TOWARDS A MULTILATERAL AGREEMENT ON INVESTMENT (MAI): IMPLICATIONS FOR DEVELOPING AFRICAN COUNTRIES.

BY

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DECLARATION

I, Nantongo B. Cissy, do hereby declare that this thesis is my own work, except where it has been stated otherwise, and that it has not been submitted for any degree or its equivalent at any other university or institution of higher learning.

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TABLE OF CONTENTS

CHAPTER THREE: FOREIGN DIRECT INVESTMENT REGULATION IN AFRICA

CHAPTER FOUR: AFRICA'S INVESTMENT STRATEGY AND ECONOMIC FREEDOM

LIST OF ACRONYMS

AAPA	Access Action Plan for Africa
AGOA	African Growth Opportunity Act
APRM	African Peer Review Mechanism
Art	Article
AU	African Union
BITS	Bilateral Investment Treaties
CBI	Cross Border Initiative
FCPA	Foreign Corrupt Practices Act
FDI	Foreign Direct Investment
FTAs	Free Trade Areas
GATS	General Agreement on Trade in services
GATT	General Agreement on Trade and Tariffs
ICSID	International Center for Settlement of International Disputes
IPA	Investment Promotion Agency
LDCs	Least Developed Countries
MAI	Multilateral Investment Agreement
MFN	Most- Favoured Nation
MNCs	Multinational Corporations
MNEs	Multinational Enterprises
NAFTA	North American Free Trade Agreement
NEPAD	New Partnership for Africa’s Development

NT	National Treatment
OAU	Organisation for African Unity
OECD	Organisation for Economic Corporation and Development
PARP	Partnership for African Recovery Programme
UNCAC	United Nations Convention Against Corruption
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organisation
SOEs	State Owned Enterprises
SMEs	Small Medium Enterprises

KEY WORDS

Agreement

Africa

Development

Investment

Multinational

Corporations

Trade

WTO

DEDICATION

This paper, is dedicated to my children and all members of my family.

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CHAPTER ONE: INTRODUCTION

1.1 Introduction

There has been a rapid growth in world trade since World War II (WW II), to approximately twenty percent (20%) of the total volume of goods and services in the global trade.[1] This has been due to substantial reductions of barriers to the movement of goods, services, and capital through foreign direct investments (FDIs), which have taken place alongside the General Agreement on Trade and Tariffs (GATT) and its successor, the World Trade Organization (WTO).[2] Indeed, FDI has been viewed as the major source behind globalization amongst trading partners of the WTO. FDI has also been viewed as a key factor in the economic growth and development in developing countries,[3] carrying ideas, jobs, and export markets, as well as capital, from industrial to industrializing countries.[4]

Furthermore, international trade agreements, like the GATT and regional trade agreements (RTAs) have gone a long way towards deregulating trade. As a result, there are over 1800 binding bilateral treaties that contain provisions related to foreign investments.[5] There is, however, no comprehensive Multilateral Agreement on Investment (MAI), notwithstanding several attempts that have been initiated by several countries, particularly the industrialized ones.[6] The MAI started in 1948 when a draft

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[1] Bora (2002) Development, Trade and the WTO, A Hand Book. World Bank Washington D. C. 171.

[2] Chapman, A 'The multilateral agreement on investment: rationale, outline and issues' (1997) < http://dsp-psd.communication.gc.ca/plot/loPBd/PB/bp444-e.htm > [accessed on 7 May 2007] Due to globalization, there is growing economic integration and interdependence of countries resulting from increased international trade in goods and services, the growth of cross border capital flows and the rapid diffusion of technology throughout the world, especially with respect to technological advances, and the increase in transport and telecommunications. These technological advances have allowed firms to locate production in the most advantageous global locations.

[3] Anonymous (2002): Bilateral investment treaties as a determinant of US foreign direct investment in developing countries; http:www.moneymastersinstitute.org/bilateral investment. PDF
More so, international flows of private investment have risen sharply. FDI jumped from $200 billion in 1990 to $315 billion in 1995.An increasing share of this investment goes to developing countries.

[4] Fitzgerald *et al (1998) 21.The* fewer barriers there are to the movement of resources, money, and products the more influence the large corporations and investors have in the global economy.

[5] Ngowi (2001). Such treaties include: the North American Free Trade Agreement (NAFTA) and Common Market of the South (MERCOSUR).

[6] Industrialized countries include: US, German, Australia, United Kingdom, Spain, France, Italy, Canada, Japan, Korea, Netherlands, and Belgium etc.

charter established the International Trade Organization (ITO) at Havana. The draft failed because the United States congress did not ratify it. This resulted in the adoption of the GATT. GATT remained silent on investment issues and continued to treat trade and investment as separate issues, thus maintaining a line between trade and investment.[7]

The Organization for Economic Co-oporation and Development (OECD)[8] commenced negotiations for MAI in 1995 and expected these negotiations to be completed by 1998.[9] The proposed MAI under the OECD requires nations to open virtually all sectors of their economies to foreign investment, treat foreign corporations the same as local companies and bar governments from altering the rights of investors. Negotiations for MAI have generated heated debates amongst developing countries,[10] and international organizations.[11] The proposed MAI seems to benefit the investor and not provide significant benefit to the host country,[12] by giving more rights to foreign investors without stipulating corresponding responsibilities.

[7] Singh, K (2002): 'Multilateral Agreement on Investment in the WTO; Issues and Illusions' <. www.aprnet.org > [accessed on 14 April 2007].

[8] The OECD is an international organization of states, based in Paris. Its goals are the pursuit of global economic growth and stability. The Organization consists of 30 members, who account for 2/3 of the world's goods and services. Member countries include: US, Belgium, Canada, German, Australia, Austria, Korea, Japan, France, Ireland, Sweden, Italy Finland, Denmark, Iceland, Norway, Mexico, Czech Republic, Greece, Luxemburg, New Zealand, Portugal, Poland, Slovak Republic, Spain, Switzerland, UK and Turkey.

[9] OECD, 1995 < www.oecd.org > [accessed on 7 May 2007].

[10] Developing countries are the major recipients of FDI, but they have been sidelined during the negotiations; developing countries have not been included in drafting the rules. According to Mark Villiantos, (1997), the US and other OECD member countries have treated the MAI as a technical agreement, negotiated by low profile expert groups with public awareness or input. Amongst developing countries, India has remained silent throughout the negotiations.

[11] Non-Governmental Organizations, labour unions, human rights and environmental activists are concerned about the implications of the proposed MAI. Developing countries have had little participation in concluding negotiations on the MAI, yet they are more vulnerable. Developing countries hold a lot of resources, and investors will target where they can access cheap labour thus exploiting workers. Liberalisation of investments and free trade allows corporations to pick and choose how to structure their operations on the global level. The MAI also lets investors repatriate their profits unrestricted by government control, which would affect investment flows. Governments need to retain the authority to respond to social, economic and environmental needs to effect sustainable development. NGOs, labour and environmental institutions insist that corporations should be required to operate under the rules of the host country on environmental and labour standards.

[12] A 'host country', for the purpose of this study refers to the country that receives the foreign investment, or where the foreign investor directs his investments, other than his own home country.

The definition of 'investment' is very broad under the proposed investment agreement. It involves not only FDI, but also the direct or indirect ownership or control of any other asset, for instance portfolio investment.[13] An 'investor' refers to an individual, company or corporation that establishes a new venture in the host country or a country other than his own that creates jobs and output, subject to a degree of control.[14]

'FDI' is defined as the transfer of technology and managerial skills as well as capital resources, and acquiring an ongoing interest in an enterprise in a country other than the investor's home country.[15] FDI involves a degree of ownership and control of a business or part of it in another economy.[16] Most host nations try to regulate the flow of FDI in their countries and developing countries stress that governments need to have the authority to control and regulate the entry and operations of foreign investors in order to maximize the positive benefits of foreign investment.[17] There is a need to balance the regulation of entry of investors and their activities on the one hand against reaping the benefits that accrue from FDI, on the other.

Developing countries in Africa stand to gain from the proposed MAI membership in the global economy. The proposed MAI is the best way to encourage long term productive capital formation by foreign and domestic firms, which is required to support sustainable development.[18] By doing so, developing countries would achieve a substantial reduction in investor uncertainty, leading to better investment opportunities.[19] The current MAI

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[13] It involves all sorts of assets management by residents or nationals of contracting parties through offshore companies. The inclusion of portfolio investment under the proposed MAI, particularly MFN and NT would restrict the ability of governments to impose control on volatile capital flows. The definition of investment also involves contract based rights with governments. This will affect concessions and licenses in key development sectors such as natural resources. Also investors who control their business under offshore holding companies are often incorporated in tax havens. In most cases this is done for tax evasion and money laundering.

[14] Samson Muradzikwa, 2002. 'Foreign direct investment in Africa: a case of the SADC region.' Development Research policy project. Working paper, 02/67. < http://www.uct.ac.za/dept/dpru.> [accessed on 21 June 2007].

[15] Muradzikwa (n. 14 above) 12.

[16] IMF; balance of payments, 1997 manual; 408. 'FDI is made to acquire a long lasting interest in an enterprise operating in an economy other than that of the investor and the investor having choice in the management of the enterprise.'

[17] Anonymous, 'MAI-type investments model criticized at NGO.' Ambassadors meeting online ;http://www.twnsdeorg.sg/title/model [accessed on 28 June 2007].

[18] The MAI, May 1998, Oxfam community AID Abroad.

[19] See OECD < www.oecd.org/daf/investments > [accessed on 7 May 2007].

draft however represents a consolidation of the existing agreements between OECD members, with provision for voluntary accession by non-members. This implies accession by a limited number of “middle-industrializing” countries in the immediate future.[20] The adoption of the MAI is likely to be more problematic for future international agreements, especially in the developing countries of Africa, because they are likely to give up their control of foreign investments in a need to increase FDIs; this will end up in harming their own economies, especially in a situation where foreign investors are allowed to freely invest in any sector of a country’s economy.

1.2 Statement of the problem

With focus on the implications of MAI on FDI in developing countries, Africa’s position on investment regulation is shared by other developing countries. Notwithstanding the attempts of the OECD, the Agreement requires host countries to give up some of their rights and adopt a selective approach to foreign investment to promote their development strategy.[21]

It is important to address some of the concerns and inherent difficulties which may arise in the context of MAI and upon which the MAI may succumb. Firstly, MAI increases the rights of investors against those of governments; it accords rights to foreign investors without any obligations or responsibilities.[22] Secondly, the MAI limits the ability of governments to regulate FDI in the public interest and transfers control over investment decisions from governments to unaccountable companies.[23]

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[20] E.V.K Fitzgerald and A. Lehman (1998): ‘The development implications of MAI.’

[21] Okhomina 2005: The quest for a multilateral agreement on investment; Implications for developing African countries. Thesis, UWC library.

[22] The strongest provisions in the Agreement are those which protect investors rights, are legally binding and backed by a right of direct access to international arbitration. This stretches the arm of international law into the service of the powerful and economically strong while neglecting the interests of the economically weak. And as such it fails to acknowledge the granting of rights with any responsibilities for the protection of the environment, human rights and social improvement.

[23] This affects developing African countries in that it prevents them from pursuing the kind of policies which involve a significant degree of state intervention. Also, developing countries have their own development strategies; so if they are denied any interference, this affects them in achieving their desired goals.

The importance of FDI is acknowledged by developing African countries. Indeed given the significance of foreign investments, it is imperative that investment rules do not weaken the possibility of the contribution of FDI to socially sustainable development, especially in the African context. It is recognized that the rapid changes resulting from globalization for developing countries clearly have both positive and negative implications, and therefore it is the role of international regulation through MAI to ensure that the economic benefits are maximized, while social and environmental standards remain uncompromised.

Consequently, the purpose of this work is to analyse the consequences of having a MAI in light of the proposed OECD Agreement, the implications it may have for developing countries in Africa, and the way forward towards a balanced multilateral Agreement.

1.3 Purpose of the study

In most African countries the private sector provides the main impetus for economic growth, especially since countries started opening up their economies for foreign investment.[24] Foreign investments have played an important role in the economic growth and development process. FDI can bring a range of benefits to developing countries, including, among others, employment, increased exports, skills and technologies, and is considered to be an instrument through which economies are being integrated at the level of production into the globalizing world economy.[25] The flows of capital are, however, concentrated in only a small number of developing countries in Africa, e.g. South Africa, Botswana, Rwanda, and the least developed, such as Zambia, Burundi and Tanzania, attract very little foreign investment. This is problematic for growth and development in

[24] Joseph Okere (2002): 'The private sector drives economic growth'; development outreach World Bank Institute. The private sector is larger than the public sector in most of the developing countries. For every $ 1 in net long term flow to the developing world, the private sector invests $ 2-3. The private sector is one of the largest and most powerful levers available to foster development in the foreseeable future. It has a high developmental impact in sectors such as: financial services, infrastructure, information technology, health and education and small and medium enterprises.
Promoting investment and enterprise development has been agreed upon as one of the major themes for international development, and FDI has played a key role in the economic growth and development process. UNCTAD, 2002.
[25] UNCTAD 2002. http://www.unctad.org [accessed on 17 October 2007].

developing countries. This therefore necessitates more research on the regulation of FDI and the impact of a MAI for developing countries. It is important that its implications at the OECD level are well researched.

1.4 Methodology

The methodology for this thesis shall include qualitative means of data collection and analysis. Data collection includes in depth review of primary and secondary information in the form of academic or discussion papers, articles, journals, output from other research processes, government statistics and internet sources, all relating to trade and investment. Primary sources shall include documents.

1.5. Scope of the study

The study covers the following areas:

a) Analysis of the legal framework of MAI, and its implications for investment in developing African countries at different levels of development.
b) A comparison of MAI with other alternative investment frameworks for developing countries, such as, bilateral and regional investment agreements, and WTO agreements on investment measures (TRIMS and GATS).
c) Aspects of MAI that have positive or negative implications on the attraction of FDI by developing African countries, such as, regulation of FDI.
(d) Analysis of Africa's investment strategies.

1.6 Overview of chapters

This study is divided into five chapters:

Chapter 1 contains the introduction and background to the study. It also includes the importance of FDI, and regulation of FDI at both regional and multilateral levels.

Chapter 2 analyzes other alternative investment agreements especially at regional level, and compares their definitions of ‘investment’, ‘investor’. It also compares the rights and obligations under these agreements.

Chapter 3 reviews the relevant literature on MAI. It also discusses the key implications of having a MAI that binds all parties.

Chapter 4 discusses, in detail, Africa’s investment strategy and economic freedom. The chapter focuses on the African Union (AU) and NEPAD. It also includes an examination of the importance of a collaborative approach by Africa towards economic integration and achieving economic freedom.

Chapter 5 discusses the recommendations and conclusions of this study. The chapter determines whether there is actually a need for MAI, especially for developing countries, it also includes a look at the way forward, and possible suggestions as to the future development in the field of investment law, if there is going to be a MAI, in terms of the negotiation format to suit developing African countries.

CHAPTER TWO: BILATERAL INVESTMENT TREATIES AND REGULATION OF FOREIGN DIRECT INVESTMENTS

“Regional trade agreements are not the easy way out, we must ensure regional trade agreements are a complementary - and not a substitute - to the multilateral trading system.” “If the multilateral system dies away, so does the positive potential of regional trade agreements”…. Pascal Lamy, Director General, WTO, in a speech at the annual memorial silver lecture at the Columbia University in New York, 31 October 2006.

2.1 INTRODUCTION

Africa has signed the largest number of bilateral investments treaties (BITS) as a way of regulating FDI on the continent,[26] and most of these agreements have been signed with the big capital exporting countries.[27] By 1995, Egypt had signed the most number of bilateral treaties, followed by Tunisia and Morocco.[28] In Africa, developing countries and LDCs would benefit from the increased importance of bilateral agreements, since they encourage foreign direct investment from economies with abundant capital and skilled labor, mainly the OECD countries, to the less developed economies.[29] Notably, Africa is relying on BITS in order to ensure that its developmental goals are reached, and this explains why Africa has signed the largest number of these agreements.

BITS were designed to address investment related principles which had not been exhausted by the existing agreements. The continued delay in establishing a multilateral

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[26] Out of 103 states surveyed in the early 1990s, only four did not provide some kind of investment incentive to FDI, UNCTAD (2003), ‘incentives and FDI’, 46, and world investment report (1995) at UNDoc.
[27]‘Investment screening’ refers to mechanisms that require prior approval for or prohibit entirely, the establishment of foreign investments and such mechanisms would be in the foreign investment codes.
[28] UNCTAD (1993) & (1994), World investment report, ‘FDI in Africa’.
[29] Peter, Michael (2004). Journal of comparative economics: ‘The impact of bilateral investment treaties on foreign direct investments’. 788-804. http://www.sciencedirect.com/science?-ob=Articles [accessed on 4/08/2007].

agreement also accounts for the multiple bilateral treaties that countries are entering into in order to solve their investment problems. Bilateral treaties have acted, therefore, as a tool to generate economic co-operation amongst the member countries, and to increase the flow of FDI in the host country.[30] The impact of BITS on FDI is not definitely known, because they may increase the flow of foreign investment in some instances and in others their positive impact may not be felt. So in order for a country to benefit from these bilateral treaties, they first have to strengthen their investment structures at national levels.[31]

For example, Hoekman, Bernad and Saggi argue, that, due to some differences in national rules, BITS may be the source of higher transaction costs and uncertainty from the investing firm's perspective, especially in situations where the recipient country may be characterized by a bureaucratic administration. Therefore, although the role of BITS in attracting FDI is significant, they are not a guarantee that a country's FDI flows will automatically increase, as at times the foreign investment inflow is uneven.

BITS also regulate FDI-related issues through their principles of general standards of treatment, such as, admission, equitable and fair treatment, expropriation, and the settlement of disputes at the bilateral level. They also establish transparency amongst members about risk, especially as regards the rules of establishment in the host country. The fact that BITS involve few countries makes accountability easier than on a multilateral basis, and this helps to promote investor confidence as regards investing in a country.[32]

Furthermore, the 1990s have seen agreements, both regional and bilateral in which investment measures have been emphasized, for example, NAFTA, the EU, Chile, and US-Morocco FTA. In fact, the OECD has played an important role in discussions on FDI agreements.[33] At present this is evidenced by the OECD code of the liberalization of the

[30] 'Bilateral investment treaties as a determinant of US FDI in developing countries' http;//www.moneymattersinstitute.org/bilateralinvestment.pdf, [accessed on 23 July 2007].

[31] Hoekman, Bernad M, and Saggi (2000): 'Multilateral Disciplines for Investment- Related Policies.' Policy Reseach Working Paper No. 2138. World Bank, Development Research Group. Washington D.C.

[32] Peter and Michael 2004: The impact of bilateral investment treaties on foreign direct investment. 32, 4,788-804. http;//www.sciencedirect.com/science*?ob*=Article [accessed on 2007/08/02].

[33] Graham and Krugman, 1995: 'Foreign Direct Investment in the United States.' Institute of International Economics, Washington, D.C.

movement of capital, which forms the only multilateral framework on international capital flows, including FDI.

In addition, the desire of governments to facilitate FDI is reflected in their regulatory changes, and the increase in the number of BITS signed in order to promote FDI.[34] This is further evidenced by the negotiating asymmetries that are common to bilateral agreements, and which have led to treaties in which developing countries have taken on substantive obligations without any rights, other than the promise of increasing their future private investment.[35]

The situation above seems to imply that BITS have a weak link to FDI and do not actually automatically increase the flow and attraction of FDI to the signatory countries. Accordingly, there is little evidence to show that BITS have played a big role in increasing FDI in the host country.[36]

Before BITS were introduced, customary law, known as the Hull Rule, applied and was used to protect foreign investments.[37] It dealt with expropriation, which gave the investor the right to sue the host government if it undertook actions that were meant, or deemed, to substantially expropriate the business of the firm, and guaranteed the investor compensation in the event of expropriation. Under the Hull Rule, there was no right of entry or admission required to invest in a foreign country. The state reserved the right to determine which foreign investor to allow in which sector.[38]

BITS contain general standards of treatment, including, fair and equitable treatment, national treatment and most- favoured nation treatment (MFN), expropriation and dispute

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Many of the existing BITS between the current OECD economies involve one old and one new OECD member, e.g., the Czech Republic, Hungary, Poland and the Slovak Republic concluded BITS with old OECD members in the early 1990s and then joined the OECD afterwards.

[34] UNCTAD,1997 19.

[35] World Bank, 2003 127.

[36]Hallward- Driemier. (2003):' Do bilateral investment treaties attract FDI? Only a bit…and they could bite.' World Bank, DECRG.

[37] The Hull Rule was based on the customary law rule of adequate compensation. It was, however , limited to expropriation. The Hull Rule was challenged at the UN by developing countries and this resulted in changing its status as customary international law.

[38] Concept paper on non-discrimination document (2000). Under customary law there is no requirement for a host country to be non- discriminatory against foreign investors wishing to establish their businesses in that country:

settlement.[39] In Africa, many countries have concluded BITS for the avoidance of over taxation of income and capital,[40] implying that the more trading partners a country has, the more the costs involved, but BITS have found a way of minimizing costs by reducing tariffs.

2.2 ANALYSING PERFORMANCE IN THE NAFTA, AND THE US-MOROCCO FTAs

BITS are agreements establishing the conditions and terms for private investment by nationals and companies of one state in another state.[41] They have gained popularity, especially amongst developing countries and LDCs, over the years. They tend to impose less responsibility on countries yet they are a relatively new phenomenon on the international investment agenda and their impact is only beginning to be understood. The weaknesses of the domestic, political and legal environments in many low and middle income countries has led investors to seek alternatives to their needs through BITS, which provide clear and enforceable rules to protect foreign investment and reduce investor risks.

In the African context, bilateral treaties allow for certain rights, obligations and limitations to be stated and negotiated by the parties.

For the purpose of this work, this section shall focus on two FTAs: Chapter 11 of NAFTA and the US-Morocco FTAs.[42]

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[39] NT and MFN are major principles of non-discrimination. The MFN implies that each member shall grant any other member the most-favourable and best treatment it grants to any other country. NT applies to domestic and imported products, and prohibits giving preferential treatment to the domestically produced goods as against the imported goods. Expropriation refers to a situation where the investor may sue the host government for compensation if actions undertaken by the government are deemed to substantially expropriate the business of the firm,(Hallward- Driemier (2003). 'Do bilateral investment treaties attract FDI? Only a bit…and they could bite' World Bank, DECRG.

[40] UNCTAD 1995. Foreign direct investment in Africa, UNCTAD/DTCI/19, current studies series A, No 28 UN New York and Geneva 13.

[41] Impact of BITS on developing countries: Online, http://en.wikipedia.org/wiki/bila-inv.[accessed on 8 August 2007].

[42] The two Agreements (NAFTA and US- Morocco) have been chosen for this study because one involves a developing African country and the other developed countries like the US, which fall within the interest

The US –Morocco FTA was signed on 15 June 2004 and consists of 24 chapters and four annexes.[43] It largely contains provisions found in recent US trade agreements with Chile, Australia and Singapore. The agreement included that, more than 95% of bilateral trade in consumer and industrial products would become duty free under the accord, with the phasing out of all other duties within a period of nine years.[44]

This chapter will focus on the similarities in most of these provisions in the agreements; definitions of investment and investor, performance requirements, conditions of entry, MFN and national treatment principles, expropriation, transfer of capital/ funds and dispute resolution

2.3 Definition of 'Investor'

Generally, an investor[45] is a party who purchases an asset with the expectation of financial rewards and who exercises greater control in the running of the business.[46]
The US-Morocco FTA does not actually define an investor but rather distinguishes between an investor of another party; as an investor who attempts or has made an investment in the territory of that party and is not an investor of either party. An investor of a party means a party or state or national enterprise of a party that is attempting to or has made an investment in the territory of the other party.

Definitions in FTAs however, seem to be more detailed in their definitions of investor, especially as concerns an investor of a party and of a non-party. The agreement further states that a person with dual nationality is deemed exclusively to be a national of the state of his dominant and effective nationality.

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of this paper. The US has been chosen because it is a major trader with African countries, for instance, in its AGOA project. NAFTA is of interest because it involves key players in the world trade. It will be used for comparison purposes.

[43] Assad 2002: American journal on international law, Volume 98, pg 836. Online http://www.ustr.gov. [accessed on 5 August 2007].

[44] Assad (n.43 above) 836.

[45] See Chapter one.

[46] Online, http;//www.answers.com/investor&=67. [accessed on 3/08/2007].

The NAFTA has a different definition because it draws a distinction between the investor of a party and investor of a non-party.

Art 1139 defines an 'investor' as a party or state enterprise thereof, or a national or an enterprise of such party, that seeks to make, is making, or has made an investment. An investor of a non-party is defined as one other than an investor of a party that seeks to make, is making or has made an investment.

2.4 Performance Requirements

Performance requirements enable the host country to influence trading and location decisions of foreign investors in favour of its own development. Export requirements can improve the balance of payments accounts of a host country and locational incentives can aid its infrastructural development.[47]

Further, performance requirements are the major conditions of entry that a nation gives to foreign investors to fulfill before they can start their operations in that country. They have been used by both the developed and developing countries and other policy instruments like, incentives, trade policy and screening mechanisms, to satisfy development objectives.[48]

Performance requirements at times cause investors to pursue practices which they would not have adopted in the open market. Accordingly, many developed countries are trying to limit the kind of performance requirements imposed on investors.[49]

There are different views regarding the effectiveness of performance requirements with regard to development strategies: the critics say that, its impact on investment is limited, costly and counter-productive.[50] On the other hand, they are an important instrument for a country's FDI policy.

[47] Jennifer and Suzan Rose: Foreign direct investment and the business environment in developing countries; The impact of bilateral investment treaties. June,4 2004.
[48] UNCTAD, 2003. Foreign direct investment and performance requirements. New evidence from selected countries online, http://www.unctad.org/en/docs/iteii20037,enpdf visited on 21 August 2007.
[49] For example US BITS prohibit investment performance requirements.
[50] Nagesh, Kumar, WTOs emerging investment regime; Way forward for DOHA ministerial meeting. August 18, weekly 36(33), 3151-58.

The use of world market pricing to determine distant transactions between companies can regulate transfer pricing instead of performance requirements and they are not the best way to solve balance of payment problems which can easily be dealt with using fiscal policies or exchange rate depreciation.[51]

Moreover, is important to note that some types of FDI have more favourable developmental externalities than others. This implies that more emphasis is required by host countries to determine the quality of FDI inflows, than merely attracting greater magnitudes of FDI.

Kumar further notes that the policies of host countries have an important bearing on the quality of FDI inflows they receive.[52]

The US has adopted different types of performance requirements for foreign investors, especially when it was the biggest capital importing country in the nineteenth century.[53] The EU has also adopted certain regulations, such as the local content requirement, to deepen the local commitment of Japanese corporations in the consumer goods industry.[54]The EU has further applied the anti-dumping measures to regulate car imports from Japan and south-east Asia.[55]

Accordingly, the NAFTA, states that "No party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a party or of a non-party in its territory."

It further lists quite a number of performance requirements which are forbidden under article 1106 (1) a-g, such as the requirement to export a given level of or percentage of goods and services, a given level of domestic content, purchases of services and goods locally, relating to volume and value of imports to exports or the amount of foreign exchange inflows, technology transfer, a production process or other proprietary

[51] UNCTAD, 2003.

[52]Kumar (2002), Investment on the WTO agenda; A developing country perspective and the way forward for the Cancun Ministerial Conference. Pg 8online http;//www.ris.org visited 4 August 2007

[53] Kumar(n.52 above) 9.

[54] Safarian, A.E. 2002: The use and impact of performance requirements in the developed countries, Geneva, UNCTAD.

[55] Safarian (n.54 above) 23.

knowledge to a person in its territory except in enforcing a court order for violation, competition laws or an Act inconsistent with the agreement, and to act as an exclusive supplier of the goods it produces or services it provides to a specific region or on the world market.[56]

It further states under paragraph 6, that the measures are not a disguised barrier to international trade and nothing under paragraph 1(b), (c) or 3(a) shall prevent any party from adopting measures to protect human, plant and animal health, exhaustible natural resources or to secure the compliance with regulations that are not inconsistent with the agreement.[57]

It is notable that FTAs are extensive in their provisions. The provisions under the US-Morocco agreement are not any different from those of NAFTA except that it includes Article 36 of the (TRIPS) and excludes "for export promotion and foreign aid programs."[58]

2.5 TREATMENT AND PROTECTION OF INVESTORS

Bilateral investments treaties have found favour with developing countries because they do not place many restrictions on host countries in following their own FDI policies in the light of each country's unique needs and circumstances.[59] Different investors apply different considerations for investment before they decide on whether to invest in a particular country. These include the amount of protection accorded to foreign investments, investors, and property.

BITS provide for two basic provisions; NT and MFN principles. These are non-discriminatory provisions to ensure that foreign investors are treated in a manner that is equal and fair, compared to investors from other non-party countries. The US-Morocco agreement provides under article 11 (3), that, "Investments shall at all times be accorded

[56] Article 1106. NAFTA
[57] Paragraph 6 of article 1106.
[58] Paragraph.1(a),(b), (c) and 2(a), (b) of article 1106 of NAFTA.
[59] Luke Eric Peterson. Bilateral Investment Treaties. International Institute for sustainable development, Nov, 2004. online http://www.iisd.org/pdf/2004/trade bits.pdf visited on 24 August 2007.

fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law." NAFTA considers the general standard of treatment under article 1104, and states that, "Each party shall accord to investors of another party and to investments of investors of another party the better of the treatment required under articles, 1102 and 1103 (NT and MFN).

2.5. 1 NATIONAL TREATMENT

The concept of NT is aimed at eliminating discrimination against foreign investment, especially between firms in the same sector.[60] NT differs from state to state. Some countries have post entry establishment provision for national treatment.

The US- Morocco FTA provides that foreign investors shall be treated no less favourably than its own investors as well as non-party investors.[61]

The NAFTA includes a similar provision which is more elaborate; it states that, with respect to a state or province, treatment no less favourable than the most- favourable treatment accorded in like circumstances, by that state or province to investors, and to investments of investors of the party of which it forms a part.[62]

Articles 1102 and 1103 of the NAFTA on National treatment and Most-Favored nation principle state that they apply to investors with respect to the establishment, acquisition, expansion, operation, management, maintenance, use and sale or other disposition of investments.[63]

Under the NAFTA, the three countries had to list the sectors they wanted excluded from the right of establishment, e.g., the energy sector in Mexico. Any sector not listed is covered by chapter 11 and is open to investment by investors of the other NAFTA countries without discrimination.

[60]OECD,1993 National Treatment for foreign investors-Controlled enterprises Paris OECD pg 62-64,22.
[61] Article 11, US-Morocco agreement.
[62] Article 1102 NAFTA.
[63] Articles 1102 and 1103 0f NAFTA.

2.5. 2 MOST-FAVOURED NATION

Any investor would want to face equal and fair treatment with regard to his investments in another country. This concept has been catered for in BITS. Most BITS contain a provision related to MFN, and has become an important indication of economic liberalisaton.[64]

The NAFTA insists on treatment of investors of another party in a manner no less favourable than the treatment given to investors of another party in the acquisition, expansion, management, conduct operation and sale or other disposition of investments in its territory.[65]

The US –Morocco agreement does not differ from NAFTA in this regard, except that it applies the phrase 'covered investments' unlike in other agreements.[66]

2.6 EXPROPRIATION

Expropriation is a common clause in many BITS which gives the investor the right to sue the host government if actions undertaken by it are deemed to substantially expropriate the business of the firm. The terms under which expropriation is deemed unlawful and compensation is to be given, differ from one country to another.[67] Different countries have a different interpretation of payment of full value. It has been interpreted to imply that adequate compensation in accordance with the prevailing market value and in convertible currency, should be paid without delay.[68]

Expropriation provisions under NAFTA and the US-Morocco FTA are more elaborate and similar.[69] They both consider that compensation be paid with interest on the currency

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[64] The principle has been extensively included in discussions at the WTO, which insist that global trade should not be discriminative amongst member countries. No member country should be put at a better advantage than others.

[65] Article 1103 (1) of NAFTA.

[66] Article 11 US-Morocco agreement

[67] Property can only be legally expropriated if it is done for a public purpose. It is done on a non-discriminatory basis and compensation is paid. Expropriation is done with the right process of law. The compensation clauses are deemed to have a number of consequences, especially where its deemed to be done adequately, promptly, and effectively or where payment is to given in the property's full value.

[68] Investment protection proclamation, no 37/1996 of Ethiopia, Art. 21.

[69] Article 1110 of NAFTA, and Article 10.6 of the US-Morocco FTA.

being used for repayment from the date of expropriation to the date of payment. Both Agreements insist that payment is to be made without delay and in full amount, and freely transferable, with interest accrued from the date of expropriation to the date of payment.

Article 1110 of NAFTA provides for expropriation and compensation, and states that, "No party may directly or indirectly nationalize or expropriate an investment of an investor of another party in its territory or take a measure tantamount to nationalization or expropriation of such an investment." It lays down exceptional circumstances under which expropriation may take place under article 1110 (1) (a-d).[70]

These provisions of NAFTA are similar to article 111 of US- Morocco agreement.[71]

BITS have a more detailed aspect of compensation provisions[72]where emphasis is put more on payment of interest than on the value of the property expropriated.

2.7 CONDITIONS OF ENTRY AND ESTABLISHMENT

Governments set different conditions for a foreign investor to invest in a country. Some countries limit investment in some areas of their economy, and prefer them to be dominated by local investors.[73]

Some governments are strict regarding the amount of investment the investor intends to invest. Where it relates to capital requirements, the government requires the foreign

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[70] The circumstances include: for public purpose, on a non- discriminatory basis, in accordance with due process of law and on payment of compensation in accordance with paragraph 2.

[71] It provides that "investments shall not be nationalized or expropriated either directly or indirectly through measures tantamount to expropriation except for public purpose, in a non- discriminatory manner, upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment."

[72] Although the determination of compensation is difficult in itself, the BITS strongly enforce that compensation is to be paid immediately, in full value and effectively. In NAFTA, Canada reserved the right to continue reviewing foreign investments, Mexico insisted on raising its foreign investment review threshold to $150 million within 10 years.

[73] Some sectors of the economy are too sensitive to allow an outsider to invest in, many governments strive not to allow foreign investors in areas of security, banking and finance and insurance to avoid situations where the investor may defraud the public or even leave behind a crisis when he decides to leave the country.

investor to bring most of its capital into the country, especially when there is a need to increase foreign currency in the country.[74]

It is a strategy for host countries to refrain from granting a right of establishment to foreign investors in order to retain a degree of control and deregulation of their domestic economy.[75] The ability to retain control is a very important strategy, especially, for developing African countries, in order to boost their upcoming industries and ensure fulfillment of their development plans.

Driemier further states that,[76] most treaties do not extend to cover market access privileges or rights of establishment to foreign investors although recent BITS include commitments at the pre-establishment level.[77]

2.8 DISPUTE RESOLUTION

BITS have been concluded by developed countries as a way to ensure the security of FDI generally, but structures that have been established to litigate disputes arising from such agreements do not acknowledge the interest of developing countries, especially African countries, or greater democratization of international institutions.[78] The entire process of arbitration remains in secrecy.[79]

Not all arbitrations provide for public disclosure of claims, they are therefore solved using a number of arbitral rules

[74]In Mexico, the energy sector is not open to foreign investors investing therein. Okhomina (2005), writes that in Australia, foreign investors are not allowed to buy any finished estates, and that in Ethiopia, they are not allowed into the banking and insurance sectors.

[75] Driemier (n.36 above) 38.

[76] Driemier (n.36 above) 18.

[77] Canada, Japan, and US are given as examples. They give NT or MFN to investors wishing to establish an investment or make an acquisition of an existing enterprise. The decisions of the host state regarding questions of establishment are however not eligible for arbitration under the treaties dispute settlement rules.

[78] Neil Sorensen, Bilateral investment treaties and Disputes. Program associate, Globalisation and globalism program; Institute of agriculture and trade policy, February, 2001. online http;//www.bilaterals.org visited on 7 September 2007.

[79] Neil Sorensen (n.78 above) 9

Most of the earliest treaty claims arose out of a clear cut dispossession or destruction of property. More recent investor claims pertain to a much broader range of alleged violations, including treatment at the hands of the host country's regulatory, administrative or tax authorities.[80]

The provision on dispute settlement is one that is common in many BITS. It is important in any agreement because parties have to agree on the choice of law to govern the agreement.

Dispute settlement under NAFTA provides for settlement between a party and an investor of another Party.[81] It also provides for claims by an investor on his own behalf or on behalf of the enterprise.[82]

Disputes arising out of NAFTA are resolved at the International Center for Settlement of Investment Disputes (ICSID). After six months of the claim, the matter is submitted to an arbitrator under: the ICSID convention, the additional facility rules of ICSID and the UNCITRAL arbitration rules.[83]

The rules of the ICSID will only apply if either parties or one of them is a member of the convention

It states that, the disputing investor shall deliver to its opponent party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted. The notice to submit shall specify the name and address of the disputing investor, aspects of breach, facts of the claim, relief sought and the actual amount of damages claimed.[84]

Generally, proceedings under BITS are not governed by precedents, and are not subject to publication, except where it is stipulated by the countries laws.[85]

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[80] Luke Eric Peterson, Bilateral investment treaties. International institute for sustainable development, November, 2004. online http://www.iisd.org/pdf/2004/trade/bits.pdf.
[81] Article 1115 of NAFTA.
[82] Article 1117 of NAFTA.
[83] Article 1120 (1) of NAFTA.
[84] Article 1119 of NAFTA.
[85] Countries like the US are obliged to make documents available to the public as by its Freedom of Information Act. This concept as noted by Mary Hallward do not apply to all countries.

Luke Eric, Peterson, a critic of the NAFTA, indicates that the subsequent rulings under NAFTA have failed to resolve the uncertainty which has arisen with respect to the line between legitimate host government treatment of foreign investors and conduct which violates standard treaty provisions, such as those on fair and equitable treatment, NT or expropriation. Therefore, foreign investors have been encouraged by the legal uncertainty surrounding the meaning of key treaty rules to turn to investment treaties with increasing frequency, and in an effort to challenge an expanding range of government interference.[86]

In NAFTA it is noted that the scope and meaning of the various provisions of chapter 11 is a matter of both uncertainty and legitimate public interest.[87]

The US-Morocco FTA provides for negotiation and consultation before the claim is instituted. Where the negotiations have failed, the party claiming may then submit the case to arbitration on his own behalf, indicating that the respondent has breached an obligation under the agreement, and that the claimant has suffered loss or damage by reason of that breach.[88]

The only difference between the two Agreements is that, under the US-Morocco agreement, the claimant does not have to institute a claim first, on his behalf or on behalf of the enterprise, the process begins with negotiations.[89]

2.9 TRANSFER OF CAPITAL/ FUNDS

Any foreign investor wishes to be granted the right to repatriate his profits from the investing country back to his own home country. Most BITS are flexible when it comes to profit repatriation; they guarantee the right to transfer profits in hard currency to the

[86] Hallward Driemier (n. 76 above)21.
[87] It was concluded in the case of Mondev international ltd V USA, award, October 11,2002 at Para 159. as quoted from Hallward Driemier 2003. "Do BITS increase FDI? Only a bit and they bite.
[88] Article X of the US-Morocco FTA.
[89] Article VI US-Morocco FTA

home country.[90] Although repatriation may have its own negative consequences especially for developing countries, some countries have instituted an exception clause for times of economic emergency.[91]

The scope of transfer is wider in developed countries than in developing countries. Among developed countries it includes any additional amounts to maintain or increase an investment, returns, payment of loans, proceeds from liquidation or sale of any part of the business and compensation in times of repatriation.[92]

The US-Morocco FTA, provides that each party shall permit returns in kind related to a covered investment to be made as authorized or specified in a written agreement between the party and the covered investment or an investor of the other party.

The agreement also considers payments arising from a dispute to be part of its forms of transfer. Article IV states that "Each Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory: Such transfers include; returns compensation, payments arising out of an investment dispute, payments made under contract including interest payments made pursuant to a loan agreement, proceeds from sale or liquidation of all or any part of an investment and additional contributions to capital for the maintenance or development of an investment."

"Transfers shall be made in a freely usable currency at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred."[93]

Unlike many BITS the US-Morocco FTA is more sensitive to environmental needs. Under Article10.10 of the Agreement, investment in its territory is undertaken in a manner sensitive to environmental needs of the country.[94]

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[90] Zachary, Andrew and Beth. The diffusion of bilateral investment treaties, 1960-2000, International organization 60, fall 2006,pp 811-846.

[91] See Suzan-Rose Ackerman (2004).'FDI and the business environment in developing countries' who cites an example of the French-Argentina BIT, it is discussed that the ability to repatriate profits may lead to liquidity problems faced by the host country, especially following the devaluation of the peso.

[92] OECD 1995: Towards Multilateral investment rules Paris, 142-43.

[93] Article IV (2) US- Morocco FTA.

[94] Article 10.10 of US-Morocco agreement.

NAFTA provides under article 1109 that, any transfers relating to an investment in contracting states should be freely made without any delay.[95]

It further provides under article 1109 (2) that, no party may require its investors to transfer, or penalize its investors that fail to transfer the income, earnings, profits or other amounts attributable to investments in the territory of another party. This does not however stop a party from restricting transfers acting in good faith and not discriminating in the event of bankruptcy, criminal or penal offences.

2.8 CONCLUSION

As discussed above, it is the overall objective of BITS to ensure protection of foreign investors and put restrictions on the host governments regarding safety for foreign investors and investments.

It is also clear that BITS intend to design a mechanism for dispute settlement in cases where a dispute may arise from such issues relating to investment.

The dispute settlement mechanism by arbitration under BITS seems to be a costly venture particularly for the host governments, especially when it comes to compensation. Most BITS provide for full compensation, but the problem is to determine a real valuation of the compensation, which they do not properly explain.

Choosing international law as the method of dispute settlement is very important for the foreign investor. It places the investor in a predictable position in case a dispute arises from the agreement or as a result of government interference.

Although international arbitration may be costly, therefore, it seems more efficient than court litigation.

Whether BITS have greatly increased the flow of FDI in the host countries remains a question of debate because having regard to the literature, there is little evidence to this effect. The countries with less developed institutions attract little FDI as compared to those already developed with established institutions. Foreign investors are interested in

[95] Article 1109 of the NAFTA.

establishing their investments in countries with a strong legal system, and where investor protection is guaranteed.

BITS however seem more flexible to developing countries since they place fewer restrictions on the host government. This allows the host country to follow its own FDI structures and fulfill the stipulated development goals, unlike the MAI which places the host country in a weaker position as regards control over its own development policies.
It is important, therefore, that provisions relating to protection of foreign investors under BITS do not interfere with the host country's ability to boost the nation's welfare.

CHAPTER THREE: FOREIGN DIRECT INVESTMENT REGULATION IN AFRICA

Attraction of FDI is on the agenda of most developing countries including those in Africa. FDI is important, especially to developing countries, for it carries with it a number of benefits; jobs, improved technology, market access, as well as capital from developed to developing countries.
The question which arises however is: which factors most influence the flow of FDI in the global market? Several policies have been designed: for instance, promoting local skills development to meet investor needs and expectations, improving domestic infrastructure, providing targeted fiscal incentives like tax concessions, cash grants, and improving the regulatory environment in the host country.[96]

Multinational corporations (MNCs) have been the primary channels for transmitting FDI to developing countries in the last two decades.[97] According to OECD, 2006, it is noted that while many developing and emerging economies continue to open up their economies to international participation, the international security conscience and fears of negative consequences of globalization have prompted the governments of most OECD

[96] Blomstrom and Ari 2003: Do tax incentives compete for foreign direct investment? Working paper 168, Stockholm school of economics, January 2003. Online www.oecd.org [accessed] 6 September 2007.
[97] Kenneth Mwenda 1999; World Bank Legal Aspects of FDI in Zambia. Vol. 6, No. 4, mwenda64.html.

countries to review their FDI regulations,[98] and that following concerns of national security and other important public interests, authorities have reviewed, and in some cases discouraged, foreign participation in areas of strategic interest.[99]

Legislation is one fundamental way of regulating FDI in developing countries in Africa and else where. Customary international law recognizes the sovereign rights of every state to tax alien residents or those owning property within their territories. The establishment of unfair taxation against nationals and their property is an unfair act which may give rise to protests, since host countries have a similar motive to attract FDI. Foreign investors are placed in a more advantageous situation than the domestic investors, for example, some countries offer tax holidays to investors and other related incentives which the domestic investors do not get yet they are at times in the same industry. This has caused friction between the foreign and domestic investors and at some point, the governments have been attacked for the unfairness.

Mwenda argues, that although legislation is important in regulating foreign investments, it is not on its own sufficient to attract FDI; there is a need to look at the socio-economic, political and cultural climate in the recipient country.[100] The positive impact of FDI will largely depend on the strength of domestic regulations.

It is apt to note that Africa depends on natural resources for its economic growth and development. Less developed countries will receive a disproportionate amount of FDI flows into their natural resources sector.[101]

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[98] OECD 2006.

[99] OECD(n.98 above) 14.

[100] Mwenda discusses the views on FDI in Zambia. It is true, however, to note that there are, other than the legal systems factors that may influence a foreign investor to invest in the country. Many scholars have tried to do research on the determinants of FDI especially in developing countries. Major determinants include incentives, administrative barriers, environment, and countries whose investment climate is clouded with political insecurity and poor public and corporate governance are unlikely to attract much foreign investment, OECD 2006.

[101]Richard McNally 2000: Foreign Direct Investment and Sustainable Development. A discussion paper for CSD WWF-UK CSD brief. online, http//csdngo.igc.org/finance/paper-wwf-fdi-htm visited on 6 September 2007.
About 52% of FDI flows to Africa from France is in the primary sector. FDI in the primary sector does not provide the host country with the same benefits as manufacturing or services.

Countries tend to ignore environmental regulation for fear of losing potential investors. They fear raising environmental standards and risk losing the competitive edge for rival firms in other less regulated countries. To attract foreign investors countries are going out of their way to offer financial incentives that often have negative implications for the environment.[102] In Uganda, for example, there seems to be a loss of environmental sensitivity especially on the part of the executive arm of government, where the oldest and biggest forests are being given away to 'potential investors' to reclaim and set up industries.[103] The terms under which this is being done remain unclear to the public and environmental activists.

According to McNally, the problems with foreign direct investment do not come from over- protection and over-regulation; problems arise because FDI is under- regulated, and countries are putting their domestic economies at a disadvantage in order to attract new investments. The solution, however, is to increase a host country's capacity to regulate, construct international standards, and, because of the economic differences between the developed and developing countries, the developed have to increase assistance to build a strong regulatory capacity.

Regulation of investments is sufficient to achieve sustainable development and good governance.[104]

The wide spread privatization of state owned enterprises (SOEs) in developing countries has focused attention on the need for an effective regulatory framework.[105] Privatisation requires clear rules regarding procedures, as well as transparency. In Africa there have

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[102] Richard McNally 24. In the UK, US, EU and Australia, threats of industrial location have defeated and weakened the proposals on energy taxation.

[103] In Uganda, it looks like the principle of separation of powers as constitutionally provided is in its dying stages. The president, (executive) can interfere in any organ of government and take conclusive decisions as he pleases. Considering the Mabira forest saga, where he was giving away one of the oldest forests to an Indian foreign investor, Mehta, to reclaim and plant sugar cane. When the matter was tabled before the parliament of Uganda and the national forestry authority, the president referred to them as ignorant politicians and warthogs. The director of the National Forestry Authority resigned. Reported by the Daily Monitor, April 2007.

[104] McNally(n.111) 16.

[105] Collin, David and Others. 'Foreign Direct Investment in infrastructure in developing countries; Does regulation make a difference?' Transnational corporations, (2006) 15

been successful examples in Uganda and Ghana of privatization with strong participation of foreign investors.[106]

The effects of privatization in developing countries indicate that, in general, it has improved the economic performance of former state owned enterprises.[107]

Collin further states that, privatization per se may not be the critical factor in raising productivity and reducing production costs, but rather, the requirement for privatization is the effectiveness of the regulatory regime in promoting competition and controlling anti-competitive behavior of the dominant firms.

Corruption is yet another factor required to be dealt with in order to ensure proper regulation of foreign investment in Africa. Corruption is divided into two categories; political corruption and economic corruption. Both categories ordinarily refer to a situation where a public office is used for private gain, for example, an official or agent entrusted with carrying out a task engages in some kind of malfeasance for private enrichment which is very difficult for the principal to monitor.[108] Sometimes corruption is interchanged with illegality in describing a transaction, although not all illegal acts are corrupt.

Although some economists, like Nathaniel (1964), think that corruption may be a better way to negotiate bureaucracies to an efficient outcome, the international community has condemned such acts especially in regard to international business transactions and procurement.

First and foremost, the US prohibits American individuals and corporations from bribing foreign government officials and states under its legislation enacted in 1976 and 1977; that tax penalties, fines and prison terms shall be executed for American companies

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[106] Maria Pigatto (2000): 'The FDI environment in Africa.' Online, http/www.fias.net/ifcext/fias.nsf [accessed on 11 September 2007].
[107] Collin, David and others, cite from Parker and KirkPatrick,(2004).
[108] Bardhan and Pranab 2001; The Development of Corruption University of California at Berkeley. Online http://www.web37.epnet.com/externalframe [accessed on 30/4/2007].

which pay bribes.[109] With the Foreign Corrupt Practices Act (FCPA) 1977, the US started a campaign for stronger international regulation of bribery of foreign officials, although it received less support from its partners who reasoned that imposing stricter national regulation hurts the export industry,[110] while favouring competing country exports, especially of those with a lower standard of ethics.[111]

Secondly, the OECD countries also launched a joint initiative to improve the conduct of their exports business. In May 1994 the OECD Council on Bribery recommended that each member examine its criminal, civil and tax laws in order to prevent the bribery of foreign officials.[112] OECD criminalized in 1996 the bribery of foreign public officials, and since then it has become an offence amongst members.

Thirdly, the UN has also condemned such acts through the United Nations Convention Against Corruption (UNCAC), and has called upon its members to enact laws prohibiting extortion and bribery.[113] Also, international agencies, for example, the World Bank and Transparency International have enacted programs to ensure open and fair contracting for their projects. From the different efforts put forward by different organizations, it can be observed that the impact of both corruption and bribery is now widely acknowledged, in that they distort markets and competition, undermine the rule of law, and destroy the integrity of the private sector.

In Africa, bribery and corruption have had a tremendous impact on the amount of FDI inflows into the continent, and due to the weak legal systems available, investors fear losing their investments if they are incapable of giving bribes. As it has been stated, some countries like the US forbid such practices and investors from those countries will be

[109] Hines Jr. 1995: Forbidden Payment: Foreign Bribery and American business after 1977; University of Michigan 23.
[110] Johann Graff 1998: Bribery in international Trade; European Journal of Development volume 10, issue 1 p 40, 20p.
[111] For example, When a US power generating company withdrew after being asked for a bribe of $3m in the Middle East, a Japanese company quickly stepped in; and whereas, Lockheed was convicted of making payments of $1.5m to an Egyptian government official, the corrupt activities of European and Asian competitors comply with their domestic legal standards.
[112] Transparency international 1995: 87-8.
[113] Heinemann and Others : 'The Long War against Corruption'; (2006) 85 Foreign Affairs

discouraged. Corruption in African countries is seen more within the oil extracting countries and during tendering processes; therefore in order for African countries to attract more FDI, they need to strengthen their laws and reduce bureaucracies within their administration as well as ensuring open tendering in order to enjoy the benefits of increased FDI.

For most investors, both local and foreign, time is of the essence to determine whether to invest or not. A country which takes a long time to allow the investors to establish themselves is likely to scare off foreign investments, as the more time spent on the processes increases the costs incurred. Such delays usually occur at the times of entry and establishment in the host country.[114] Although regulation is necessary, when excessively done, it may lead to losses on behalf of the investor.

Access to land is yet another issue for most foreign investors in determining whether to invest in a country or not. In Africa, it is difficult for non- citizens to buy and own land. In most cases investors obtain leases from the government. When an investor has succeeded in getting the land, the next regulatory challenge is to acquire permits for construction, development, and workers.[115]

As regards the incentive framework, most developing countries have signed bilateral, regional, as well as multilateral agreements, with international organizations.[116] Restrictions on external account transactions have been eliminated and many countries now rely on market based exchange rates.

Pigatto states that, harmonization of investment laws and incentives have been intensifying during the last couple of years, in East Africa and Southern Africa that adhere to cross border initiatives (CBI). They have adopted a common roadmap for

[114] Margeret Kigozi, Director Uganda investment Authority, Annual Report 2001-2002, pg 4. Emphasizes that in Uganda, for example, investors are obliged to first establish that the project generates economic benefits, like foreign exchange, employment, use of local raw-materials and technological transfer.
[115] Maria Pigatto (n.106 above)37.
[116] Maria Pigatto (n.115 above) 38.

investment facilitation, and countries have agreed to codify regulatory provisions into a single document.[117]

Generally, as Collin states,[118] regulation is supposed to establish a policy environment that sustains market incentives and investor confidence; therefore, the regulator should be free from political interference, consistent and accountable. Independent regulation can provide assurance to foreign investors that their profits and output will not be politically manipulated.[119]

There is recognition that the rapid changes in globalization for developing countries have both positive and negative implications and some analysts argue that it is the role of the international regulation through a multilateral agreement on investment to ensure that the economic benefits are maximized while the social and environmental standards remain unhampered.

The MAI is strongly marketed within African countries as the only way in which African countries can reach their desired expectations of attracting FDI. The support of MAI will increase investor confidence about Africa's determination to do what it takes to attract FDI.[120]

Okere refers to this type of FDI as a 'rose-tainted' type of FDI which he advises developing countries especially in Africa, to avoid, and says that, the usefulness of FDI depends on the way it is regulated.

In the next section of this chapter, the implications of the proposed MAI are discussed extensively. The proposal for a MAI may not be a bad idea as a whole, but the participants need to act very keen and balance the needs of the host country and those of the investors.

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[117] Maria Pigatto (n.166 above) 38.
[118] Collin and Others(n.107 above) 15
[119] UNCTAD, 2006.
[120] Charles Okere. MIA and Africa's foreign direct investment; The proposed multilateral investment agreement and Africa's desire for foreign direct investments.
Third world network, Accra online, http://www.aidc.org visited on 24 September 2007.

3.2 IMPLICATIONS OF THE PROPOSED MAI COMING INTO EFFECT

3.2.I INTRODUCTION

The OECD attempt to propose a multilateral agreement on investment in 1998 provides an important case to examine the process of internationalization of a state. In fact, the suspension of negotiations for a MAI indicates clearly how serious the conflict is against the transnational capitalist class.[121] At the beginning of negotiations OECD members thought that negotiations would be complete within six months, which never happened. Some members now feel that it is time to start negotiations at the WTO, since it has more experience in implementing multilateral agreements and might succeed where the OECD has failed.[122] Also the WTO has a bigger membership than the OECD; therefore the agreement would be part of the WTO commitments.[123]

The fact that the OECD involved members of the same category, capitalists and those 'like-minded', implied that it could not be trusted.[124] The proposed MAI was more concerned with the interests of investors, their contractual and proprietary rights, and did not consider whether there was any actual inflow of money or resources.[125]

To a larger extent, it was indeed a wise move to reject the OECD MAI because it was negotiated without serious involvement of the major stake holders. There was no consultation about the different clauses it contained and yet, it is the developing countries in the long run that would suffer the consequences.

3.2.2 OUTSTANDING ARGUMENTS IN FAVOUR OF MAI

[121] Edward Graham. The transnational historic materialism sees the neo- liberal strategy of an emerging transnational capitalist class in defining internationalization in terms of a national state becoming a transmission belt for global capital; Trade and Investment at the WTO. Online www.iiecom/publications/chapters[accessed on 11 may 2007].

[122] ' The talking FDI blues' and 'An investment treaty in trouble'. The Economist, 34. No.8059, 14/03/1998; 18-19 and 81-82.

[123] OECD public documents. www.oecd.org.

[124] About 95.4% of multinational corporations are OECD members. There is no way the agreement could be drawn on fair grounds.

[125] Picciotto sol (1999): 'A critical assessment of MAI. Regulating international business beyond liberalization'. Oxfam in Association with Macmillan 85.

The major exporters of capital are the ones behind the MAI. These are mainly the EU countries.[126] The debate on the positive effects of MAI is a 'hot' issue amongst members and this accounts for the failure to come to a conclusion on the agreement. This section shall analyse some of the positive arguments for the MAI such as, policy coherence, growing importance of FDI, transparency, predictability and legal security, national legislation no alternative, competition for FDI, the need to move to a multilateral level, marginalization, international policy spillovers and reduction of uncertainty.

3.2.2.1 Policy coherence

International agreements have been signed, which are either bilateral or regional to improve the investment environment in the signatory countries.[127] A multilateral framework on investment would encourage policy coherence which in turn would promote FDI.

The existence of bilateral and plurilateral agreements on investments has its short-comings. By June 1996 a total of 1166 agreements had been signed,[128] and this is problematic since different agreements have different coverage of issues and rules. The more the agreements, the higher the risk of having inconsistent rules,[129] which is a big impediment to FDI. The risk is seen by even those who are against MAI but have a preference to go bilateral or regional.[130] It would be prudent therefore, to be part of a single agreement with a defined set of rules, than being party to many which may conflict with each other and in the long run the desired goal of attracting FDI is not achieved.

Policy coherence in international trade can contribute to an equitable and sustainable global development.[131]

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[126] These are the industrialized countries which are at the highest levels of development compared to those in developing countries an Africa. These countries have been joined however by some of the developing ones to come up with a multilateral investment agreement.
[127] These agreements include those signed between the developed and developing countries, as earlier on noted in chapter 2 above and also between countries at the same levels of development.
[128] WTO,1996.
[129] WTO,1996 has observed that members would have to sign about 7503 agreements if they wished to provide investment protection through bilateral treaties of which is likely to involve a lot of inconsistencies.
[130] UNCTAD, 1996.
[131] Nordic Africa, Tanzania. Online http://www.sweden.gov.se/content/i/pdf. [accessed on 27 May 2007].

3.2.2.2 Growing importance of FDI

Attraction of FDI is on the agenda for most developing countries. FDI is a form of international integration that brings gains to both parties according to the principles of comparative advantage.[132] During 1986 to 1995 FDI outflow increased rapidly in world trade and its value multiplied more than twelve times.[133] In many African countries, FDI is a major source of external finance. In 2002, developing countries had a net FDI reading of $143 billion.[134] Benefits for the home country include market access and increased competition, as a result of an alliance between governments, whereas, for the host country, FDI creates an increase in jobs and wages, increased technology, organizational and managerial skills, market increase and a contribution to domestic savings and investments. There is a close link between FDI and trade because trade leads to FDI and FDI leads to trade.[135] This has contributed greatly to poverty alleviation in Africa and other developing countries.

3.2.2.3 Transparency, predictability and legal security

Foreign investors need transparent and predictable rules, as well as legal security, in order to operate. Investors need to be sure of any corresponding returns in the form of compensation in case of a risk involved. This is however disadvantageous to the host country in attracting foreign direct investments.

The MAI will provide transparency and predictable rules,[136] and instill confidence in foreign investors since the rules are all the same. This is unlike the bilateral and regional agreements which at times contradict each other on certain principles of trade.

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[132] Graham, Krugman 1995. International trade unlike FDI involves an arms length transaction while FDI deals with intrusive transactions.

[133] WTO, 1996.

[134] BBC. Africa best for investment. Online www.globalpolicy.org/sececon/develop/africa/2003. [aceesesd on 21 September 2007].

[135] WTO, 1996. A Research by Centre D'etudes Prospectives et D'informations internationals in Paris.

[136] The supporters of MAI look at transparency and legal security as major considerations in attracting FDI. This may be unlike the bilateral or regional agreements. Once the country has signed more than one agreement, it is foreseeable that its rules are likely to contradict because not all these agreements have similar provisions.

3.2.2.4 National security is no alternative

LDCs are undergoing a process of policy liberalization which has affected the monitory infrastructure in these countries to attract inward FDI.[137] The absence of an international agreement can have serious consequences for the flow of FDI. Different investors from different countries do not have similar rules on investment and this can affect foreign direct investments, especially on the principles of law. This may be worse for developing countries whose laws are not very developed. What investors need is the protection to do business.

Where there is a difference in the laws of the host country and the home country, there requires to be an international institution for dispute settlement to solve disputes between investors and the host governments, or between the contracting states. The multilateral investment agreement would be the appropriate vehicle because it would create a balance between the laws and have its own dispute settlement system to handle international investment cases.

3.2.2.5 Competition for FDI

Economic nationalism in developing states has sought to control inward and outward investment flows; they have employed interventionist measures like protective tariffs and tax incentives,[138] investment screening,[139] and performance requirements.[140] The global

[137] Drabrek and Liarb, 1997.
[138] Out of the four states surveyed in the early 1990's, only three did not provide some kind of incentives to foreign investment.
UNCTAD, incentives and FDI flows, World investment report 1995.
[139] Investment screening refers to mechanisms that require prior approval for or prohibit entirely the establishment of FDI and such mechanisms are in the foreign investment codes.
[140] The case for investment incentives, screening and performance requirement are widely discussed in investment law. Investment incentives especially have called for a different approach amongst economists. While some countries offer these incentives, others do not regard them as having a significant impact on flows of FDI. Some argue that incentives should be shifted to be financial like co-financing e.g. under the EU rules as opposed to fiscal incentives such as tax holidays. Hungary ministry of finance, Budapest, September 2003.

environment for FDI increased in 2005.[141] Corporate profitability was strong and low interest rates and equity valuation[142] in most countries was firm.

Some countries have imposed restrictions on outward investment to prevent a loss of capital. Developing countries have begun to encourage outward investment so as to gain access to foreign markets or needed assets such as natural resources, less expensive labour and technology.[143]

The role of incentives in attracting FDI is criticized to be distortionary. Those who provide incentives get more and those that provide less or none at all are excluded. This has made competition for FDI more intense. Rich countries are providing better and attractive incentives which have led to increased marginalization of the poor and developing countries in Africa.

FDI plays an increasingly important role in promoting world wide economic growth and development through stimulating markets, creating jobs, increasing wages and transferring technology and knowledge, it stimulates development and reduces poverty.[144] FDI also contributes to growth in government revenue.[145]

Considering the benefits and importance of FDI, it is better to globally regulate in order to maximize its benefits and increase its flow especially among the developing countries.

3.2.2.6 Marginalization

It is generally noted that poor countries attract less foreign investment compared to the rich and developed countries. Membership of the MAI will bolster the confidence of not

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[141] Hans Christiansen 2006: Trends and recent developments in FDI; International investment perspectives, 2006.
OECD 2006.
[142] Ibid, 32.
In the US, net FDI flows were $ 110 billion in 2005 up from the 18% decrease in 2004, FDI flows from Japan in the same year were 64 billion. This was considered a spectacular increase and even though Japan is reknowned as the world's most important outward investor, its 2005 figure was the highest on record since 1990.
[143] Richard Caves. Multinational enterprises and economic analyst, 27, 31-34, 2nd ed, 1996.
[144] Business Rountable 2003. WTO policy working paper. How the WTO can promote the benefits of international investment. http://www.brtable.org/taskforces. [accessed on 17 September 2007].
[145] Ibid pg 3.

only foreign, but also domestic, investors, by ensuring that the policy regime is unlikely to shift in the future due to the cost of withdrawal from a multilateral agreement of this type.[146] For those unable to accede, it would provide a benchmark for evaluating the standards and quality of their investment regimes.[147]

Due to the failure to conclude the MAI, there is a major shift from multilateralism to BITS,[148] because investors seek opportunities in countries where they can best be protected. This has resulted in discrimination for those countries that are not party to these agreements.[149]

Since the provisions under the BITS are not the same, it has led to conflicts between the parties.

The above situation does not encourage foreign direct investments and is very discouraging as well to foreign investors. In essence, it is right to argue that a MAI would therefore be a better option in attracting consistent and even distribution of FDI and ensure investor protection under a single binding rule.

3..2.2.7 International policy spillovers

There is skeptism that regulation of foreign investments may lead to negative spillovers and externalities at a global level leading to distortions in the allocation of investment, as well as co-ordination failures which result in inefficient results.[150]

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[146] FitzGerald and Cubero 1998: Development Implications of Multilateral Agreement on Investment; A report to the Department for International Development University of Oxford. 21.
[147] FitzGerald and Cubero(n.146 above) 12.
[148] UNCTAD, 2007.
This is a major reason for replacing the BITS
with a multilateral framework because they have discriminated against those countries that cannot achieve those requirements. According to UNCTAD, 2007, BITS are a creation of the western capital exporting countries to protect investors and their investments abroad especially in developing countries to supplement domestic legal systems, so as to provide protection against many kinds of interference by host governments and discrimination against foreign investors and investments.
[150] Okhomina' The Quest for MAI; Implications for developing countries'. 2005.

It is foreseeable that once investment regulation is done on an international basis, this may in turn increase the global flow of FDI. Such benefit may be achieved through accession to the MAI.

3.2.2.8 Reducing uncertainty

Firms may confront significant transaction costs and uncertainty resulting from differences in national rules and bilateral treaties. The MAI will act to address the concerns of developing countries. The fact that many developing countries have signed bilateral and plurilateral treaties with developed countries is likely to cause a lot of uncertainty amongst investors since the rules may be different in each agreement.

According to Hoekman and Saggi, the MAI may act as a mechanism through which governments make irrevocable commitments and guarantees against policy reversals, thereby anchoring expectations of investors.[151] Investors may avoid a country which has a frequency of policy reversals, or whose commitments to reversal are not deemed credible.[152]

Nunnenkamp notes that, developing countries seem to be reluctant to buy the idea that their bargaining power would be stronger in a multilateral context than in the bilateral dealings with major industrialized countries.[153]

Generally, there is a need to move to the multilateral level. Membership to the MAI is the best way developing countries can promote and encourage a long term productive capital formation by foreign and domestic firms that will support sustainable development.

If developing countries committed themselves to an international regulatory regime, there is hope for achieving a substantial reduction in uncertainty which should lead to more and better investment by foreign, domestic and expatriate firms.[154]

[151] Hoekman and Saggi. World Bank Development, May 1999. online www.worldbank.org/wbiep/trade [accessed on 28 August 2007].

[152] Ferrani Berno 2003. A Multilateral Investment Framework: Would it be justifiable on economic welfare grounds? 2003. online http://www.wti.org [accessed 25 August 2007].

[153] Peter Nunnenkamp and Manoj Pant. Why the case for Multilateral Agreement on Investment is weak. March 2003. online. http://opus.zbw.kiel.

MAI would be in the best interest of African countries that need a well negotiated investment agreement which takes into account their developmental interests on a multilateral level.

International organizations such as the EU and WTO have also advocated for a multilateral investment agreement to boost the flow of investments amongst countries. According to the EU, many countries have already liberalized their domestic investment regimes, having realized that this is the avenue for attracting more investments and for smaller countries, would be an avenue for access to larger markets.[155]

It is further stated that, while the 1600 BITS cover investment protection, market opening rules on the admission of investment are confined to regional initiatives and even though the WTO rules cover some forms of investment under the GATS and address relevant issues on investment under the TRIMS,[156] investment protection is not given attention.

3.2.3 Arguments against the MAI: Why opposed

With the grant of excessive protection and the grant of rights without corresponding obligations to the multinational corporations, developing countries feared the consequences this would have on their economies and their national development strategies.

There were serious concerns of loss of state sovereignty, security concerns, environmental as well as labour threats and a lack of control over foreign direct investments. The MAI would give maximum protection to foreign investors and multinational corporations thus limiting the ability of developing states to regulate foreign investments.

Developing countries and other WTO members have since insisted on further discussing the agreement especially as regards the modes of negotiation.

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[154] Fitzgerald (n.147 above) 4.

[155] Young Steven and Tavares 2004: Multilateral rules on FDI; Do we need them? Will we get them? A developing country perspective in UNCTAD 2004 Transnational corporations Vol. 13 UN publications.

[156] European Commission 1998: WTO New Round . Discussion paper.

3.2.3.1 Security considerations

Investing in security would give governments discretion to allow or reject foreign investment security being an important sector of any economy that requires direct government control. The definition of security is not very clear. Drabek argues that, it is this ambiguity which gives each of the different states the discretion to define it their way.[157]

Governments will play a leading role in the choice of foreign partners, and Privatization and foreign direct investment will give the black majority a greater share of the white dominated economy.[158]- Robert Mugabe, President of Zimbabwe

Mugabe explains further that, 'the role of the state is vital.' The fact that the definition of security is left to the governments to decide, is perceived to be for the protection of some special interest groups.[159]

If there is no common definition reached, this is likely to hinder the negotiations of MAI. When a government loses the ability to control its security issues to a foreign corporation, it in itself implies insecurity and this would be associated with loss of state sovereignty.[160]

[157] Drabek Zdenek, 'A Multilateral Agreement on Investment: Convincing the skeptics.' 1998.

[158] The citation is quoted from Grace Okhomina in 'The quest for a multilateral Investment Agreement, 2005. The quotation is cited from Financial Times, 5 March 1997, 7.

[159] Okhomina(n.158 above) 45.

[160] No country would allow its army or police institutions to be taken over by a foreign corporation. Losing control due to globalization is a fear of many countries and governments. Governments reserve the right to pursue their political objectives and national priorities and generally attempt to restructure the countries political and other institutions in accordance with the demographic characteristics of society concerned (Drabek 1998). Governments also need to protect their cultures which would be destroyed by uncontrolled foreign domination as an intervention through globalizing investments.

3.2.3.2 Costs of globalisation

The parties involved in the MAI view globalization as if it is a costless venture or procedure altogether.[161] The adjustment costs seem to be more unbearable especially for developing African countries. As Drabek states some of the recent financial turmoil affecting capital and foreign exchange markets in Mexico, Argentina, the Czech Republic and Thailand, the whole idea of globalization has scared off developing countries since even the extent to which they are going to benefit from it is not clear.

The question which remains is what net benefits will the MAI bring to them? MAI is likely to create development costs and not benefits for developing countries. The WTO members are not certain that the WTO will produce fair rules for developing countries and fear therefore that once the agreement is reached, it is going to have binding effects on them that will be very hard to change and which may result in greater marginalization of these countries. This therefore explains the position for the increased number of bilateral and plurilateral agreements signed between these countries. Bilateral agreements seem to be more protective of their interests than the multilateral investment agreement.

3.2.3.3 Corporate practices

Policies requiring companies to incorporate will be made invalid. The treaty will enforce more serious liberalization of finance with foreign banks and other institutions being given the right to operate.[162] The argument against MAI is that it is likely to promote corporate malpractices in MNCs who are the major exporters of foreign investment.[163]

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[161] Adjustment costs have been ignored. There are also negative effects pointed out by some economists (Rodrik, 1997) that include; growing income inequality, poverty as well as marginalization of some countries. Adjustment costs therefore may scare off some countries from opening up their markets to investment globalization.
[162] Okhomina(n.159 above) 52.
[163] Drabek, 1998 states that corporate practices are used by MNCs to deprive host governments of fiscal resources thus leading to persistent dependence of those countries on MNCs. MNCs are taking advantage of globalization to get around environmental concerns and operating rules, for example labour conditions. Such practices are considered as unethical and dangerous to the development of poor African countries.

Practices like transfer pricing, have been commonly used as an example of how MNCs keep developing nations in a situation of dependence.

Considering the signing of the agreement and all the consequences involved, like the binding nature and the excessive power it gives to multinational corporations, developing countries will be left in a more disadvantaged position. Following the signing of the MAI, policies favouring local firms will be cancelled and will heavily reduce their market share as well as preferential treatment. In fact when the worst comes, they may be forced to close down and this has multiple effects on the countries revenue.

3.2.3.4 Preserving the status quo

The basic argument against MAI is that host countries need to preserve their investment regulations and be free to make any adjustments in the interest of the country.

According to UNCTAD, 1996, it was concluded that the current arrangements on FDI regulation are working well in enabling a framework that allows FDI to contribute to growth and development and supporting high standards and growing FDI flows.[164]
It states that it is better to go both ways to regulate FDI through regional and bilateral approaches if countries are made to understand the real benefits of foreign investment.

UNCTAD is accused of not supporting MAI, yet some critics think that it is a better institution to handle this matter because of the greater influence it has on different countries in the field of trade and investment. It clearly indicates that it is countries with a similar status that enter into this agreement, and that it is those that are highly industrialized that are pushing for this MAI because they have a common goal to achieve, like increasing their market access, ensuring accessibility to natural resources, and maximizing their profits. The ideas are very different from those of the FDI recipients who look at foreign investment as a “final touch” to all their developmental problems.

[164] UNCTAD, 1996.

MNC's are flexible and more experienced in operating diverse policy frameworks and can adapt to regulatory differences among countries and rule coherence through negotiating a global bilateral investment agreement.[165]

3.2.3.5 Negotiation strategy

Another argument against the MAI is that some countries lack negotiating support and others do not even understand the issues discussed in negotiations. Drabek[166] the leading author on this subject, quotes the Commerce Secretary of Bangladesh as saying that,

"In conferences, we cannot play a meaningful role and as a result our comparative advantages are undermined…..the least developing countries often do not know their obligations and rights under the world trading system."

Other countries are against the MAI because they do not understand the nature of the negotiations at all, they believe that their hands are tied and have already been burnt in the past.[167]

Developing countries also have a preference to negotiate at regional levels because such agreements are not unilaterally binding and also considering the process of dispute settlement, they are comfortable with the bilateral system of regulating investments. Developing countries are still divided among themselves on whether they should cooperate towards a multilateral agreement.[168]

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[165] UNCTAD is very sensitive about about the plight of developing countries once they sign the multilateral investment agreement. There is skeptism about the honesty of MNCs and the rules governing foreign investment. Some members have more faith in UNCTAD which strongly believes that negotiations should take a completely bilateral direction.
Drabek argues that, allowing countries and regions to develop their own approaches fosters policy competition which leads to a relatively rapid spread of best practices of FDI.

[166] Drabek(n.163 above)13

[167] Martin Knor, Third world net work. Developing countries should not be coerced into Investment negotiations. He quotes the Indian minister of Trade who advised developing countries not to take part in the WTO negotiations on the multilateral Investment Agreement unless they are fully convinced it is in their interest. One of the delegates commented that they started negotiations before knowing before hand what the elements and obligations entailed and that it was very important to know the substance and the path before deciding on whether to negotiate.
Online http://www.twnside.org.sg/tittle/twninfo17.htm. [accessed on 27/08/2007].

[168] Seid, Sherif H 2002, Global regulation of foreign direct investments, Ashgate publishing, pg 99.

3.2.3.6 Mechanism of global negotiations

The mechanism of negotiations is inefficient. It takes such a long time before conclusions are reached. In the case of bilateral negotiations, they seem to be faster and easier than multilateral treaties. Prolonged negotiations result in further delays of FDI.[169] The fear of developing countries is that the negotiations are driven by the world's wealthiest economies, and therefore it's their priorities which matter. The concerns of labour mobility, environment, and transfer of technology, would not receive adequate attention.[170] Developing countries are avoiding a situation where they will adopt strong liberalization measures too fast. However, according to Graham 1996, the agreement will be drafted with exceptions, especially in favour of developing countries who in most cases need more time, but not on the nature of the obligations. Negotiations at the WTO bind all members; so when a member fails to agree in negotiations, it may leave and lose all the benefits under the institution which has still instilled fear among WTO developing country members in Africa.

3.2.3.7 Decapitalisation and denationalisation

Increased growth of economic integration and interdependence has exposed the limitations of the classic liberal internationalist system based on national sovereignty.[171] Decapitalisation and denationalization are causes of impoverishment in LDCs in Africa and other developing countries. The effect of such globalization is that it leads to marginalization of these regions, and also accounts for the income disparities.[172]

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[169] Developing countries are more interested in discussions on textiles and agriculture because tis s the base of their economies. This could be the reason why they have little interest in the MAI negotiations. Although the commitment to the negotiations by the like minded people are faster and stronger, there is a risk for LDC's that multilateral negotiations could be dominated by the agenda of the strongest economies. There is a fear therefore of adopting too strong liberalization rules too soon and fast.

[170] UNCTAD,1996 168.

[171] Sol piccitto, Networks in International Economic Integration. Fragmented states and the dilemmas of neo-liberalism. 17.J. INT'L Law & Business, 1014.

[172] Woodward, 1996.
FDI leads to decapitalisation of host countries as well as denationalization especially given the fact that they do not have the economic power to compete with the already strong and established MNCs. The fear of host countries of losing economic control through globalisation poses a serious threat to the finalizing of the multilateral negotiations on investments.

While some developing countries have benefited, African and other LDC's have been harmed; which means that the effects of globalization have not been fully spread. The excessive domination of MNCs under the MAI poses the threat of economies being dominated by the powerful countries with rights given to them without any obligations which may result in environmental degradation and human rights violation.

The 1998 OECD draft agreement could encourage a situation where private companies would sue governments under international law for regulatory undertakings and whether this should be compensated is still an issue of concern.
It should be made clear under the MAI that the sovereignty of the state is preserved and the right of the governments to regulate the activities of MNCs is reserved.

3.2.3.8 Implications of FDI

The advocates of the multilateral investment agreement argue strongly that the agreement will increase the flow of FDI into the host countries together with its benefits. FDI promotes the countries capital as well as investment stocks but the effect still remains that the returns from such investments are repatriated by the foreign investors.[173]

Developing countries need to first be sure that FDI is beneficial to both the host and home countries. Considering the domestic sectors, they may be overwhelmed by foreign investment and may result in them being eliminated completely from the investment scene.
It is quite clear as earlier mentioned in chapter one, that the needs of foreign investors and those of the host countries are different. This creates problems in clearly understanding the importance of foreign direct investment especially to the host countries.

[173] Bhagirath Las Das. A critical Analysis of the Proposed Investment Treaty in the WTO
July 2003. WtroubleO.
Such benefits that are likely to be repatriated include; dividends, profits, fees, management expenses.

Investors aim at using cheap labour and reducing the cost of production as well as easy access to raw materials while host countries focus on improving their market access, technology, job opportunities, increased government revenue and infrastructure, to mention but a few.

3.2.4. An overview of the TRIMS and the GATS as measures for investment in WTO

Having failed to conclude negotiations at the OECD, some members agreed to start negotiations at the WTO.[174] Edward Graham argues that negotiations at the WTO may succeed since it has more members and this would imply a very strong commitment to the agreement.[175]

The Agreement on Trade- Related Investment measures, (TRIMS) establishes rules on certain investment measures which restrict and distort trade.[176] The Agreement has however raised more questions than can be answered regarding its significance to developing the multilateral trading system and the WTO.

A number of issues led to the inclusion of investment in the working program of the Uruguay Round negotiations.

Such concerns included the changing role of FDI in development and an intense debate on the linkage between the GATT rules and foreign investment policy arising out of the

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148 The talking FDI blues and An Investment Treaty in Trouble: The economist 346, no. 8059. 14 March 1998; 18-19 and 81-19.

At the December 1996 ministerial meeting of the WTO, nations authorized the creation of a working group on Trade and Investment. Several other members rejected the idea indicating that no formal negotiations should be begun until the completion of negotiations at the OECD to create a multilateral agreement on investment. The motive of the OECD members was that, the small OECD membership of like-minded, nations would be able to quickly craft a ‘ state of art’ investment agreement containing high standards. At the time of the WTO meeting, the OECD members expected that the MAI could be concluded in six months so as to be adopted at the 1997 OECD ministerial meeting which never happened. This was impossible due to the unfinished issues among members negotiating. Some have suggested that negotiations start at the WTO.

[175] Edward Graham. Trade and Investment at the WTO; Just Do IT. Online http://www.iie.com/publication/chpt.

[176] Preamble TRIMS, 2002. WTO Legal texts. WTO secretariat, 143.

US-Canada dispute on Canada's application of performance measures to foreign investment.[177]

The TRIMS has succeeded in applying the GATT, Article 111.4 on NT and quantitative restrictions.

The General Agreement on Trade in services (GATS) is seen as the next potential multilateral agreement on investment. The Agreement has however met with several objections especially at the effect it would have on people's lives.[178]

The GATS aims to further liberalise services in the public domain with private businesses providing public services. The main concerns of the GATS is to have a concentrated ownership, foreign ownership by large MNCs and rules limiting the ability of national governments to approximately hold companies providing these services accountable.[179]

Both Agreements have faced criticism. The TRIMS does not explain the meaning of some crucial wordings in it. It does not explain the meaning of 'trade –related investment measures', although it has a conclusive list of measures that are inconsistent with the GATT provisions.[180] The Agreement covers trade in goods only.[181]

The Agreement becomes an inadequate regulation on a multilateral level since it does not cover services and movement of capital, which are considered a major part of FDI.

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[177] Bijit Bora. Development, Trade and the WTO. Trade-Related Investment Measures, 19.
[178] Anup Shah. General Agreement on Trade on services; Free Trade and Globalisation. July 24, 2001. online http://www.globalissues.org.
[179] Global issues. www.global issues.org
[180] Bijit, op cit pg171
[181] Art 1. TRIMS. WTO Legal Texts WTO secretariat pg 143

CHAPTER FOUR: Africa's investment strategies and economic freedom

4.1 Introduction

This chapter analyses Africa's trade and investment strategies and economic freedom through the AU and NEPAD frameworks. It further looks at Africa's economic integration and the process of achieving economic freedom through trade and investment strategies.

4.1.1 African Union (AU); New Partnership for African Development (NEPAD)

NEPAD is a Programme under the African Union created by Africans, for Africans and implemented by Africans,[182] to strengthen development in terms of trade and investment on the African continent. It was adopted at the 37th session of the assembly of the heads of state and government in July 2001 in Lusaka, Zambia. The assembly also introduced the Nepad heads of state and government implementation committee which provides leadership to Nepad process as well as setting priorities and the program of action. It is further meant to develop trade values and monitor their implementation within the framework of the African Union.[183] There is however no unified investment strategy when it comes to FDI in Africa, although FDI trends have had a negative impact on the continent, and there is a need to design an investment strategy to ensure proper regulation of investments and also establish how best Africa can benefit from FDI flows.

More emphasis has been put on NEPAD, the African Union and the African Peer Review Mechanism in order to establish a joint investment strategy for Africa to specifically solve the problems facing it in general, for instance, disease, unemployment and poverty which can only be overcome by creating financial sources specifically through FDI and empowering the Africans to manage their natural resources as are the basis of their economy.

[182] NEPAD 2001: www.nepad.org [accessed on 4 July 2007].
[183] NEPAD (n 182 above) 6.

The AU has replaced the Organisation for African Unity (OAU); its constitutive Act was adopted in July 2000. The major objectives of the OAU were to rid Africa of the remaining huddles of colonization and apartheid, promote unity and solidarity among African states, coordinate and intensify corporation for development, safeguard sovereignty and territorial integrity of member states as well as promote international corporation within the framework of the UN.[184] Hilfiger[185] says that, it has similar institutions to that of the EU and the AU. Unlike the OAU, it has a comprehensive plan of action which includes having accelerated political and socio-economic integration.[186] Although the Act does not give guidelines on attainment of foreign direct investment, it creates certain institutions to handle FDI. It states,[187]

> We heads of state and government of member states of the OAU are convinced of the need to accelerate the process of implementing the treaty establishing the African Economic Community in order to promote the socio-economic development of Africa, and to face the challenges posed by globalization.

NEPAD is a holistic, integrated sustainable development initiative for the economic and social revival of Africa involving a constructive partnership between Africa and the developed world.[188] It's a pledge by African leaders based on a common vision and a firm and shared conviction that they have a pressing duty to eradicate poverty, promote trade and investment and place their countries both individually and collectively on a path of sustainable growth and development through active participation in the world economy.[189]

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[184] Department of Foreign Affairs, Republic of South Africa 2003: African Union in a nutshell. Online http:// www.dfa.gov.za/au.nepad.[accessed on 7 November 2007].
[185] Hilflinger, Marcus.2002: False hopes for an African Union- conditions for Integration Lacking- Die WZZ – Folio – Box Jestyt Bestellen. Dienstag. 20 August.
[186] Constitutive Act; art 3.
[187] Ibid, constitutive Act 1-2.
[188] Professor Wiseman Nkuhlu, 2005; Former CEO of the Nepad Secretariat: What is the New Economic Partnership for Africa Development? Online http://www.corporateafrica.com/ca/forward.[accessed on 7 November 2007].
[189] Nkuhlu Wiseman (n. 188 above) same page.

The initiative is based on the determination of Africans to rid themselves and the continent of Africa from the dangers of underdevelopment and exclusion in the global economy.[190] NEPAD[191] offers opportunities for the advanced countries of the world to enter into genuine partnership with Africa on grounds of mutual interests and benefit, shared commitment and binding agreements provided by the African leadership. Also in proposing NEPAD, Africa realized how much control it has in holding the key to its own success and development.[192] In adopting a concrete development strategy together with a detailed programme of action marks the birth of new opportunities in the partnership and increased co-operation between Africa and the developed world.

4.1.2 Trade and market access

NEPAD highlights the need for African governments, the private sector and other institutions of civil society to commit to the genuine integration of all nations into the global economy to enhance trade and market access.[193]

The potential for trade to help Africa become integrated in the international economy is no longer an issue of debate, but more of action.[194] Moving from Africa's capitals to western capitals, there is consensus that if Africa is to overcome its development challenges, trade is a key player that will make this happen. The international commitment at high political levels to making trade work for Africa in its endeavor to lift its millions out of poverty is also not in doubt.[195]

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190 Professor Nkuhlu (n. 189 above) 2.

191 The founding document of the NEPAD contains both a strategic policy framework and Programme of action.

192 See details of the principles underpinning NEPAD; Smunda S Mokoena (2003), African Peer Review Mechanism, Presentation at 4th Pan African Conference of Ministers of Public Service, Stellenbosch, South Africa; NEPAD .

193 See World Trade Organization (WTO); Support to NEPAD Period Report 2004-2005. www.un.org/africa/osaa [accessed on 28 July 2007].

194 Firmino G Mucavele (2001); Industry development, Trade and Market Access: the NEPAD agenda, www.unido.org [accessed on 28 July 2007].

195 This is in line with NEPAD's primary objective of accelerating the eradication of poverty and inequality between Africa and the developed world.

Further more, political efforts have been boosted in areas where trade has featured prominently and this can be traced to the millennium summit in 2000 of world leaders and the formulation of the Millennium Development Goal 8.[196]

World leaders have also committed themselves to creating a multilateral trading system that is both fair and equitable in order to accommodate trade challenges. The commitment was expressed in a more concrete and solid manner through the Doha mandate ministerial conference in Qatar in November 2001.[197]

Professor Mucavele,[198] states further that financial access may be considered as a major challenge, where many investment projects from the formal sector and SMEs continue to be affected by a lack of financial products necessary to their needs.

4.2. Trade opportunities

4.2.1 Preferential trade agreements for Africa

Although over the last three decades Sub- Saharan Africa has been a beneficiary of preferential market access offered by most developed countries, for example preferential agreements have long existed between the EU and the African Caribean and Pacific countries, ACP such relationships are governed by the cotonou partnership agreement which came into force in 2000 in place of the Lome convention.[199] Since the cotonou is a

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[196] MDG 8: Develop a global partnership for development: The enormous gaps between the potential realization of trade development and the actual attainment in this area, and increased awareness of the lack of capacity of some states to emerge from misery without more and better assistance have led to a global determination to broaden and deepen international co-operation. This aims at developing further an open trading and financial system that is law based, predictable and non- discriminatory. www.un.org [accessed on 3 August 2007].

[197] Firmino G Mucavele (2001), op.cit : In line with the MDG's, concrete commitment towards more equitable co-operation has been re-iterated on several occasions. In 2001 the Doha Ministerial Declaration committed to make the interests of poor countries central to the future work of trade ministers and pledged itself to duty free, quota free, market access for products from LDC's.

[198] Professor Mucavele (n.197 above) 3.

[199] Catherine Grant 2006; Southern Africa and the European Union: the TDCA and SADC EPA. Online http://www.trilac.org/pdf [accessed on 7 November 2007].

preferential agreement, it has been criticized by some WTO members for not being in line with Article xxiv of the GATT, 1947.

Grant further explains that,[200] economic partnership agreements between the EU and ACP countries will be negotiated and be made compatible with the WTO. The major principles under the cotonou for the economic partnership agreements include; reciprocity, differentiation, deeper regional integration and coordination of trade.[201]

Developed countries have thus provided preferential market access through the Cotonou Agreement and recently the EU's "*Every Thing but Arms*" initiative and the United States Africa's Growth and Opportunities Act (AGOA).[202] The continent has not however been able to exploit this access to improve its trade performance, and a major part of the reasons for this has to do with supply side constraints and a range of problems with those preferential arrangements have combined to severely diminish the realization of potential benefits.[203] South Africa for instance participates in a number of preferential trade relations which are both regional and bilateral and is also a founding member of the General Agreement on Trade and Tariffs, 1947 as well as active in the WTO.[204]

These problems include limited security of access, inadequate product coverage, and low utilization due to stringent attached conditions, insufficient preference margins, quota restrictions and administrative red tape, among others.[205] These factors discourage exporters from utilizing preference schemes because compliance costs and uncertainty outweigh the value of the preferential margin making the preferences not commercially meaningful.[206]

Subsequently, due to the non discrimination principle of Most- Favored Nation (MFN) tariff rates continue to apply to an estimated half to three quarters of exports from Africa

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[200] Grant (n. 199 above) 5
[201] Grant (n.200 above) 5
[202] See www.ictsd.org/weekly [accessed on 23 July 2007].
[203] See Potential Partnerships for African Recovery Programme (2001), A market access action Plan for Africa, Department of Trade and Industry, South Africa, 4.
[204] South African trade relationships. Online http://www.sa.info/doing-business, [accessed on 7 November 2007].
[205] See www,ictsd.org/weekly [accessed 23 July 2007].
[206] ICSTD (n. 205 above) 8

and other Least Developed Countries (LDC's) in the major markets.[207] Rules of origin in preferential agreements are an independent trade policy instrument regulating market access as much as tariff concessions and are largely responsible for the nullification of the trade preferences and application of the MFN rate for at least three quarters of LDC exports.[208]

4.2.2 Africa's participation in the World Trade Organization

Africa has not been an active player in global trade liberalization initiatives for most of the half century of the history of the world trade system now based on the WTO.[209] The share of developing countries generally increased to about 25% in recent years,[210] but the share of African countries has stagnated, for instance in 2001, its share amounted to less than 3% compared to 5% in 1980.
The economic gains in certain areas such as, FDI to Africa was heavily concentrated in oil exporting countries and South Africa.[211] Although Africa was involved in the GATT negotiations, they viewed the multilateral trading system with a lot of skepticism and concentrated on the especial and differential treatment through out the negotiations, and yet they seem to have achieved little economic progress which has been attributed to Africa's insistence on non- reciprocity of trade concessions, whereas, African countries insist that it is the lack of faithful implementation of the Uruguay round agreements.[212]

It is thus necessary to assess how the WTO agreements which are of importance to African countries such as agriculture address their major concerns, for instance on commodity dependency and subsidies. The marginalization of Africa countries has been mainly because of the special exception for developing countries under GATT rules in

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[207] ICTSD (n.205 above) 8.
[208] ICTSD (n. 207 above) 17.
[209] See www.un.org/africa/osaa, for details on WTO's periodic Support to NEPAD's trade initiatives. [Accessed 2 August 2007].
[210] ICTSD Round table 2004; What is Africa's Role in the Multilateral Trading System? Geneva, WTO, Concept paper and Program. Online http://www.ictsd.org/dialogue/2004 [accessed on 7 November 2007].
[211] ICTSD (n.210 above) 2
[212] ICTSD (n.211 above)2

terms of which Africa is exempted from market access confessions especially with the industrialized countries.[213] The opportunity for Africa is to develop a global trading environment through the NEPAD framework in order to attain its development goals.

4.2.3 Strengthening regional integration arrangements in Africa.

There continues to be strong interest in regional integration arrangements among African countries.[214] Many view them as vehicles to support their economic growth, development as well as and industrial objectives. A major concern for Africa is to overcome constraints associated with small domestic markets which are characteristic in Africa. However, successive rounds of multilateral trade negotiations and the various preferential schemes in favour of Africa have reduced tariff barriers against most African exports to insignificant levels which is likely to have a bearing on efforts to redirect patterns of trade to boost intra- African regional trade.[215]

Further more, regional trade initiatives may actually create trade rather than divert it,[216] but the main concern is more based on the extent of trade creation and its nature, there fore it is more likely that successful economic integration initiatives will depend upon successful implementation of trade and industrial policies.[217] A major part of this will involve accelerating and deepening the various ongoing regional integration projects on the continent.[218] This will require new innovative approaches based on interpretation of the major principles and a consideration of how WTO rules would restrict or facilitate Africa's efforts in this regard.

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[213] The Millennium Partnership for African Recovery Program, op cit 5.
[214] This is in tandem with NEPAD's primary underpinning of accelerating and deepening regional and continental economic integration.
[215] View details of regional trade initiatives on www.afrodad.org/downloads/nepad. [accessed on 2 August 2007].
[216] The Millennium Partnership for African Recovery Programme, op.cit. 6.
[217] This is according to the Labor Resource and Research Institute (LRRI) research papers on NEPAD and Trade, see www.larri.com.na/papers/nepad/trade.[accessed on 7 August 2007].
[218] ECOWAS (Economic Community of West African States), COMESA (Common Markets for Eastern and Southern Africa), CEAC (Community of States of Central Africa), SADC (Southern African Community), WAEMU (West African Economic and Monetary Union) and EAC (East African Community).

4.2.4 **Trade policy in Africa**

Trade policy in Africa will play a major but increasingly contested role as both domestic and foreign constituencies take a heightened interest in the extent of openness or protection of African economies and markets.[219] The challenge for trade policy in Africa is the role it will play in adopting the continent's economies to a highly competitive global environment in which success depends on the utilization of new technologies and production processes to increase efficiency.[220]

Though subject to tensions between economics and politics, and differences in scope and intensity, trade policies in African countries have followed a discernible trend characterized by the prevalence of restrictions on trade and which seem to complicate the process towards freer trade.[221]

In order to benefit from globalization and increase trade and investment flows, African countries need to adopt supply side and market access strategies,[222] aimed at long term development and exploitation of the continents comparative advantage, based on adding value to a natural resources, including through harnessing knowledge and FDI.[223] This requires main- streaming trade policy into comprehensive and integrated development strategies, incorporating appropriate macro-economic policies and the development of a stable and transparent regulatory environment.[224] This involves strengthening the capacity of the state in African countries to understand and facilitate these changes.

Also in order to improve the infrastructure for trade in the broadest sense are a critical element of the required trade interactions in Africa to enable exporters and importers to

[219] Labor Resource and Research Institute. 13.
[220] LRRI (n.219 above).
[221] Soludo and Osita 2005: The politics of Trade Policy in Africa; International Development Research center, document 5. online http://www.idrc.ca/en/html [accessed on 7 November 2007].
[222] See Proposals on the role of trade in the NEPAD framework and NEPAD's support of trade liberalization vis a vis globalization at www.transcend.org/t_database/pdfarticles. [Accessed on 7 August 2007].
[223] NEPAD (n, above).
[224] See UNCTAD 2002.

take advantage of open markets. Subsequently a range of complimentary domestic policies are necessary such as those to protect vulnerable social groups, to expand alternative revenue sources and the provisions of education, training and health.[225]

4.3 The challenges to Africa's trade prospects

The African continent continues to be marginalised by the massive growth of world trade over the last half century, in contrast to other developed and developing regions where trade has fuelled growth and development.[226] Some of these challenges exist within countries, for instance political instabilities, corruption and lack of skills whereas some are far fetched from the world trading system as will be discussed below;

4.3.1 The causes of Africa's weak trade performance

Africa is faced with a prolonged trend of weak trade performance which reflects the combined effects of deep long term structural constraints in many economies of Africa and adverse features in the international trade regimes which affect Africa's exports.[227] The protectionist policies in key international markets have affected the products in which Africa specialises especially agricultural products thus constraining the continent from taking advantage of the benefits of world trade.

4.3.2 Supply Side constraints

According to the Millennium Partnership for African Recovery Programme, (PARP) [228] the combination of macro-economic imbalances, lack of human and physical capital, poorly developed infrastructure and economic governance institutions, an underdeveloped private sector and especially small and medium enterprises, constitute

[225] See www.un.org/africa. Visited on 23 July 2007.
[226] UN (n.210 above) 20.
[227] The Millennium Partnership for African Recovery Programme, op.cit, 2.
[228] PARP (n.212 above) 4.

the key impediment to Africa's participation in world trade and the new global growth dynamic based on new technologies and increased investment flows.[229]

These factors have weakened the supply response of African economies to existing and new international market access opportunities. Also the decline of Africa's share of world trade has coincided with the remarkable opening of international markets for the continent through preferential market access granted to Africa under the many schemes put forward by the major industrial countries , as well as the series of rounds of multilateral trade negotiations under the GATT (1947), now the WTO.[230] At the same time African countries have entered into various intra- continental regional trade and co-operation arrangements through BITs and FTAs, although these have not sufficiently increased trade flows on the continent.

In addition to the above is the narrow supply base for exports in many African countries due to their characteristic reliance on a few low value- added economic activities, typically in agriculture and mining.[231] Conversely the industrial sector is small and often inefficient, narrow production specialization has rendered African countries vulnerable to external shocks and has limited their scope for economic growth.[232]

Further more, from the 1960's until the early 1980's, African countries pursued inward looking trade policies with a typical anti- export bias, limiting the contribution of international trade to the continent's development prospects.[233]

Nonetheless, since the 1980's the external trade sector has assumed new importance as many African governments, either unilaterally or through IMF and World Bank Structural Adjustment Programmes (Washington Consensus Paradigm),[234] began reforming their trade regimes towards greater openness and export- orientation. However,

[229] PARP (n.212 above) 4.
[230] Harnessing trade for development: Benefiting from Market Access Opportunities (2005), www.id21.org [accessed on 21August 2007].
[231] World Bank 2003. www.world bank.org [accessed on 21 August 200].
[232] World Bank (n. 217 above) same page.
[233] World Bank 2004: www.worldbank.org [accessed on 21August 2007].
[234] World Bank (n. 233 above).

past trade liberalization efforts in Africa have been characterized by frequent policy reversals, not least because these programmes were externally imposed and lacked national ownership and outlook.[235]

4.3.3 Market access constraints

With regard to the many constraints to the growth of trade in Africa, they have been reinforced by certain characteristics of the external market access conditions faced by the continent and developing countries in general. A general feature of the market access available to Africa is its concentration in low value added sectors and its restrictiveness in high value added activities with the greatest potential of widening opportunities in investment and employment as well as sustaining economic growth.[236] In addition, the fact that Africa relies more on unfinished goods or raw materials also limits its access to external markets which prefer manufactured products.

In particular, low average tariffs have masked high tariff peaks and tariff escalation in industrial economies, specifically in areas of export interest to Africa and other developing countries.[237] UNCTAD further states that, tariff peaks are frequent for agricultural products that are generally considered to offer potential for export diversification. Despite preferential market access granted to many African countries, competition is severely restricted by massive domestic support of agriculture in industrialized countries. Moreover, export subsidiaries distort international markets, depress prices and drive otherwise competitive agricultural productions in Africa out of the market.[238]

[235] World Bank (n. 235 above) 10
[236] UNCTAD 2002
[237] UNCTAD (n. 236 above) 4
[238] See the justification for the Doha round, www.id21.org [accessed on 21 August 2007].

4.4 NEPAD's weakness

According to Herbert Jauch,[239] NEPAD's section on the promotion of Africa's exports doesn't provide a critical analysis of the current problems that global trade causes for development on the continent. Instead NEPAD merely wants to promote African exports through improved procedures, market mechanisms, the tackling of trade barriers and skill-shortages, increased intra-regional trade, publicity for African goods and an improved image of Africa. At international level it proposes negotiations for access to world markets, encouragement of FDI, capacity building in the private sector and active participation of African heads of state in the world trading system under the auspices of the WTO; [240]

"NEPAD wants developing countries to benefit from those industries in which they have a natural competitive advantage and calls for diversification. African states have an existing or potential competitive advantage. This compromises value added industrial production for trade."

The fact that Africa encourages more imports than exports, NEPAD notes that Africa offers a wide and growing market for producers across the world. A developing Africa with increased numbers of employed and skilled workers and a burgeoning middle class would constitute an expanding market for world manufactured products, intermediate goods and services NEPAD thus regards trade and investment as a key area for African development and accepts economic liberalization as the strategy to achieve the continent's development goals and is thus problematic on the following counts;[241]

Opening up to global competition in the provision of goods and services for African countries is likely to prevent the promotion of intra- African trade.

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[239] Herbert Jauch 2005: NEPAD and Trade, Labor Resource and Research Institute (LaRRI), www.larri.com.na .
[240] Herbert Jauch (n. 239 above) 7
[241] NEPAD 2002

Inter- regional trade liberalization in Africa will benefit the stronger economies in Africa while holding little benefit for the weaker ones.

Africa's development problems cannot be solved through trade although increased market access for African goods and services may be a useful initiative. This will however require the abolition or reduction of protectionist barriers which exist in various forms in industrialized countries.[242] They undermine market access for African goods but NEPAD does not mention them.

The implementation of the Uruguay Round Agreements has shown that multilateral trade agreements tend to be biased towards the interests of the most industrialized countries at the expense of the needs and the interests of the developing countries. Global trade rules favour industrialized countries and a review of these rules at WTO level has consistently been blocked by the powerful WTO members whose corporate interests dominate the WTO agenda but NEPAD is silent on these issues.

NEPAD does not mention the issue of capital flight, or the net export of capital that some African countries experience, and the risks posed by the liberalisation of the financial markets. These factors increase the vulnerability of national economies as shown in many parts of the world.

In conclusion, NEPAD has also failed to provide an adequate analysis of the impact of global trade on Africa's development prospects and thus fails to acknowledge the illusion that globalization and increased participation in the global economy will automatically lead to the continent's recovery.[243] Even some UN agencies like UNDP and UNCTAD have long acknowledged the polarizing impact of globalization which has driven Africa deeper into poverty.[244] As Dot Kent,[245] pointed out in a recent critique of NEPAD,

[242] NEPAD (n.241 above) 12
[243] Vale, Peter 2002: NEPAD; Fiction of Fantasy? Senior Professor at the School of Government and Professor of Social Theory. University of the Western Cape.
[244] UNCTAD 2002.
[245] Kent Dot (2003), NEPAD and the African Union; New Agenda, Issue 9, First Quarter.

"The most fundamental problem for Africa is not its exclusion but rather the long standing, subordinate and exploitative nature of its inclusion into a profoundly asymmetrical international economy" (2003)

Unless this fundamental problem is addressed, NEPAD's hopes of achieving development through international trade and investment hold little prospects for the continent of Africa.

4.5 Strengthening Africa's participation in International Trade and the World Trade System

It is the responsibility of African governments to address the challenges mentioned above and this calls for comprehensive and integrated national development strategies in which trade policy and market access will play a vital role in sustaining the continent's economic growth through institutions like NEPAD.

The increased openness of international markets and heightened economic interdependence in the world present an opportunity for Africa to be part of the dynamic growth of global trade and investment, both as an exporter and importer of goods and services.

4.5.1 Creating a Market Access Action Plan for Africa

An effective trade policy for Africa will foster structural adjustment and reform of the domestic economy to improve competitiveness and develop supply capacity.[246] The question of how trade policy- making can contribute to enhanced capacity through properly phased and sequenced liberalization, also needs to recognize the importance of an enabling regulatory regime [legal frame work, competitive policy, investment policy….] within this context and that negotiation and participation in the WTO can be a

[246] Catherine Grant (n. 199 above) 8

positive complement thereto.[247] Participation in the WTO increasingly posses challenges and proactive trade policies as an integral part of national long-term development strategies.

4.5.2 Improving preferential trading arrangements for Africa

There is considerable scope to improve the benefits of preferential schemes for Africa, other developing countries, and LDC's. In addressing the problems in the design and application of existing preferential arrangements could form a key part of a Market Access Action Plan for Africa (AAPA) in collaboration with other developing countries. Specific consideration as discussed by the AAPA needs to be given to the following elements:[248]

Seeking the "binding" of preferential treatment under multilaterally agreed criteria to be adhered to by preference giving countries in the operation of their schemes. Accomplishment of this could be attained under the WTO for example under the Enabling Clause.

Seeking the expansion of the scope of product coverage for duty free treatment for Africa and other LDC's thus seeking to ease stringent rules of origin to match African and LDC industrial capacity, simplifying the detailed and ancillary origin criteria, direct consignment requirements, administration, documentation and verification which imply substantial additional costs and ensuring recognition of regional economic arrangement among developing countries.

Ensuring that duty free access is not frustrated by other non-tariff measures, for example anti-dumping and safe guard measures, and eliminating non- trade conditionalities.

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[247] See WTO, www.wto.org, [accessed on 27 August 2007].
[248] Catherine Grant (n.246 above) 8

> Technical co-operation programmes to raise awareness of available preferences in LDCs and Africa, as well as to raise the level of understanding of the laws and regulations that govern market access conditions, like quotas , and rules of origin trade remedies in preference giving countries .

The above captioned objectives will need to be pursed both at a multilateral level and in bilateral trade agreements between Africa and the developed countries.

Further, the prospects, provided for in both AGOA,[249] and the Cotonou Agreement of Africa entering into negotiations with reciprocal trade arrangements with the US and the EU respectively, presents both a challenge and an opportunity for the continent's trade strategies for these two critical trade partners.[250]

4.6 Improving Africa's participation in the WTO

To take advantage of the new global environment, African countries would need to strengthen their capacity to participate in the World Trade Organization System.[251] This entails the ability to: identify and exploit trading opportunities; effectively defend trading rights; fulfill rights; fulfill obligations and execute development polices within the framework of these obligations and define and pursue interests in future trade negotiations.[252]

The NEPAD trade enforcement strategists need, therefore, to focus on the following commitments as discussed in the above WTO document:

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[249] African Growth Opportunity Act, (AGOA). This is a US policy to help in the development of African countries and increase their market access into the US market.
[250] See information on trade treaties at www.infoexport.ge.ca , See also, www.itcsd.org/weekly/02-11-07/story6 [ccessed on 4 October 2007].
[251] See Getting to know WTO, www.id21.org, see also Partial Guide to WTO, A Publication by 3D Geneva, www.3dthree.org/en/complement.php?IDcomplement=36&IDcat=4&IDpage=14.
[252] WTO (n. 247 above) 5

Strengthening efforts to integrate trade polices into national development polices geared towards poverty eradication and capacity building in trade policy and related areas, such as, tariffs, customs, competition, investment, and technology, including through the use of the Integrated Framework for trade- related technical assistance for LDCs.

Improving economic openness and policy predictability as well as sound macro-economic policy, is another strategy for developing Africa. Developing human and institutional capacity, for effective and unformed participation in the multilateral trading system, and for effective negotiations on trade, finance, technology transfer and related areas. They also need to remove procedural and institutional bottlenecks that increase transaction costs, including through efforts to improve efficiency and transparency by the implementation of trade facilitation measures and improving standards.

4.7 Intensifying and deepening intra-African regional integration

The potential for regional integration in Africa has been fully realized and concerted action by African countries is required to intensify and deepen the various integration initiatives on the continent.[253]

While integration in Africa is constrained by a host of structural, policy and organizational factors, the progress of current initiatives also depends on the political will of the participating countries.[254] This presents a challenge to the African Union. The key consideration is if it will be necessary and feasible to have an overcharging mechanism within the framework of the union to accelerate the objective of intra African trade and economic integration.

[253] See Multi – Stakeholder Consultative Workshop to review NEPAD, www.afrodad.org/downloads/nepad [accessed on 12 October 2007].
[254] NEPAD Workshop (n.239 above) 11

4.7.1 The NEPAD trade agenda for Africa

While the role of the international community in helping African countries address poverty through trade based growth is indispensable, the African countries themselves have a clear agenda on trade[255]. Part of the agenda is linked with their global market share but the rest of it is concerned with domestic actions. These include building supply capabilities and diversification of trade mainstreaming of trade polices in national development and deepening regional economic integration.[256]

African countries can play a major part in their capacity to trade with other African governments and engage in economic reforms that are aimed at addressing supply capacity constraints. By reallocating budget spending towards capital expenditures in productive sectors such as value- added industrialization and focusing on main-streaming trade polices in development strategies, African countries can fully compete with the developed countries.[257]

Markets were removed on some transitional support provided to Africa to take care of preferences erosion and other adjustment costs associated with global trade liberalization without increased supply and trading capacity. Africa will not have a sustainable outcome in which trade plays its expected role unless there African trade integration is deepened.[258]

The policy framework for investment is intended to assist governments to create an environment that attracts domestic and foreign investment taking into account the broader

[255] Firmino G Mucavele, (n.198 above) 21.
[256] Firmino G Mucavele (n.255 above) 23.
[257] Yoweri Museni's, address to Uganda Manufacturer's Association at the UMA show grounds. New vision, October 2004. 15.
[258] Yoweri Museveni (n.257 above) 15.

interests of the communities in which the investors operate.[259] The framework helps countries develop a sound investment environment by fostering an informed process of policy formulation and implementation across government agencies.

Based on best practice drawn from OECD and non-OECD experiences, it proposes a set of practical policy consideration in ten inter- related areas that go beyond stable macro-economic considerations which contribute to such an investment environment.[260] Governments can consider these policy considerations in country self- evaluation and for reform implementation, regional cooperation and peer reviews in multilateral discussions.

The fundamental questions in the investment policy framework address: investment policy, promotion and facilitation, trade policy, competition policy, tax policy, corporate governance, human resource development, infrastructure and financial sector development.[261]

A country's trade policy influences both domestic and foreign investment and is important for any development strategy. Investment has long been recognized as the key ingredient for economic growth and development.

4.7.2 The changing inter- relationships of trade, domestic investment and FDI

The relationship between international trade, domestic investment and FDI is complex and intrinsically interlinked as earlier discussed under chapter three. To begin with, trade can either substitute for or compliment FDI. Market seeking firms[262] can serve foreign subsidiaries. The latter effectively substitute FDI for trade.

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[259] Jean monnet center, 1997. online http://www.jeanmonnetprogram.org,97/97-12 html [accessed on 2 October 2007].
[260] OECD, 1996.
[261] OECD, 1996.
[262] FDI is often classified into four types according to the investing firms' motives: market seeking (to get access to new foreign markets), Resource seeking (to get access to resources not available at home), efficiency seeking (to take advantage of cost differences/scale economies and rationalize production), and strategic asset seeking (to acquire strategic assets or prevent competitors from obtaining them). Dunning, J. (2002), "Determinants of FDI: Globalization induced changes and the role of FDI in polices", paper presented at the ABCDE – Europe Conference, Oslo, June 24, 2002.

FDI (and to a lesser extent domestic investment) can induce imports in the short term. An investing firm, for instance building a new plant, may require capital items only available (or cheaper) from foreign sources. Credit rating agencies evaluating emergency serving debt are aware of the impact on the current account, and will at times discern between types of imports and pure competition or nonperforming investment verses capital imports for an investment that will earn its costs.[263]

4.7.3 **Proposed areas of action**

From the conclusions reached at in the meeting of the OECD African investment Advisory Board,[264] participants invited the OECD, the NEPAD, and key African and international partners to turn the following proposals into concrete actions for implementation over the next three years. The OECD stands ready to support these activities, together with NEPAD and other international and regional organizations, and to act as a catalyst for the on going efforts at policy reform. The following sub-paragraphs examine several proposals that were discussed on participation inputs.[265]

4.7.3.1 **Supporting investment Peer Review process**

The African Peer Review Mechanism (APRM)[266] is about self monitoring, peer learning and promoting the adoption of the principles and standards of good governance and international best practice. The review mechanism could explore variations of the domestic policy framework for FDI in Africa including general laws and regulations, public services, macroeconomic policies, customs procedures, the regulation of FDI, incentives and trade related investment measures.

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[263] Dunning J (n.262 above) 24

[264] 8th September 2003, Geneva meeting, more information from www.oecd.org.

[265] OECD 2003.

[266] In an effort to enhance the quality of governance in Africa, the 6th Summit of the Heads of State and the Government implementation Committee (HSGIC) held on 9th March 2003 adopted a memorandum of Understanding on the African Peer Review Mechanism (APRM) which contains prioritized and approved codes and standards in four focus areas\: Democracy and Good Political Governance; Economic Governance and Management; Social Economic Development and Corporate Governance.

OECD's investment policy reviews methodology and experience could be shared with NEPAD in support of its efforts to develop a set of relevant "best practices" for African governments seeking to increase FDI.[267]

One idea to pursue in this context may be organizing an OECD-NEPAD working session of government officials on *"investment capacity building; how and what for."* This working session could discuss the experiences of OECD and others with investment peer reviews,[268] and helps identify priority areas for peer review in light of African country's investment needs.

The OECD initiative, which non-OECD partners are invited to actively participate in would be done on a regional and sub- regional basis.[269] This discussion would include; public governance, corporate governance, corporate social responsibility and the linkage between FDI and local business development.

4.7.3.2 Enhancing investment through an improved institutional and regulatory framework

Poor public governance and lack of adequate transparency have been for a long time a chief bottleneck to investment, both domestic and international in African countries. The resulting poor economic development and increasing poverty has in turn further deteriorated public governance in many African countries. Breaking out of this circle is therefore a precondition to using private sector investment to recover regional economies.

A number of OECD recommendations and principles in the area of public governance used as reference points on a global level can serve as a general benchmark for Africa. That is policy recommendations on regulatory reform, principles of managing ethics in

[267] OECD 1996.
[268] Peer Review in this case is an integral part of capacity building. It provides an opportunity to transfer knowledge and experiences; help develop best practice; and assists compliance with rules and commitments.
[269] OECD 1996.

the public service, guidelines for managing conflict of interest in the public sector and guiding principles for successful E-government.[270]

Actions should be identified together with NEPAD and other African partners.

Good Corporate Governance is part of a broader investment framework supportive of sustainable growth and development in Africa.[271] Indeed, NEPAD's July 2002, "Declaration on democracy, political economic and corporate governance", suggested that all African countries should strive to comply with a set of eight standardized codes and practices related to economic and corporate governance.[272] NEPAD has also called upon the African Development Bank to develop a framework for reviewing corporate governance practices in Africa, drawing upon the OECD principles and other sources.[273]

A range of Africa's specific corporate governance related initiatives are already underway. Recognizing the importance of African ownership in corporate governance reform efforts and building upon existing initiatives, the OECD will continue to play a supporting role to the Pan African forum as a member of its steering committee and having gained in adopting the OECD principles to arrange economic and political circumstances through its roundtable experiences in other regions.

The OECD guidelines for multinational enterprises (MNE'S)[274] and its work on promoting corporate responsibility initiatives can be used to further enhance the positive contribution of MNE's to African host societies. This would also build on more recent OECD work on corporate responsibility in extractive industries.

An important contribution can be made in this regard by TUAC[275] and BIAC.[276] TUAC organized meetings in Zambia and Morocco aimed at raising awareness, sharing experiences and benchmarks with regard to the implementation of the OECD guidelines.

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[270] OECD(n.265 above) 12.
[271] See Smunda S Mokoena, op.cit.
[272] NEPAD 2002.
[273] OECD 1995.
[274] OECD 1995.
[275] Trade Union Advisory committee to the OECD, 1995.

4.7.3.3 Enhancing linkages between foreign invested enterprises and SME'S

Small and medium enterprises (SME's) are viewed as a critical sector for growth, employment and poverty alleviation in Africa. Building stronger SME's - FDI linkages is an issue of great interest to most African partners. The lack of adequate domestic investment and markets remain a major deterrent to FDI inflows.

NEPAD's work focuses on how to make SMEs better local partners for foreign investors to make African economies more attractive to FDI and to strengthen the benefits of foreign investment to the local economy. Another equally important area could be expanding the ways and means of ensuring that African SMEs benefit from expanding regional and international trade opportunities and identifying the roles of the international community and stake holders to facilitate this process.

Regional integration in Africa is seen as critical to creating a larger economic space with more opportunities for investors and entrepreneurs. There are considerable unexploited opportunities in Africa to promote growth through regional cooperation. Creating larger and more integrated markets, facilitating cross border investment and allowing the free movement of people and exchange of ideas carries economic as well as political benefits.

Existing initiatives[277] are all designed *inter alia* to gain from economies of scale and attract investment. It is of foremost importance for African development to strengthen regional cooperation (through initiatives such as the Zambia Malawi Mozambique growth triangle).[278]

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[276] Business and Industry Advisory committee to the OECD.

[277] OECD 1995.

[278] The World Bank in supporting regional efforts to create integrated markets and initiatives is aimed at increasing cooperation to address common issues in a regional context, such as the Nile Basin initiative and

Current OECD research on FDI related issues in preferential trade agreements involving developing countries is focusing on southern Africa. The role of cross- border infrastructure in regional integration could also be explored and institutions such as the World Bank and the East African Development Bank could be invited to contribute. An OECD Development center study on “regional integration, FDI and competitiveness: the case of SADC[279] has been established and could be used by African and other partners’ to support regional integration efforts.”

4.7.3.4 Corruption

The NEPAD initiative could explore possibilities for establishing regional and sub-regional networks to fight corruption. Broad co-operation with international organizations, private sector and civil society should be sought.[280] Analyzing the private sector perceptions (2001) in Uganda, corruption was a frequently mentioned problem,[281] and described by investors as cumbersome and which could slow down the investment move in developing countries.

4.7.3.5 Strengthening Investment Promotion Agencies (IPAs)

A framework could be developed to share best practices in investment promotion. The various experiences of OECD member countries with NEPAD and African IPA partners, in close cooperation with UNCTAD, UNIDO and the World Bank, could help to enhance the promotion, policy advocacy and transparent functions of the IPAs on the continent.[282]

WAEMU payments systems. Initiatives such as the EU- Southern Africa free trade Area and US- SACU. free trade area promote regional integration and help expand inter-regional trade; www.worldbank.org

[279] Effective regional cooperation and integration in Africa is constrained by many factors such as lack of infrastructure (for example across border transportation network in key in many African countries to achieving a regional market that is sufficient to attract investors, both foreign or domestic), tariff and non - tariff barriers, lack of political commitment, weak harmonization of policies, overlapping and multiplicity of organizations.

[280] See Transparency International (2005), Understanding the African Union Convention on preventing and combating corruption and related offences, third edition.

[281] An Investment Guide to Uganda, Opportunities and Conditions, 2001 52.

[282] UNCTAD 2002.

4.8 Conclusion

It is encouraging that African leaders themselves have reflected on the importance they attach to trade and investment in Africa in the design of NEPAD through the AU jurisdiction although there is debate to separate NEPAD from AU and make it a separate legal entity. Experience shows that sustainable trade and investment in Africa is essential for reducing poverty. And consequently, NEPAD is right to set ambitious goals for economic growth in Africa. Achieving these goals will depend to no small extent on integrating African countries more strongly into international investment and trade.

OECD and NEPAD ministers agreed during their meeting on 16 May 2002 to seek ways in which the OECD could contribute to best development practices, aid effectiveness, the promotion of trade and investment, good governance and approaches to sustainable development in Africa. OECD is working together with NEPAD and the AU, the African Development Bank, the World Bank group and other key partners to develop an African Trade and Investment initiative.[283]

[283] See Paper by Richard Hecklinger (2003), "The OECD Strategy on Investment for Development: Creating a framework for Dialogue and Learning"; Presented at the OECD Global Forum on International Investment 17-18 November 2003, Johannesburg.

CHAPTER FIVE

CONCLUSION

Having discussed extensively Africa's growth and investment strategies under chapter four, the researcher will conclude this thesis with a drawback on bilateral investment treaties in relation to foreign direct investments and the way forward to a multilateral investment agreement in global trade.

The move towards a multilateral investment agreement has not been an easy one following the various attempts that have been made first at the ITO, then OECD and now at the WTO. The members of the OECD that have been the major players in advocating for a multilateral investment agreement have been the leading industrialized and capital exporting countries in the global economy. Unfortunately, having failed to win enough support from developing countries and the least developing countries especially from Africa and Latin America, as well as environmental, labour and human rights activists, the agreement could not be concluded as hoped by 1998, and some members participating are suggesting that it is time to start negotiations at the WTO.

The question of whether the agreement will register success at the WTO is left to the key negotiators to decide and remove such doubt, although it would make it more meaningful to have a multilateral agreement like this one discussed and concluded where other international trade agreements are regulated and concluded. For an agreement to be concluded at the WTO, it has to be consistent with other obligations of WTO members and subject to the same procedures under the dispute settlement and adjudication mechanisms.[284]

According to the researcher, the WTO is a credible institution where other related agreements have been signed and successfully enforced and there is no doubt therefore that the MAI too could fall into this category once discussions start there. The major complaints that arose from the OECD proposed multilateral agreement were that, the organization consisted of 'like-minded' people and had not involved members from the developing and least developing countries to participate in the drafting of this agreement yet they are the vulnerable group to the policies therein. Even so, under the proposed agreement, there was little mentioned about environmental and labour standards where developing countries have large concerns.

There is enough evidence that the WTO takes into consideration the needs of all its members especially those from the developing countries and LDC's.

This can be seen from the non-discrimination principles of Most-favoured Nation and National Treatment.[285] Countries are not allowed to discriminate between their trading partners whether from the perspective of domestic products or imports. Secondly, when it comes to accession, developing countries are always given more time to prepare to accede. This is unlike the procedure which the OECD members used of no consultation and simply presented the agreement for signing. Such an improper move would definitely limit membership and further marginalize the LDC's.

Thirdly, the WTO has a large membership than the OECD. The OECD as earlier observed in chapter one consists of thirty members which accounts for a small portion of the global economic countries, whereas the WTO involves more trading countries including the developed and developing countries. Clearly, therefore, if the OECD MAI

[284] The "talking FDI blues" and an investment treaty in Trouble. The Economist 346, no.8059. 14 march 1998.

[285] The MFN principle prohibits any kind of discrimination or favours between trading partners. It states that each member shall grant any other member the most favourable and best treatment it grants to any other e.g., if a member grants lower customs to one member, the same should apply to all other members. This applies to both trade in goods and services. Whereas the NT principle applies to domestic and imported products, it prohibits giving preferential treatment to the domestically produced goods as against the imported products. Both should be treated in the same way if they are 'like-products.'

was considered, many countries would be marginalized since they are not members of the OECD and accession to the agreement would be limited to the countries that are already economically powerful.

In designing a multilateral investment agreement, it is important therefore that the major players are involved,[286] these include the developing and least developing countries. Accordingly, there have been major protests against the MAI. As earlier noted in chapter four, Africa is already coming up with its own strategy giving more reason for it to be given chance to participate in global trade.

More so, in order to succeed in MAI negotiations, negotiators should ensure a balance between the interests of investors and the host countries because this was another area that led to rejection of proposed MAI. The negotiation framework should be flexible enough to allow a situation where national laws will be applicable to investors.

As discussed earlier, developing countries have signed both bilateral and plurilateral agreements either among themselves or with other developed countries. The multiplicity of these agreements is based on the presumption that BITS are more flexible than the multilateral framework and the question of whether BITS increase FDI is not certain. Countries with a more stable economy tend to have increased FDI flows than those in transformation, therefore given the fact that Africa is characterized by political instabilities, poor infrastructure, low levels of technology and worst of all corruption, even with the signing of many BITS they attract little FDI. Unless the above mentioned problems affecting many African countries have been addressed by governments, efforts to enjoy the benefits of foreign investment may be futile even at the multilateral level.

There is a need for African countries to first deal with the problems that are affecting their economies before joining the international investment framework if they want to benefit from foreign investment.

[286] These include, developing and least developed countries.

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