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The WTO Agreement on Trade Related Investment Measures and the Flow of Foreign Direct Investment in Africa: Meeting the Development Challenge

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THE WTO AGREEMENT ON TRADE RELATED INVESTMENT MEASURES AND THE FLOW OF FOREIGN DIRECT INVESTMENT IN AFRICA: MEETING THE DEVELOPMENT CHALLENGE†

Victor Mosoti*

I. Introduction	182
II. The Regulation of FDI and its link with Trade	187
A. The Legal Framework for Foreign Investment Regulation in the GATT/WTO	188
1. GATT 1947	188
2. Uruguay Round Negotiations	189
3. Uruguay Round Results: Agreements on TRIMs	189
4. Other Agreements Relevant to Trade and Investment	191
5. Post-Uruguay Round Developments.....	192
B. Reasons Why it is Necessary to Have a Legal Framework for FDI Regulation	194
1. Linkages Between Trade and FDI	194
2. TRIMs and FDI Inflows in Africa	195
3. Responses to TRIMs Agreements by Some Selected Countries:	
Nigeria	196
Uganda	197
Mali	198
Egypt.....	199
Zambia	199
Mauritius.....	199

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South Africa	200
III. Conclusion.....	201

I. INTRODUCTION

Optimists usually describe Africa as the last great frontier for investment.¹ Pessimists, on the other hand, look at the consistently dismal economic performance of the region and discount any potential for brisk investment activity. However, both agree that any region that attracts large inflows of Foreign Direct Investment (FDI) is bound to register strong economic development and that FDI has been one of the principal engines for economic globalization.² Africa remains a marginal recipient of FDI. The most up to date figures peg this at two percent of the global FDI inflows.³ FDI inflows into the region rose from \$9 billion in the year 2000 to more than \$17 billion in 2001.⁴ Although this increase looks impressive, the report goes on to point out that FDI for most countries in the region remained more or less as it was in 2000.⁵ The report attributes the increase to a few large FDI projects, notably in South Africa and Morocco.⁶

The primary characteristics of FDI into the region also remained the same. A large proportion of it was directed towards the primary sector, especially oil and gas, which explains why countries such as Angola, Nigeria, Sudan and Equatorial Guinea have been high recipients of FDI.⁷ Botswana, Namibia, South Africa, Egypt, Tunisia, and Morocco have also received a large part of the continental inflows.⁸ The most attractive countries are now cited as South Africa and Egypt, while the most attractive sectors are tourism, natural resource industries, and

¹ See Annual Report of UNIDO, U.N. Industrial Development Organization (1999). See generally Special Report of the New African Magazine (Nov. 1999).

² See Ludger Odenthal, *FDI in Sub-Saharan Africa*, OECD Technical Paper No. 173, at 1.

³ See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), WORLD INVESTMENT REPORT 2002: TRANSNATIONAL CORPORATIONS AND EXPORT COMPETITIVENESS, at 13-14, U.N. Doc. UNCTAD/WIR/2002, U.N. Sales No. E.02.II.D.4 (2002), available at www.unctad.org.

⁴ See *id.* at 48.

⁵ See *id.*

⁶ See *id.*

⁷ See Odenthal, *supra* note 2, at 16.

⁸ See *id.*

industries for which the domestic market is important, such as telecommunications.⁹

Attracting FDI is generally advocated as the key to solving most of Africa's economic problems. This year's *Economic Report on Africa* by the United Nations Economic Commission for Africa is categorical that "FDI is the most important source of external finance, more important than commercial loans, portfolio investment and official development assistance."¹⁰ It is the thrust behind the New Partnership for African Development (NEPAD).¹¹ It is also the reason why many African coun-

⁹ See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), WORLD INVESTMENT REPORT 2000: CROSS-BORDER MERGERS AND ACQUISITIONS AND DEVELOPMENT, at 14, U.N. Doc. UNCTAD/WIR/2000, U.N. Sales No. E.00.II.D.20 (2000), available at www.unctad.org.

¹⁰ U.N. Economic Commission for Africa (UNECA), *Economic Report on Africa 2002: Tracking Performance and Progress*, 2 (2002), available at <http://www.uneca.org/era2002/mainframe.htm>. The Report notes further that Africa's share of FDI into developing countries has dropped from 25% in the early 1970s to just 5% in 2000. See *id.*

¹¹ See CUTS, NEPAD: Another Initiative for Africa' in *Investment and Development*, No. 3 at 12 (May 2002). Yash Tandon provides some very interesting, if somewhat cynical, perspectives on the NEPAD and its FDI initiatives in an essay entitled *NEPAD and FDI's Symmetries and Contradictions*. They deserve full quotation;

"we must assess the value of the . . . strategy offered by NEPAD on how to lure FDI into Africa. The first priority is to address investors' perception of Africa as a 'high risk' continent, especially with regard to security of property rights, regulatory framework and markets. Several key elements of the New Partnership for Africa's Development will help to lower these risks gradually, and include initiatives relating to peace and security, political and economic governance, infrastructure and poverty reduction. Interim risk mitigation measures will be put in place, including credit guarantee schemes and the strong regulatory and legislative frameworks. The next priority is the implementation of a Public-Private sector partnership (PPP) capacity-building programme through the African Development Bank and other regional development institutions, to assist national and sub-national governments in structuring and regulating transactions in the provision of infrastructural and social services. The third priority is to promote the deepening of financial markets within countries, as well as cross-border harmonization and integration, via a Financial Market Integration Task Force. Initially, this will focus on the legislative and regulatory environment for the financial system. The objective behind all this is to show to the investors that Africa is not a "high risk" continent, and that they can safely bring their money in, do what they want to do with it, and take it with them when they want it and how they want it."

Yash Tandon, NEPAD and FDI's Symmetries and Contradictions, African Forum for Envisioning Africa, April 26-29, 2002, in Nairobi, Kenya 19-20, available at

tries wanted to be included in the Generalized System of Preferences (GSP) scheme springing from the United States African Growth and Opportunity Act (AGOA)¹² from which some demonstrable benefits have resulted for some African countries.¹³ The deep interest and effort at regional integration arrangements in the region may also be partly explained by the desire to create larger and more viable markets, and therefore more attractive destinations for FDI.¹⁴ Many investors find investing in Africa a very risky venture. According to the World

<http://www.worldsummit2002.org/texts/YashTandon.pdf>. On NEPAD, for a general discussion, see PATRICK BOND, *FANON'S WARNING: A CIVIL SOCIETY READER ON THE NEW PARTNERSHIP FOR AFRICA'S DEVELOPMENT* (2002); WASHINGTON A.J. OKUMU, *THE AFRICAN RENAISSANCE: HISTORY, SIGNIFICANCE AND STRATEGY* (2002).

¹² See African Growth and Opportunity Act (AGOA), 19 U.S.C. §§ 3701-3741 (2000). AGOA's central provisions seek to foster increased trade, investment, and economic developments in Africa by expanding the access African products have to the U.S. market. It removes existing product exclusions and other restrictions in the U.S. Generalized System of Preferences program. As a result, AGOA affords almost all non-textile and non-apparel products from eligible sub-Saharan African countries duty-free and quota-free access to the U.S. market. In addition, AGOA expands the access to the U.S. market accorded textile and apparel products from African countries. However, access to the new trade preferences is conditioned on the U.S. President first determining that a country meets the AGOA eligibility requirements and then designating a country as a "beneficiary sub-Saharan African country." A "beneficiary sub-Saharan African country" must also satisfy the general GSP eligibility criteria. Under AGOA only those sub-Saharan African countries that the President determines are in the process of adopting economic and social policies that will promote reform and a market economy are to be eligible countries. See generally J. M. Migai Akech, *The African Growth And Opportunity Act: Implications For Kenya's Trade And Development*, 33 N.Y.U. J. INT'L L. & POL. 651 (2001). See also Charles Whittier, *The Africa Growth and Opportunity Act: A Cup Half Empty or Half Full?*, BLACK BUS. J. (1998), available at <http://www.bbjonline.com/archives/AfricaGrowth.html> (last visited Oct. 12, 2002); South Centre, *Lopsided Rules of North-South Engagement: The African Growth and Opportunity Act* (1999), available at <http://www.southcentre.org/publications/usafrica/toc.htm> (last visited October 13, 2002) (noting the developed countries' recent efforts to forge a "new partnership" with Sub-Saharan African countries, and stating that these "new partnerships are mostly inspired by the globalization-liberalization policy framework . . . which is at the heart of the controversial orthodox structural adjustment measures which developing countries . . . have been encouraged to embrace by the International Monetary Fund and the World Bank."). *Id.*

¹³ U.S. imports have grown considerably in recent years, from about \$1.5 billion a month in 1999 to \$2.3 billion a month in 2000. U.S imports from Africa covered by the AGOA have "increased sharply" since the coming into force of the Act. See UNECA, *Economic Report on Africa 2002*, *supra* note 10, at 2.

¹⁴ See UNECA, *Annual Report on Integration in Africa*, 2 (Mar. 2002), available at <http://www.uneca.org/adfiii/ariaoverview.htm>.

Bank's *Can Africa Claim the 21st Century?*,¹⁵ investors are averse to the high costs and high risks associated with doing business in the continent; the study goes on to suggest that these high risks and costs could be lowered "by locking in reforms and delivering business services more efficiently, with less corruption, better infrastructure and financial services, and increased access to the information economy."¹⁶ Therefore, it is not confounding that the region remains weak in attracting large FDI inflows, in spite of the acknowledged fact that it consistently yields the highest return for foreign investment compared to all other regions of the world; four times the return compared to developed countries, double the return from Asia, and two-thirds more than from Latin America.¹⁷

The attraction of FDI is a top priority for many African governments. Most of them now see it as their duty to do everything in their power to create an environment that is conducive to FDI. The argument that has been advanced consistently, and that lies at the heart of the push for multi-lateral disciplines on investment, is that a conducive environment mainly results from granting transnational corporations the freedom to enter into "any industry combined with non-discrimination between foreign and domestic investors."¹⁸ In the eyes of the transnational corporations, this means that investment decisions are left in the hands of investors and not the government.¹⁹

The idea that it is best to leave the decisions about investment to the discretion of the foreign investor rather than to the developing country's government implies one fundamental assumption, that left to operate on its own dictates, foreign investment will flow in a manner that accords with each country's development imperatives. This is a rather simplistic and untenable assumption. Every country has peculiarities that

¹⁵ See *Can Africa Claim the 21st Century?*, The World Bank, at 4 (Apr. 2000), available at http://www-wds.worldbank.org/servlet/WDSCContentServer/WDSP/IB/2000/. . /multi_page.tx.

¹⁶ *Id.*

¹⁷ See Annual Report of UNIDO, *supra* note 1, at 2.

¹⁸ Tetteh Hormeku, *Investor Rights, FDI Flows and Development: The Experience of Africa*, THIRD WORLD NETWORK BRIEFING PAPER, at 1 (2001).

¹⁹ See *id.*

should be taken into account.²⁰ The country's decision makers are in the best position to most accurately determine what is good for the country, and therefore need some "policy space" to make such decisions. As India has remarked in a paper presented at the WTO's Working Group on the Relationship Between Trade and Investment:

Development is a complex process. There is no single formula that can fit into every economic situation in such a manner that it inevitably leads to growth. Developing countries, therefore, need policy space so that they can determine for themselves how the process of economic development can be speeded up and the welfare of their citizens enhanced. This also includes the policy space to determine the manner in which investment shall be regulated and channeled. Any multilateral discipline that seeks to limit this policy space, by its very definition, would reduce the policy options available to developing countries to use foreign investment for promoting development.²¹

Additionally, African countries have, especially over the past fifteen years, adopted in essence most of the measures in their investment policies that have been deemed necessary to assure the priority of investors' interests. In fact, upon the conclusion of the Uruguay Round, all that most African countries had to do by way of notification of WTO inconsistent measures was to simply state that no such measures were applied in their respective countries. Sadly, these reforms, most of which were undertaken as part of the Bretton Woods Institutions Structural Adjustment Programs (SAPs), have not yielded much fruit by way of increased FDI inflows.²² It is ironic that even when such FDI has come, it has usually been directed at sectors that have very little potential for meaningful structural transformation and development in these countries.²³

²⁰ This and many other sound arguments formed the case against the OECD-sponsored Multi-lateral Agreement on Investment.

²¹ Working Group on the Relationship Between Trade and Investment-World Trade Organization, *Communication from India*, WT/WGTI/W/148 (Oct. 2, 2002), available at <http://www.wto.org>.

²² See *Can Africa Claim the 21st Century?*, *supra* note 15, at 8-9.

²³ See comments discussed *infra* note 11.

II. THE REGULATION OF FDI AND ITS LINK WITH TRADE

FDI has been subject to various types of policies by both host and parent countries, from the really extreme ones such as nationalization and/or appropriation, to positive incentives such as tax holidays.²⁴ Nationalization is rare now, but the threat of it is always real.²⁵ Disincentives such as restrictions on foreign equity share, domestic content requirements,²⁶ production or export requirements, restrictions on remittance of profits, and many others are much more common. Most of the restrictions placed on FDI by poor countries stem from the perception that transnational corporations engage in restrictive and predatory business practices, and that these countries do not have the institutional set-up to effectively enforce competition policies.²⁷

Against this background, countries negotiated several FDI regulation provisions in the Uruguay Round agreements. Among the four broad categories of agreements, namely, goods, services, intellectual property rights, and dispute settlement, the agreements on goods and services contain some FDI regulations. Under goods, the participants negotiated the separate Agreement on Trade Related Investment Measures (*TRIMs Agreement*).²⁸ The Agreement is basically a codification of the

²⁴ See Satya P. Das, *An Indian Perspective on WTO Rules on Direct Foreign Investment* 1 (1999), available at http://www.worldbank.org/wbiep/trade/services_files/Das.pdf.

²⁵ Perhaps the most drastic use of nationalization in Africa was by Idi Amin of Uganda in 1972. Under international law, such acts have always been deemed illegal. The International Court of Justice has had occasion to make pronouncements on expropriation. For instance see *Certain German Interests in Polish Upper Silesia* (F.R.G. v. Pol.), 1926 P.C.I.J. (ser. A), No. 7, at 22 (Feb. 5), the court, speaking of treaty provisions allowing expropriation of foreign property without compensation, stated that such taking is "a derogation from the rules generally applied in regard to the treatment of foreigners and the principle of respect for vested rights." *Id.*

²⁶ See World Trade Organization, *India-Measures Affecting the Automotive Sector, Report of the Panel*, WT/DS146/R, WT/DS175/R (Dec. 21, 2001), available at <http://www.wto.org>.

²⁷ See *Can Africa Claim the 21st Century?*, *supra* note 15, at 4.

²⁸ Eight types of TRIMs are commonly cited; Local content requirements; Trade Balancing Requirements; Foreign Exchange Restrictions; Export Performance requirements; Local Production Requirements; Production Mandates; Mandatory Technology Transfers; Limits on Foreign Equity, and Remittances. See Eden S.H. Yu & Chi-Chur Chao, *On Investment Measures and Trade*, *THE WORLD ECONOMY*, Vol. 21, No.4, 549-61 (June 1998).

Foreign Investment Review Act (FIRA) case.²⁹ The objective of the *TRIMs Agreement*, as set out in its preamble, is to “promote the expansion and liberalization of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country Members, while ensuring free competition.”³⁰

A. *The Legal Framework for Foreign Investment Regulation in the GATT/WTO*

1. *GATT 1947*

The Havana Charter for an International Trade Organization (ITO),³¹ which never came into effect, included a separate chapter on “Restrictive Business Practices,” including several provisions relating to the regulation of foreign investment. The GATT 1947, however, did not contain any provisions explicitly directed at investment measures. Until the early 1980s, the GATT played a marginal role as a multilateral forum for the

²⁹ See *Canada-Administration of the Foreign Investment Review Act, Report of the Panel*, BISD 30S/140 (1984), available at <http://www.sice.oas.org/dispute/gatt/82fira.asp>. The case was perhaps the most significant development with respect to investment in the period before the Uruguay Round. It was a ruling by a GATT panel in a dispute settlement proceeding between the United States and Canada. In the case, the panel considered a complaint by the United States regarding certain types of undertakings that were required from foreign investors by the Canadian authorities as conditions for the approval of investment projects. These undertakings pertained to the purchase of certain products from domestic sources (local content requirements) and to the export of a certain amount or percentage of output (export performance requirements). The Panel concluded that the local content requirements were inconsistent with the national treatment obligation of Article III:4 of the GATT but that the export performance requirements were not inconsistent with GATT obligations. The Panel emphasized that at issue in the dispute before it was the consistency with the GATT of specific trade-related measures taken by Canada under its foreign investment legislation and not Canada's right to regulate foreign investment *per se*. The panel decision in the FIRA case was significant in that it confirmed that existing obligations under the GATT were applicable to performance requirements imposed by governments in an investment context in so far as such requirements involve trade-distorting measures. At the same time, the panel's conclusion that export performance requirements were not covered by the GATT also underscored the limited scope of existing GATT disciplines with respect to such trade-related performance requirements.

³⁰ Agreement on Trade-Related Investment Measures, pmbl., available at http://www.wto.org/english/docs_e/legal_e/18-trims.pdf [hereinafter *TRIMs Agreement*].

³¹ See generally *Havana Charter for an Int'l Trade Organization*, available at http://www.wto.org/english/docs_e/legal_e/havana_e.pdf.

control of measures regulating foreign investment. In 1955, the GATT Contracting Parties adopted a *Resolution on International Investment for Economic Development*, encouraging contracting parties to enter into bilateral agreements to protect foreign investments.³² In the early 1980s, attention turned to the trade-distorting effects of the so-called performance requirements applied by host-country governments in the context of their foreign investment policies. The first significant event confirming that at least certain types of measures regulating investment are subject to the disciplines of the GATT was the FIRA dispute.

2. Uruguay Round Negotiations

Two issues were central to the trade-related investment negotiations in the Uruguay Round. The first issue that separated the parties was whether the disciplines imposed on trade-related investment measures should be limited to the existing GATT articles with certain clarifications or substantially expanded to cover all TRIMs resulting in trade distortion.³³ The second issue was whether TRIMs should be prohibited outright or only be made actionable on a case-by-case basis depending on the actual economic effects or harm of the measure in question.³⁴

3. Uruguay Round Results: Agreement on TRIMs

The *TRIMs Agreement* requires members not to apply TRIMs that are inconsistent with Articles III or XI of the GATT 1994.³⁵ The *TRIMs Agreement* does not define the term “trade-related investment measure” but does include an illustrative, non-exhaustive list of measures that are explicitly regarded as inconsistent with either Article III or XI of the GATT 1994.³⁶

³² See generally *GATT Resolution on Int'l Investment for Economic Development*, BISD 3S/49 (Mar. 4, 1955).

³³ Based on personal discussions with Ambassador Joel Marwa Kisiri, Representative of the African Caribbean and Pacific States in Geneva, and Uruguay Round Negotiator for the United Republic of Tanzania.

³⁴ See *id.*

³⁵ See TRIMs Agreement, art. 2(1), available at http://www.wto.org/english/docs_e/legal_e/18-trims.pdf.

³⁶ See TRIMs Agreement, annex, available at http://www.wto.org/english/docs_e/legal_e/18-trims.pdf.

Examples of prohibited TRIMs are local content requirements, which are contrary to Article III of the GATT 1994 and trade-balancing requirements, which are contrary to Article XI of the GATT 1994.³⁷ TRIMs that were notified to the WTO before April 1995 could be maintained during a transition period of up to two years for developed countries, five years for developing countries and seven years for least-developed countries, subject to possible extensions for developing countries.³⁸ Such extensions have and continue to be considered and granted.³⁹ The *TRIMs Agreement* also includes transparency and notification requirements, and it also set up the Committee on Trade-Related Investment Measures, mandated *inter alia* to “consider whether the Agreement should be complemented with provisions on investment policy and competition policy.”⁴⁰

For those countries that pressed for an extensive *TRIMs Agreement*, the fact that the WTO now explicitly prohibited certain performance requirements was seen as a victory. At the same time, the prohibited TRIMs are prohibited only in the context of *existing* GATT articles. Hence, it has been argued that the *TRIMs Agreement* only confirms what was already prohibited under GATT 1947. The *TRIMs Agreement* does not explicitly address performance requirements falling outside Articles III and XI of the GATT 1994, such as export requirements *per se*, de-linked from imports. Nor does it deal with foreign investment *per se* and its protection such as minimum standards in

³⁷ See *id.*

³⁸ See *TRIMs Agreement*, art. 5, available at http://www.wto.org/english/docs_e/legal_e/18-trims.pdf.

³⁹ See World Trade Organization, *Doha Ministerial Decision*, WT/MIN(01)/17, para. 6 (Nov. 14, 2001), available at <http://www.wto.org>. According to paragraph 6 of the Doha Ministerial Decision on Implementation Related Issues and Concerns, the Ministerial:

6.1 Takes note of the actions taken by the Council for Trade in Goods in regard to requests from some developing country members for the extension of the five-year transitional period provided for in Article 5.2 of Agreement on Trade-Related Investment Measures.

6.2 Urges the Council for Trade in Goods to consider positively requests that may be made by least-developed countries under Article 5.3 of the *TRIMs Agreement* or Article IX.3 of the *WTO Agreement*, as well as to take into consideration the particular circumstances of least-developed countries when setting the terms and conditions including time-frames.

⁴⁰ *TRIMs Agreement*, art. 7, available at http://www.wto.org/english/docs_e/legal_e/18-trims.pdf.

respect of expropriation.⁴¹ The focus of the *TRIM Agreement* remains, therefore, trade in goods, *not the inducement or protection of foreign investment*.⁴²

4. Other Agreements Relevant to Trade and Investment

The *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) is relevant to foreign investment as a result of the relatively broad definition of the term "subsidy" set forth in Article 1.⁴³ This definition may cover certain incentives frequently used by countries to attract foreign investment. Such incentives could be contrary to provisions of the *SCM Agreement* on prohibited and/or actionable subsidies when linked, for example, to export performance or the use of domestic over imported products, or when they cause injury or serious prejudice to other WTO members. Similarly, the domestic support and export subsidy limitations in the *Agreement on Agriculture*, as they may affect foreign investors in the agriculture sector, may also apply to certain types of investment measures.⁴⁴

The *General Agreement on Trade in Services* (GATS) covers foreign direct investment in services as a form of trade in services.⁴⁵ The definition of "trade in services" set forth in Article I: 2 (c) of the *GATS* covers four modes of supply, including "by a service supplier of one Member, through commercial presence in the territory of any other Member." Put differently, the *GATS* covers certain aspects of the entry, establishment, and treatment of foreign investors who provide services in the host country by means of a commercial presence: for example, a South African bank establishing a branch in Botswana. The as-

⁴¹ Such minimum standards form part of customary international law. In some treaties they have been set out fairly conclusively. See, e.g., North American Free Trade Agreement, Dec. 8, 1993, ch. 11, 107 Stat. 2057, 32 I.L.M. 289, 1993 WL 574441; and the Energy Charter Treaty, Dec. 17, 1994, 34 I.L.M. 360 (1995).

⁴² In addition, when it comes to the phase-in periods, accorded to the TRIMs that have been notified, the *TRIMS Agreement* has been seen as a step backwards, temporarily allowing what was already prohibited under GATT 1947.

⁴³ See Agreement on Subsidies and Countervailing Measures, art. 1, available at <http://www.worldtradelaw.net/uragreements/scmagreement.pdf> [hereinafter SCM Agreement].

⁴⁴ See generally Agreement on Agriculture, arts. 6 & 9, available at http://www.wto.org/english/docs_e/legal_e/14-ag.pdf.

⁴⁵ See generally General Agreement on Trade in Services, available at http://www.wto.org/english/docs_e/legal_e/26-gats.pdf [hereinafter GATS Agreement].

pects thus covered are subject to obligations to afford Most-Favored-Nation (MFN) treatment, market access, and national treatment. However, the GATS does not contain provisions on investment protection against expropriation, for example.

Most definitions of "investment" include intellectual property, as is the case with international investment agreements. Hence, the protection offered by the *Agreement on Trade-Related Aspects of Intellectual Property Rights* to foreign holders of intellectual property rights may also affect foreign investment.⁴⁶ Finally, it is worth noting that the plurilateral *Agreement on Government Procurement* requires parties not to discriminate in their government practices against locally established suppliers on the basis of their degree of foreign affiliation or ownership.⁴⁷ Therefore, the Agreement may protect foreign investors in their bids for government contracts.

5. *Post-Uruguay Round Developments*

At the first WTO Ministerial Meeting, held in Singapore in 1996, a Working Group on the Relationship between Trade and Investment (WGTI) was created.⁴⁸ Intense debate has continued within the WGTI on whether it is desirable to create a multilateral framework of rules on foreign investment in the WTO. Separately, the OECD attempted to negotiate a Multilateral Agreement on Investment but failed to reach agreement among its members.⁴⁹ Expropriation was a particularly divisive issue within the OECD discussions.⁵⁰

Concrete proposals for the launching of WTO negotiations on investment were submitted in July and August 1999 by Japan, the European Communities, Switzerland, Korea, Hong Kong, China, Poland, and Costa Rica.⁵¹ A number of developing

⁴⁶ See generally *Agreement on Trade-Related Aspects of Intellectual Property Rights* available at www.wto.org/english/docs_e/legal_e/27-trips.pdf [hereinafter *TRIPS Agreement*].

⁴⁷ See generally *Agreement on Government Procurement*, available at http://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf.

⁴⁸ See Singapore Ministerial Declaration, para. 20, Dec. 13, 1996, available at http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodoc_e/htm.

⁴⁹ See generally *Multilateral Agreement on Investment*, available at <http://www.oecd.org>.

⁵⁰ See *id.*

⁵¹ See World Trade Organization, *Preparations for the 1999 Ministerial Conference Agreement on Investment from the Permanent Mission of Japan*, WT/GC/W/

country members agreed in principle to the launching of investment negotiations in the WTO, while some other developing-country members, as a matter of principle, remained opposed to the proposal.⁵² There were also divergent views among the developed-country members; in particular, the United States did not support the proposal for a decision to start investment negotiations at the Seattle Ministerial Meeting.⁵³ No decisions were taken in Seattle with respect to future work on investment in the WTO.

At the Fourth Ministerial Meeting in Doha, however, members agreed that, with respect to trade and investment:

[N]egotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.⁵⁴

In the meantime, the WGTI is to continue its work and was instructed to:

[F]ocus on the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safe-

239 (July 6, 1999); World Trade Organization, *Preparations for the 1999 Ministerial Conference EC Approach to Trade and Investment from the Permanent Delegation of the European Commission*, WT/GC/W/245 (July 9, 1999); World Trade Organization, *Preparations for the 1999 Ministerial Conference Negotiations on Trade and Investment from the Permanent Mission of Switzerland*, WT/GC/W/263 (July 20, 1999); World Trade Organization, *Preparations for the 1999 Ministerial Conference Trade and Investment from the Permanent Mission of Korea*, WT/GC/W/267 (July 20, 1999); World Trade Organization, *Preparations for the 1999 Ministerial Conference Negotiations on Trade and Investment from the Hong Kong Economic and Trade Office*, WT/GC/W/268 (July 21, 1999); World Trade Organization, *Preparations for the 1999 Ministerial Conference Investment from the Permanent Mission of Poland*, WT/GC/W/277 (July 28, 1999); World Trade Organization, *Preparations for the 1999 Ministerial Conference Negotiations Relating to a Multilateral Framework for Investment from the Permanent Mission of Costa Rica*, WT/GC/W/280 (July 29, 1999), available at <http://www.wto.org>.

⁵² See generally Chakravarthi Raghavan, *Sharp Divisions on New Issues*, SOUTH-NORTH DEVEL. MONITOR, available at <http://www.twinside.org.sg/title/sharp-cn.htm>.

⁵³ See *id.*

⁵⁴ World Trade Organization, *Doha Ministerial Declaration*, WT/MIN(01)DEC/1, para. 20 (Nov. 14, 2001), available at http://www.wot.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

guards; consultation and the settlement of disputes between members.⁵⁵

The general thrust of any new WTO agreement on investment was set out as follows:

Any framework should reflect in a balanced manner the interests of home and host countries, and take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest. The special development, trade and financial needs of developing and least-developed countries should be taken into account as an integral part of any framework, which should enable members to undertake obligations and commitments commensurate with their individual needs and circumstances.⁵⁶

B. *Reasons Why it is Necessary to Have a Legal Framework for FDI Regulation*

1. *Linkages Between Trade and FDI*

It is necessary to have a legal structure for regulating FDI simply because FDI and trade are closely interlinked, and in certain respects, such as under the Mode 3 delivery of trade in services, one cannot talk of FDI without trade and vice versa.

FDI and trade are of great importance for economic performance, growth, and development. However, policies for trade and FDI are usually formulated independently of each other. The result is that such sets of policies may not be mutually supportive. The inter-link between trade and FDI is important in understanding how FDI regulatory structures can impact on FDI flows. Other reasons for the importance of such interlink would include:

- The role of trade as a positive factor in growth and development has long been recognized and reflected in trade policies. FDI, as the principal method of delivering goods and services to foreign markets and the principal factor in the organization of international production, increasingly influences the size, direction and composition of world trade, as do FDI policies.
- The role of FDI as a positive factor in growth and development is being increasingly appreciated and is also being increas-

⁵⁵ *Id.* at para. 22.

⁵⁶ *Id.*

ingly reflected in FDI policies. Trade and trade policies can exert various influences on the size, direction, and composition of FDI flows.

Apart from the autonomous impact of each on growth and development, interlinks between trade and FDI must be taken into account if the developmental contribution of each is to be maximized, and if the synergies between the two and broader growth and developmental objectives are to be maximized.

2. *TRIMs and FDI Inflows in Africa*

How does the *TRIMs Agreement* affect Africa's ability to attract FDI with the ultimate goal being the creation of new trade opportunities? On the one hand, it may be viewed as a positive obligation that does not require considerable compliance effort. Essentially, the *TRIMs Agreement* mainly enforces existing GATT disciplines while the transition period for developing and least developed countries and the possibility of extension imposes few immediate obligations. In any event, as highlighted earlier, most African countries did not have any serious TRIMs-inconsistent measures in place as of 1995.

Due to the elimination of restrictive policy measures, there is the possibility that there are efficiency gains to be made by African countries with deep involvement in TRIMs disciplines. No doubt, compliance with the *TRIMs Agreement* provides an indication to foreign investors of a more stable and predictable investment environment.⁵⁷

On the other hand, the prohibition against TRIMs effectively limits the policy options available for developing countries in their dealings with multi-national corporations. Some developing countries have been known to resort to TRIMs as a response to the restrictive business practices of multi-nationals, and not necessarily as a means to generate greater domestic resource gains.⁵⁸ In addition, African countries must never un-

⁵⁷ See generally Sorsa Piritta, *The Burden Of Sub-Saharan African Own Commitments in the Uruguay Round: Myth of Reality*, International Monetary Fund Working Papers 95/48 (1995).

⁵⁸ See generally Oliver Morrissey and Yogesh Rai, *The GATT Agreement on Trade Related Investment Measures: Implications for Developing Countries and their Relationship with Transnational Corporations*, J. DEVEL. STUD., Vol. 31, No. 5 (June 1995).

derestimate the fact that they should and could use TRIMs as a bargaining tool in their negotiations with foreign investors.

3. *Responses to TRIMs Agreement by Some Selected Countries*

Nigeria On March 6, 1998, Nigeria notified the Committee on TRIMs that the *Nigerian Enterprises Promotion Act* of 1989 had been repealed. It was replaced with the *Nigerian Investment Promotion Commission Decree No. 16 of 1995*.⁵⁹ Under the existing Decree, non-Nigerians may invest and participate in the operation of any enterprise in Nigeria.⁶⁰ Nigeria also enacted the *Foreign Exchange Monitoring and Miscellaneous Provision Decree No. 17 of 1995*.⁶¹ Combined, these laws opened up almost all industrial sectors to foreign investors and liberalized the legal framework governing the structure of Nigerian firms.⁶² Foreigners can now fully own any business and are provided guarantees against expropriation.⁶³ The law on foreign exchange allows foreigners to repatriate freely any foreign currency dividends and conduct both foreign currency remittances and capital transfers without prior government

⁵⁹ See generally Nigerian Investment Promotion Commission Decree No. 16 (1995), available at <http://www.nipc-nigeria.org/fir.htm#nipc>.

⁶⁰ See World Trade Organization, *Committee on Trade-Related Investment Measures Notification under Art. 5.1 of the Agreement on Trade-Related Investment Measures from the Permanent Mission of Nigeria*, G/TRIMS/N/1/NGA/1 (July 31, 1996); World Trade Organization, *Committee on Trade-Related Investment Measures Notification under Art. 5.1 of the Agreement on Trade-Related Investment Measures Addendum from the Permanent Mission of Nigeria*, G/TRIMS/N/1/NGA/1/Add.1 (Mar. 6, 1998), available at www.wto.org.

⁶¹ See generally Foreign Exchange Monitoring and Miscellaneous Provision Decree No. 17 (1995), available at http://www.nigerianembassy.nl/invest_climate.htm.

⁶² There are a few exceptions such as arms, dangerous drugs and military wares. See J.O. Ebuete, *Measures to Attract Foreign Direct Investment in Nigeria*, Paper Presented at the UNCTAD Expert Group Meeting on "Home Country Measures," Nov. 8-10, 2000.

⁶³ See *id.*

approval.⁶⁴ Foreigners are also allowed to invest in securities traded on Nigerian capital markets.⁶⁵ In sum, Nigeria has put in place a regulatory framework that is fully compliant with the *TRIMs Agreement*, and hopefully it will improve and diversify⁶⁶ the rate of FDI inflows. However, problems such as corruption and inadequate infrastructure will have to be fully addressed to complete the overall picture.

Uganda In June 1997, Uganda notified the Council for Trade in Goods that Section 13 of the *Uganda Investment Code*, Statute No. 1 of 1991⁶⁷ was not in conformity with the provisions of the Agreement on TRIMs.⁶⁸ The law requires that when the Uganda Investment Authority is considering an application for investment in Uganda, it shall carry out an appraisal of the capacity of the proposed business enterprise to contribute to a number of objectives, *inter alia*, the utilization of local materials, suppliers and services; the creation of employment opportunities in Uganda; the contribution to locally or regionally balanced socio-economic development; and the introduction of advanced technology or up-grading of indigenous technology.⁶⁹ Uganda sought to fully exhaust the seven-year period prior to implementation

⁶⁴ See *id.*

⁶⁵ See *id.*

⁶⁶ Most FDI has hitherto been concentrated in the oil and gas sector. The abundance of these resources has made Nigeria one of the top FDI recipients in Africa in the past. President Olusegun Obasanjo is one of the African leaders that have actively wooed investors from abroad, making an average of two trips abroad every month since he came into office. See generally Neil Ford, *Nigeria: Two Sides of the Coin*, AFRICAN BUS. MAG. (Sept. 2002).

⁶⁷ See generally Uganda Investment Code, available at <http://www.newafrica.com/investment/acts/uganda.pdf>.

⁶⁸ See generally TRIMs Agreement, available at http://www.wto.org/english/docs_e/legal_e/18-trims.pdf.

⁶⁹ See generally Uganda Investment Code, *supra* note 67.

for least developed countries,⁷⁰ but promised to review her *Investment Code*.⁷¹ FDI inflows into Uganda have increased rapidly, standing at about \$100 million annually since 1995.⁷² Political stability has often been cited correctly as one of the main factors for this result.⁷³ Another is the return, at the invitation of Uganda's current leadership, of some of the Asian investors that had been expelled in the 1970s.⁷⁴

Mali

In June 1997, Mali notified the Committee on TRIMs that it applied "no measures concerning investments related to trade in goods that are inconsistent with the provisions of Articles III and XI of the GATT 1994."⁷⁵ Mali has a number of incentives that should serve as an attraction to FDI. For instance, there is a 5-year tax holiday available from the start of production for any investor, and mineral products may be freely exported and are exempt from all indirect internal taxation.⁷⁶

⁷⁰ See World Trade Organization, *Committee on Trade-Related Investment Measures Notification under Art. 5.1 of the Agreement on Trade-Related Investment Measures from the Permanent Mission of the Republic of Uganda*, G/TRIMS/N/1/UGA/1 (July 7, 1997), available at <http://www.wto.org>.

⁷¹ It should be noted that in practical terms, this Code is not rigidly implemented even presently, and has no real negative consequence on FDI.

⁷² See 2000 World Investment Report, *supra* note 9, at 40.

⁷³ See Odenthal, *supra* note 2, at 22.

⁷⁴ President Museveni embarked on a policy of returning some of the farms and industrial concerns that had been expropriated from Asian investors by the Idi Amin government. Many are now involved in large scale agriculture and manufacturing. For example, the Kakira sugar mill and Nile Breweries are part of the Madhvani Holding Group, owned by an Asian businessman. The Madhvani Group has about twenty-four subsidiaries involved in the production of a range of products such as soap, glass, steel, beer and sugar. See *id.*

⁷⁵ World Trade Organization, *Committee on Trade-Related Investment Measures Notification under Art. 5.1 of the Agreement on Trade-Related Investment Measures from the Permanent Mission of the Republic of Mali*, G/TRIMS/N/1/MLI/1 (June 25, 1997), available at <http://www.wto.org>.

⁷⁶ See Miria Pigato, *The Foreign Direct Investment Environment in Africa*, African Region Working Papers Series No. 15, 33 (April 2001), available at <http://www.worldbank.org/afr/wps/index.atm>.

- Egypt By a communication dated October 9, 1995, Egypt informed the Committee on TRIMs that it had no local content laws or regulations.⁷⁷ However, "certain incentives in the form of custom duties reductions to promote the establishment and development of industries in the country" were applied, aimed at "facilitating the exploitation of available resources, transfer of technology and to remedy the chronic trade balance deficit."⁷⁸ Egypt stated further that the customs duties incentives are voluntary, i.e., left open for enterprises that elect to benefit from such incentives.⁷⁹
- Zambia In 1995, the Committee on TRIMs was notified that no measure inconsistent with the provisions of Article III or Article XI of the GATT 1994 was being applied in Zambia.⁸⁰
- Mauritius On April 4, 1995, the Committee on TRIMs was notified that no measure inconsistent with the provisions of Article III or Article XI of the GATT 1994 was being applied in Mauritius.⁸¹ Mauritius has been a front-runner in creating a regulatory environment particularly suited to attract FDI. It was one of the first countries to use the Export Processing Zones (EPZ) concept.⁸² The main features include exemption

⁷⁷ See World Trade Organization, *Committee on Trade Related Investment Measures Notification under Art. 5.1 of the Agreement on Trade Related Investment Measures from the Permanent Mission of Egypt*, G/TRIMS/N/1/EGY/1 (Sept. 29, 1995), available at <http://www.wto.com>.

⁷⁸ *Id.*

⁷⁹ See *id.*

⁸⁰ See World Trade Organization, *Committee on Trade-Related Investment Measures Notification under Art. 5.1 of the Agreement on Trade-Related Investment Measures from the Permanent Mission of Zambia*, G/TRIMS/N/1/ZMB/1 (Apr. 13, 1995), available at <http://www.wto.org>.

⁸¹ See World Trade Organization, *Committee on Trade-Related Investment Measures Notification under Art. 5.1 of the Agreement on Trade-Related Investment Measures from the Permanent Mission of Mauritius*, G/TRIMS/N/1/MUS/1 (Mar. 27, 1995), available at <http://www.wto.org>.

⁸² See S. LALL and G. WIGNARAJA, MAURITIUS: DYNAMISING EXPORT COMPETITIVENESS, COMMONWEALTH SECRETARIAT ECONOMIC PAPER No. 33, 139 (1998).

from payment of import duty on capital goods and import and excise duty on raw material, a tax holiday from corporate income, and tax-free dividends.⁸³ Most FDI inflows are in the textile and garment sector.⁸⁴

South Africa On May 8, 1995, South Africa notified the Committee on TRIMs that TRIMs-inconsistent measures were being applied in the *motor vehicles industry*. A minimum local content has to be attained by motor vehicle manufacturers to qualify for rebate of excise duties. "The measure is applied pursuant to mandatory legislation - the Customs and Excise Act of 1964 - Rebate Item 609.17 and is also applied to new enterprises and new investments of existing enterprises";⁸⁵ the telecommunications sector since 1959 (a local content requirement, based on value added to the product during the manufacturing process, is a prerequisite for obtaining type approval for some types of customer premises telecommunication equipment such as Private Automatic Branch Exchange (PABX), Standard (basic) Telephone Instruments, Plan Telephones Systems (PTS), and others); and the tea and coffee sector (the measure entails that coffee or tea packers/blenders/roasters have to purchase predetermined quantities of locally produced coffee or tea at predetermined prices before import permits can be issued for the importation of the balance of domestic demand).

South Africa has been an extremely attractive country for FDI. Most FDI inflows, in the past ten years have been in the area of

⁸³ See *id.* at 121-27.

⁸⁴ See *id.* at 112.

⁸⁵ World Trade Organization, *Committee on Trade-Related Investment Measures Notification under Art. 5.1 of the Agreement on Trade-Related Investment Measures from the Permanent Mission of South Africa*, G/TRIMS/N/1/ZAF/1 (Apr. 19, 1995), available at <http://www.wto.org>.

cross-border mergers and acquisitions.⁸⁶ Traditional investors, in particular from the United Kingdom and the United States still account for a large percentage of the FDI.⁸⁷ The manufacturing sector is steadily growing as an attraction for FDI, especially in the cellular industry sector where corporations like Cable & Wireless, SBC Communications, and Vodafone have a strong presence.⁸⁸

III. CONCLUSION

In spite of recent increases in FDI inflows, Africa has remained a marginal recipient. A few countries in the region attract the bulk of such FDI, notably South Africa, Botswana, Guinea and Morocco. Increased efforts by African governments to actively woo investors through the active use of GSP schemes such as AGOA and initiatives such as NEPAD have and most likely will continue to bare some benefit. It is well to remember, however, that the focus of the *TRIMs Agreement* remains, trade in goods, not the inducement or protection of foreign investment. It simply re-emphasizes what was already prohibited under GATT 1947. It does not explicitly address performance requirements falling outside Articles III and XI of the GATT 1994, nor does it deal with foreign investment *per se* and its protection, such as minimum standards with respect to expropriation. African countries have responded in varying ways to their *TRIMs Agreement* commitments. The majority of them already had an investment climate that was largely WTO consistent by the time the *TRIMs Agreement* was concluded. However, due to problems such as poor infrastructure and inadequate communication networks, which translate into high operational costs, FDI was not forthcoming. This is changing, slowly.

⁸⁶ See Brendan Vickers, *M&As and FDI in South Africa*, CUTS: Investment for Development, No. 3, at 11 (May 2002).

⁸⁷ See Odenthal, *supra* note 2, at 31.

⁸⁸ See *id.*