organization: 2011 News Items Webmaster@wto.org*

52. Khor M. Loc Cit pp. 34 - 35

Several developing countries proposed in the pre-Seattle negotiations in the WTO that the TRIMs Agreement be amended to provide developing countries the flexibility to continue using such investment measures to meet their development goals. In the view of the TRIMs Agreement, the problems of implementation for developing countries should be highlighted. The TRIMs Agreement could be amended to allow developing countries the right to have "local-content" policy and to limit the import of inputs to a certain percentage of a firm's exports.

(d) The TRIMS Agreement

The South's collective loss in the Uruguay Round was most acutely felt in the TRIMS Agreement, through which countries are obliged to introduce Intellectual Property Rights (IPR) legislation with standards of protection that are similar to those in Northern countries. This will hinder Southern countries' indigenous technological development. It should be noted that the

present industrial countries did not have patent or IPR laws, or laws, as strict as those that will now be imposed through the TRIPS Agreement, during their industrializing period, and this enabled

them to incorporate technology originating from abroad in their local systems.

The agreement will also give rise to increasing technical payments such as royalties and license fees to transnational companies that own most of the world's patents.

The new IPR regime will also have a significant impact on the prices of many products. By restricting competition, the IPR rules will enable some companies to raise the prices of their products far beyond cost and thus earn rents in terms of monopoly revenues and profits.

Also, most Third World countries have in the past exempted agriculture, medicines and other essential products and processes from their national patent laws, but with the passage of the TRIPS Agreement, all products are subject to IPRs unless explicitly exempted. The prices of medicines are expected to shoot up in many countries, reducing access by consumers. The problem of the inability of AIDS patients in developing countries to have access to patented drugs due to their high prices has already become a major issue of concern.

The TRIPS Agreement also opens the door to the patenting of life forms such as micro-organisms and modified genetic materials. Many environmentalists are concerned that this will be detrimental to the global environment as the present lack of controls and accountability in biotechnology research and application will likely accelerate biodiversity loss and could threaten natural ecosystems. For plant varieties, the TRIPS Agreement does permit countries the option to either introduce patents or institute an alternative "effective" sui generis system of intellectual property protection. Many governments, NGOs and farmers' groups in developing countries are concerned that the practice of "biopiracy" (patenting in the North of biological materials and

resources originating sui generis systems are established in developing countries that protect the traditional knowledge and genetic resources of farmers, these farmers may be further disadvantaged by plant-variety protection regulations.

Given these many problems, the TRIPS Agreement should be amended to take into account development, social and environmental concerns. Meanwhile, the grace period before implementation should be extended. Many developing countries have made formal proposals before and at Seattle that a review of the TRIPS Agreement along these lines be made and that there should be an extension of the implementation deadline. These and other proposals can be pursued in the process of the review of the agreement.

Recently there have been calls from some eminent economists and from some NGOs to study whether the TRIPS Agreement should be taken out of the WTO. Their argument is that the agreement is a protectionist device and should have no place in an organization that is supposed to be committed to liberalization. Moreover, IPRs is not a trade issue. By locating it in the trade system, the door is open to overloading the WTO with more non-trade issues. It is however note worthy that the Ministerial Conference held in 2011 has assured of extension of the LDC transition period with respect to the TRIPS Agreement in its future work [53].

These are only a few examples of serious problems facing Nigeria and other developing countries in their implementing their WTO obligations, now and especially in future. Thus, many of the countries are arguing that they need time to digest the outcome of the Uruguay Round, and that some of the rules that are imbalanced or inequitable and that generate serious problems should be reviewed and amended. In fact some of the agreements themselves mandate that reviews be carried out. The next phase of the WTO's activities should focus on the review process, so that the opportunity to rectify the defects of the agreements can be taken. This review process would in itself be a massive task, involving analyses of the weaknesses of the various

agreements, assessments of how they have affected or will affect developing countries, proposals to amend the agreements, and negotiations on these proposals.

53. World Trade Organization: 2011 News Items. webmaster@wto.org

4.9 Moves For New Issues In WTO

A major reason for the failure at Seattle was the reluctance of many developing countries to give the WTO a mandate for taking on new issues or negotiating new agreements, which had been proposed by some of the developed countries.

There is much merit in the view that the WTO should focus in the next few years on reviewing problems of implementing the existing agreements and making the necessary changes in the agreements. These will be enormous tasks. They will not be properly carried out if there is a proliferation of new issues in a new round of negotiations. The extremely limited human, technical and financial resources of developing countries and their diplomats and policy-makers would be diverted away from the review process to defending their interests in the negotiations on new issues. The limited time of the WTO would also be mainly devoted to the new issues.

Moreover, most of the proposed new issues would also have the most serious consequences of the South's future development. Issues such as investment rules, competition policy and government procurement are strictly not trade issues and it has been argued that they do not belong in the WTO. There is a suspicion on the part of some developing countries that these issues are sought to be placed there by the developed countries to take advantage of the enforcement capability (the dispute settlement system) of the WTO, so that disciplines can be effectively put on developing countries to open their economies to the goods, services and companies of the developed countries. Other issues relate to labour, social and environment standards. Most developing countries have argued that these issues should also not enter the WTO as they could be made use of as protectionist devices against the products and services of

developing countries. Should pressure be continued to be applied for these new issues to be accepted into the WTO, then the WTO will continue to be split, and, moreover, other pressing issues such as the problems resulting from the existing agreements would not be tackled.

4.10 **The Approach Needed**

(i) In the WTO, members should take a more realistic approach towards liberalization, with a slowdown to pressures being put on developing countries for further liberalization. If the developed countries continue after so many years to maintain such high protection in agriculture, textiles and some industrial products (and argue that they need more time to adjust), then developing countries should not be subjected to more pressures to continuously liberalize on the ground that it is automatically good for them.

(ii) It should be reasserted that the main objective of the multilateral trading system is the development of developing countries, which form the majority of the membership. Liberalization is a means, and there should be sufficient flexibility to implement measures when appropriate. The goal and dimension of development must be primary in WTO rules and in assessment of proposals. The "special and differential treatment" principle should be greatly strengthened operationally, above its present weak state.

(iii) Resolving the problems of implementation of the Uruguay Round agreements should be given top priority at the WTO.

The following steps should be taken:

(a) Developed countries should greatly increase access to their markets for developing countries' products, such as in agriculture, textiles and industrial products (where there are now high tariffs); moreover, they should stop taking protectionist measures such as anti-dumping measures;

(b) In the areas where developing countries face problems in implementing their obligations, a systematic exercise to review and amend the existing rules should be carried out as a matter of priority;

(c) In the meanwhile, where the transition period for implementation for developing countries has expired an extension should be given at least until the review process is completed. There should also be a moratorium on bringing dispute cases against developing countries on issues where the reviews are taking place.

(iv) There should not be pressures to introduce new issues such as investment, competition, procurement, and labour and environmental standards in the WTO as these would overboarden the multilateral trading system further and lead to more systemic stress and tensions.

(v) As the Seattle meeting showed, there is a need for serious reform of the system and culture of decision-making in the WTO. The reform process itself should be conducted in a manner whereby all members can fully participate. The reform should aim at a result whereby WTO meetings are run on the basis of full transparency and participation, where each member is given the right to be present and to make proposals. Even if some system of group representation is considered, all members should be allowed to be present at meetings and have participation rights. The WTO secretariat should also be impartial and seen to be impartial. The system should reflect the fact that the majority of members are now from developing countries, which have as great a stake or more in a truly fair and balanced multilateral system as the developed countries, and therefore the system must be able to provide the developing countries with adequate means with which to voice their interests and exercise their rights [54].

54. ***Das BL***. Some Suggestions for improvements in the WTO Agreements. ***Penang Malaysia,*** Third World Network (1999), quoted ***by Khor M***. Loc Cit pp. 39 - 41

CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 SUMMARY

This research considered the Regulatory Environment for Foreign Investment in Nigeria with particular attention on globalization of national policies and policy making mechanisms and its negative effects on foreign investment regulations in Nigeria. In so doing the work looked at protectionism in regulatory policies as applied by developed countries

in earlier stages of their economic development to facilitate situating the Nigerian position on the same subject. The Nigerian Companies and Allied Matters Act (CAMA) has made efforts to introduce the incorporation of foreign companies in Nigeria before they can commence business in Nigeria to facilitate their regulation in Nigeria as Nigerian Corporate Citizens (entities) which is common with other countries of the world. For example, like companies Act of many other countries the CAMA provides for a foreign company wishing to do business in Nigeria to incorporate as a Nigerian company before commencement of business in Nigeria, failing which upon conviction shall be subject to penalty by way of fine(s). Also companies exporting technology into Nigeria under the National Office for Technology Acquisition and promotion Act (NOTAP) should register such contracts and agreements and furnish accurate returns (information) on such contracts and agreements default in so doing shall attract fines and imprisonment or both.

There are also other significant provisions omitted and those cauched such that regulatory benefits are whittled away contrary to commonly regarded best practices in foreign investment regulations. The findings identified below indicate that there are significant best regulatory practices which need to be included in the CAMA and NOTAP. These would facilitate effective legal foreign investment regimes in Nigeria. In the same vein they form the reasons for recommendations for improvement. The major findings include the following:

Findings

5.1.1 Penalties in Nigerian investment regulatory legislations.

Section 55 of the Companies and Allied Matters Act (CAMA) 2004 prescribes penalty against a foreign company for non compliance with Section 54 CAMA. Penalty for default in incorporation before commencement of business is N2,500.00 upon conviction. Fine for the officer of the company

who authorized the breach is N250.00.Where the offence is a continuing one N25.00 fine will be paid for every day during which the default continues.

In the same vein Section 15(1) of the National Office for Technology Acquisition and Promotion Act (NOTAP.) Prescribes penalties for failure to furnish returns and upon conviction the fine is N2,000.00 or imprisonment for a term of six (6) months or both. Section 15(2) NOTAP Act prescribes penalty of N1,000.00 for furnishing false returns or to an imprisonment for six months or to both fine and imprisonment. These Acts failed to prescribe penalties/fines that have the force of deterrence as it is done in Section 68 of Nigerian Oil and Gas Industry Content Development Act, 2010 where the fine is 5 percent of the project sum in which the breach is committed.

This failure of the penalties/fines in these Acts to carry the force of deterrence especially when most of the foreign companies involved are multinational corporations raises concern about compliance by the foreign companies. It is opined that such non deterrent penalties/fines will amount to a mere pat on the back and the Act observed only by constant breach.

5.1.2 **Procedure for exemption of foreign company from registration in Nigeria.**

The common practice as identified by the Companies and Allied Matters Act (CAMA) under Section 56 (1) (a) - (d) is that a foreign company qualifies for exemption from registration if it is invited into Nigeria by or with the approval of the Federal Government to execute special individual project, in Nigeria for the execution of specific individual project on behalf of a donor country or international organization; Foreign government owned companies engaged solely in export promotion activities, and Engineering consultants and technical experts engaged on any individual specialist project under contract with any of the governments in the Federal or any of their agencies or with any other body or person, where such contract has been approved by the

Federal Government. The essence is to contribute to the well being of the nation as envisioned by Nigeria and negotiated with such exempted foreign companies, donor country or international organization. However, the procedure for exemption of foreign companies as categorized under the CAMA is to the effect that such application should be made to the Council of Ministers through the Secretary to the Government of the Federation. The implication is that the procedure is unnecessarily cumbersome and time wasting. These will send a wrong signal to such companies, donor agencies and countries that Nigerian government is not seriously receptive to projects that are negotiated and beneficial to her citizens and nation. This will discourage donor international organizations and countries willing to undertake specialist projects under contract with any of the governments in the Federation or their agencies.

5.1.3 Vetting of concluded agreements by regulatory agencies in Nigeria.

The National Office for Technology Acquisition and Promotion (NOTAP) Act provides for the agency to vet agreements to be submitted to it by Nigerian Company which have been negotiated and concluded with the foreign/ technical partners. This lacuna in the Act which does not provide for the involvement of the regulatory agency (NOTAP) at the negotiation of contracts and agreements between Nigerian companies and their foreign technical partners/ consultants leaves much to be desired in the quest for maximum benefit from technology transfer and foreign investment in Nigeria.

5.2 CONCLUSION

From the findings stated above it is observed that since the penalties prescribed by the CAMA and NOTAP Act are not punitive enough to deter the foreign companies involved from defaulting; the preference will be to breach the provisions of the Acts and pay the penalties/fines which are immaterial. Where this becomes the norm, it will make nonsense of such investment

regulations and the Nigerian regulatory environment and the quest to make foreign investments beneficial to the Nigerian economy.

The implication of this will be that the power to control foreign investments and the conditions that affect the behaviours of foreign investors and development of investment regulations in Nigeria would have been whittled away.

Another important defect that has been noticed from the findings is in connection with procedure of exemption of foreign companies in Nigeria from registration under the CAMA. It is therefore opined that where Nigeria maintains this procedure in granting exemption to foreign companies coming into Nigeria to render specific approved services with the attendant bottlenecks and delays, it will be interpreted as unseriousness on the part of Nigeria and discourage donor nations and international organizations and their agencies from coming to render such specific personal specialized services to the country for the benefit of her citizens.

Finally, the failure of the National Office for Technology Acquisition and Promotion (NOTAP) amongst other foreign investment regulatory agencies in Nigeria to be involved at the negotiation stage rather than just vetting of concluded agreements and contracts submitted to it denies Nigeria and Nigerian companies the deployment of expert skills in negotiating of such agreements and contracts with their foreign technical partners which in most cases are highly experienced multinational corporations MNCs. Thereby denying the country the much desired maximum benefit from technology transfer and foreign investment in Nigeria.

5.3 RECOMMENDATIONS

5.3.1 Inadequate Penalty regimes in Nigerian investment regulatory legislations.

The various penalty regimes in Nigerian investment legislations such as Section 55 of CAMA and Section 15(1) (2) of NOTAP are powerful aspects of the regulations which should facilitate its full compliance by the foreign companies. It is desirable that these penalties should be the force behind these regulatory legislations. The penalty regimes should be reviewed upward to carry the force of deterrence and reduce the level of non compliance with such legislations by foreign companies to the barest minimum.

5.3.2 Simple procedure for exemption of foreign company from registration in Nigeria.

Despite the fact that the importance of incorporation of a foreign company in Nigeria before commencement is provided in the CAMA and has been alluded to in this research, it has also been provided in this same Act for exemption of certain categories of foreign companies from registration based on its merits as have also been discussed in this work. Moreover, this provision is favoured because of the benefits it gives to the economy of the nations. It is therefore recommended that Section 56 CAMA should be amended to vest the power of exempting such foreign companies under Section 54 as categorized in Section 56 (1) (a)-(d) seeking exemption from registration in Nigeria in the Minister of Trade and Investment through the departments of his Ministry.

This will enhance efficiency and expediency in handling such matters in the same way the Minister of Interior through the Immigration Services handles issues of expatriate quotas, business permit or in which appropriate organs handle incentive regimes. This is because foreign companies that qualify for exemption have been categorized in the Act consequent upon

government approval and the specialized Services they are bringing to Nigeria. This makes it necessary to remove all bottlenecks and delay which the involvement of the Council of Ministers brings to bear.

5.3.3 **Negotiation experts from regulatory agencies to be involved in concluding agreement with companies.**

The role of the NOTAP amongst other regulatory agencies in negotiating and concluding agreements and contracts between Nigerian companies and foreign companies is pivotal to the benefits derivable from such agreements to Nigeria. Given the importance of the NOTAP in this regard, it is recommended that Section 4(a) (b) (c) of NOTAP Act should be strengthened to involve a designated department under a director to be involved from the negotiation of agreements/contracts between Nigerian companies and their foreign partners in bringing investment and transfer of technology to Nigeria. This will put the interest of Nigeria and Nigerians first as is the case with the provisions of the Nigerian Oil and Gas Industry Content Development Act, 2010.

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