Economic Integration and Foreign Direct Investment in West Africa

by Alhagi Marong
Faculty of Law
Mcgill University, Montreal
October, 1997
Copy # 1

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements of the degree of Master of Laws (LL.M.) at Mcgill University, Montreal, Canada.

0-612-44066-4

DEDICATION

To my parents Alhaji Mbandi Marong and Binta Sonko. Also to my uncle Saikou Sonko who passed away in June this year before he heard an opportunity to witness the completion of this work.

ABSTRACT

Economic integration and foreign direct investment were adopted by developing countries particularly in Africa, as strategies for economic development. For these countries, economic integration became not only a tariff issue, but a strategy for development; hence the term "developmental regionalism". This thesis is a study of the concept of developmental regionalism in West Africa. It concentrates on the Economic Community of West African States (ECOWAS), which was formed in 1975.

It is argued that as a strategy for development, the ECOWAS integration effort was inadequate because of undue reliance on tariff reductions - - so called "negative integration" measures. It is suggested that to facilitate a more cohesive integration program, countries in the region ought to adopt positive integration measures in the form of common policies on money and payments, industrialization and most significantly, a common policy on investments.

With respect to investment regulation, it is my argument that because liberalization of investment laws at the national level failed to attract the desired flow of foreign investment to the region, ECOWAS Member States ought to harmonize their regulatory framework with a view to ultimately adopting a single legal regime for international investment.

As a framework for analysis, I adopt the criteria of economic efficiency. This is a cost/benefit analysis of the transformations that occur as the result of contractual transactions. Where the costs to the parties exceed or are likely to exceed the benefits of the transaction, it is said to be inefficient. Using these criteria, I argue that in order to inject a level of fairness in investor/host state relations, and to avoid the costs of FDI to host societies exceeding the gains therefrom, international law ought to make binding prescriptions to govern corporate conduct. Based on this reasoning, I suggest a framework for improving the investment climate in West Africa.

TABLE OF CONTENTS

Abstract..........

Acknowledgments.......... v

List of Abbreviations.......... vii

INTRODUCTION.......... 1

CHAPTER ONE: TRADE AND INVESTMENT: A RELATIONSHIP OF COMPLEMENTARITY.......... 6

CHAPTER TWO: INTEGRATION, INVESTMENT AND DEVELOPMENT: THEORETICAL FOUNDATIONS AND PRACTICAL STRATEGIES.......... 16

A. THEORIES OF FOREIGN DIRECT INVESTMENT.......... 16

B. THEORIES OF ECONOMIC INTEGRATION.......... 18

C. DEVELOPMENTAL REGIONALISM IN WEST AFRICA.......... 22

(1)The ECOWAS Trade Liberalization Scheme.......... 28

(2)Free Movement of Persons and Right of Establishment.......... 33

D. PROBLEMS AND PROSPECTS.......... 35

CHAPTER THREE: FOREIGN DIRECT INVESTMENT: THE LOCATIONAL FACTORS.......... 46

A. DO LEGAL RULES MATTER?.......... 47

B. ECONOMIC FACTORS.......... 50

C. POLITICAL CONSIDERATIONS.......... 54

D. REGULATORY ISSUES.......... 58

(1) Removal of Distortions.......... 59

(i) Entry and Establishment.......... 59

(ii) Ownership and Control.......... 62

(iii) Operational Restrictions.......... 63

(iv) Authorization and Reporting.......... 64

(v) Incentives.......... 65

(2) Measures to Increase Investor Confidence........ 65
(i) No Expropriation Without Compensation........ 65
(ii) Dispute settlement........ 66
(3) Standards of Treatment........ 66
(4) Investment Liberalization Revisited........ 68

CHAPTER FOUR: THE REGIME FOR FOREIGN DIRECT INVESTMENT IN WEST AFRICA........ 78

A. NATIONAL LAWS........ 78
(1) Entry, Establishment and Sectoral Limitations........ 78
(2) Ownership, Control and Capitalization Requirements........ 80
(3) Measures to Increase Investor Confidence........ 81
(i) Availability and Transfer of Foreign Currency........ 81
(ii) Settlement of Disputes........ 82
(iii) Expropriation and Compensation........ 85
(iv) Standards of Treatment........ 87
(4) Incentives........ 88
(i) Flawed Rationale of Incentive Competition........ 92
(ii) Incentives and the WTO Subsidies Agreement........ 95
B. Bilateral Investment Treaties........ 96
C. RegionalRegulation........ 98
(1) Multinational Enterprises and Regional EconomicIntegration........ 98
(2) ECOWAS' Regulatory Regime........ 103

D. Synthesis of Regulatory Regime........ 106

CHAPTER FIVE: FROM HARMONIZATION TO UNIFORMITY: A FRAMEWORK FOR IMPROVING W /AFRICA'S INVESTMENT REGIME........ 109

A. Approaches to International Harmonization........ 109
B. The Search for Efficiency and Equity........ 117

CHAPTER SIX: CONCLUSION........ 125

BIBLIOGRAPHY........ 128

RÉSUMÉ

L'intégration économique et l'encouragement des investissements étrangers ont été adoptés comme stratégies de développement économique dans de nombreux pays en voie de développement, et particulièrement en Afrique. Pour ces pays, l'intégration économique est devenue non seulement une question de réduction des tarifs douaniers, mais une stratégie de développement, d'où le concept de régionalisme pour le développement.
Ce mémoire constitue une étude de cette stratégie telle qu'appliquée en Afrique de l'Ouest, et examine plus particulièrement le cas de la Communauté Économique des États de l'Afrique de l'Ouest (CEDEAO) qui fut formée en 1975.

Nous argumentons qu'en tant que stratégie de développement, l'effort d'intégration de la CEDEAO était inadéquat car tablant excessivement sur les réductions des tarifs, des mesures dites "d'intégration négative". Nous suggérons dès lors qu'afin de faciliter la mise en place d'un programme plus cohérent de développement, les pays de cette région adoptent des mesures "d'intégration positive", telles des politiques communes en matière monétaire et traitant des paiements, en matière d'industrialisation, et surtout une politique commune sur les investissements.

En ce qui concerne la réglementation des investissements, on constate que la relaxation au niveau national des lois relatives aux investissements n'a pas attiré dans la région le niveau désiré d'investissements étrangers. Nous argumentons en conséquence que les pays membres de la CEDEAO devraient harmoniser leurs réglementations, avec comme objectif ultime l'adoption d'un régime juridique unique traitant de l'investissement international.

Nous avons adopté comme cadre d'analyse l'étude des critères d'efficacité économique, qui consiste en l'examen des coûts et bénéfices des transformations résultant des transactions contractuelles. La transaction est dite inefficace lorsque les coûts à la charge des parties excèdent ou risquent probablement d'excéder les bénéfices retirés de l'opération. En utilisant ces critères, nous plaidons pour l'adoption en droit international de mesures gouvernant l'action des entreprises et ayant force obligatoire, afin d'injecter une dose d'équité dans les relations investisseurs - pays receveurs, et éviter que les coûts résultant des investissements directs étrangers n'excèdent les bénéfices pour les pays qui les reçoivent. Sur la base de ce raisonnement nous suggérons ainsi un cadre réglementaire, afin d'améliorer l'environnement dans lequel s'opèrent les investissements en Afrique de l'Ouest.

ACKNOWLEDGMENTS

Even though I spent the past three months researching and writing this thesis, it is far from being the outcome my efforts alone. A lot people of contributed both directly and indirectly to its successful completion and indeed to my career as a whole. I therefore owe them all a debt of gratitude. In the first place I wish to thank Mcgill University for giving me an opportunity to study at the Institute of Comparative Law which has been a significantly exciting experience for me. In particular, I wish to thank the Greenshields Memorial Scholarships from which I benefited and without which I could not have taken up my place at Mcgill. I believe I was one of the lucky few to benefit from both the Greenshields Scholarship proper and the Greenshields Research Fellowship. I am deeply grateful for both. In this connection, I also wish to thank the Government of The Gambia which paid part of my fees and provided funds for my other expenditure during my year at Mcgill. In particular, I wish to say special thanks to Mrs. Hawa Sisay-Sabally, Attorney-General and Secretary of State for Justice and all the staff at the State Law office in Banjul, all of whom were supportive and understanding.

Back to Mcgill, I also wish to thank Professor Jeremy Webber, former Associate Dean at the Graduate Programs in Law, for his support and encouragement, and also Ginette Van Lynselle and all the staff at the Institute of Comparative Law.

Back home, I wish to thank my family and friends all whom were understanding and supportive of my insatiable appetite for academia, despite the fact that they would all rather have me home. I must in particular mention Sheriff and Mba and the entire Ceesay family, Ous and Hawa for those formative years in high school, as well as the rest of the family in Kanifing, and Brikama.

My uncle Dr. Karamo Sonko, has been an undiminishing source of support and inspiration and I clearly lack the words with which to express my gratitude. To him, I can only make a commitment to continue to work hard.

A number of great friends also contributed in no small measure to getting me to this stage. I therefore wish to say thanks to all 'them boys'; Babs, Baba, Bittaye, Ess, Foday, H.O, Jah, Musa, Njie, Nyan, and Tangs. Thanks also to Andreas, Marco, Lai and Hellen, Tapha and Sanusi.

Back in Montreal, this year was made particularly worthwhile by what everyone has called the greatest ICL class. I can only hope that as classmates, we will all keep in touch wherever we are, and meet for a reunion party sometime in the new millennium.

I am also grateful to Prof. A.L.C. de Mestral of Mcgill University, my supervisor, for the advice and guidance he gave me throughout this work and who, despite his busy schedule, never hesitated to discuss with me, or comment on my work. This thesis could definitely not have been completed without his invaluable guidance.

Finally, my classmate Christopher Waters, read the first draft of this work and provided useful comment. Cecile Hubin translated the abstract to French. *Merci beaucoup, Mes amis* !

LIST OF ABBREVIATIONS

ANCOM Andean Common Market

GATT General Agreement on Tariffs and Trade

BIT Bilateral Investment Treaty

CARICOM Caribbean Common Market

CFA Communauté financière africaine

CEAO Communauté Economique de l'Afrique de l'Ouest
(Economic Community of West Africa)

ECA United Nations Economic Commission for Africa

ECOWAS Economic Community of West African States

FDI Foreign Direct Investment

GATT General Agreement on Tariffs and Trade

ICC International Chamber of Commerce

ICSID International Center for the Settlement of Investment Disputes

ILO International Labor Organization

MFN Most Favored Nation

MNC Multinational Corporation

MNE Multinational Enterprise

MRU Mano River Union

NAFTA North American Free Trade Agreement

NT National Treatment

OECD Organization for Economic Cooperation and Development

TNC Transnational Corporation

UDEAC Union Douaniere et Economique de l'Afrique Central
(Customs and Economic Union of Central Africa)

UEMOA West African Monetary and Economic Union

UMOA West African Monetary Union

UNCITRAL United Nations Commission on International Trade Law

UNTCMD United Nations Transnational Corporations and Management Division

WTO World Trade Organization

INTRODUCTION

The end of the Second World War, the emergence of the United Nations and the ending of colonial rule through the instrumentality of the Declaration on the Granting of Independence to Colonial Countries and Peoples,[1] in 1960 gave rise to the emergence of new nation states in most parts of the developing world. In Africa, the early to late 1960s was an era of political emancipation for most countries. Henceforth, Africans had to take charge of their own political and economic destiny. The most pressing concern of these newly independent countries was to break away from the legacy of dependence on former imperial powers and to set their economies on the path to growth through the use of indigenous resources, manpower and entrepreneurship.

The wide-scale nationalization or indigenization of foreign investments following independence can be attributed to this need to ensure local control of the means of production. In addition to the measures at the domestic level, countries in the region soon awoke to the realization that most of them were too small in size and economic potential to chart the arduous road to economic development all by themselves. This realization gave impetus to the adoption of regional integration as a strategy to accomplish economic development. The belief was that the opening up of national markets by the reduction of tariff and non-tariff barriers to trade among countries that were geographically contiguous, would result in the creation of large markets in which scale economies could be exploited and where factors of production could circulate freely.

[1] Resolution 1514 (XV).

In addition, following the global recession of the 1980s, and the consequent decline in the volume of official development assistance, developing countries turned to foreign investment as a source of capital, as well as new technology and skills necessary for development.

In essence, both regionalism and foreign investment were adopted by emergent nation states of Africa and other parts of the developing world as complementary strategies for economic development. However, there were problems in elaboration and implementation of both strategies; thus the integration effort in West Africa for example suffered from undue reliance on negative integration measures through the elimination of tariff and non-tariff barriers to inter-area trade. Positive measures to integrate the national markets through the elaboration of regional industrialization policies, as well as common policies on monetary and financial matters and a common policy for international investment, were all initially lacking.

This thesis focuses on integration and investment in the framework of the Economic Community of West African States (ECOWAS), which is the most comprehensive integration grouping in the sub-region, comprising all the sixteen constituent states of West Africa. Two principal arguments are made: firstly, the negative integration measures which have until now characterized the ECOWAS integration effort, are inadequate to usher in the desired level of regional development; and, secondly, the tariff reduction program ought to be complemented by positive integration measures in the form of common policies in the areas of money, finance and payments and most significantly, a common investment policy. This suggestion follows from the fact that liberalization of FDI policy at the individual national level since the early 1980s, has proved inadequate to attract the desired amount of foreign capital inflows. It is submitted that a regional policy that not only addresses investor protection, but also investor conduct, so as to inject a larger degree of congruence between the profit motive of investors and the development needs and aspirations of host states, will better serve the purpose. In terms of injecting a level of equity and balance in investor/host relations, it is argued that the time has come for international law to make prescriptions to govern international corporate conduct. Underlying these arguments, is the belief that despite economic explanations for international corporate behavior, legal rules play a significant role in investors' location decisions. Without an appropriate legal framework, location and ownership advantages can be dissipated.

As a framework for analysis, I adopt the criteria of economic efficiency. This approach analyses transactions in terms of their costs and benefits, with the transaction said to be economically efficient if the costs thereof do not exceed the gains. The best known economic efficiency standard is 'Pareto superiority' which describes the consequences of a transaction in which at least one party is made better off and none is made worse off. However, where the parties bargain to a point that any further transactions will enhance the welfare of one of them only at the expense of the other, they are said to reach the situation of 'Pareto-optimality'. At this point, no further Pareto-superior outcomes are possible. Economic efficiency criteria also takes into account the effects of transactions on third parties. Where these third party effects take the form negative externalities, they must not exceed the gains to the parties; where they do, the parties must be in a position to compensate for the externalities. This is referred to as the Kaldor-Hicks criterion of efficiency. In the same way that Kaldor-Hicks standards can be applied to transactions, legal structures may be thought of as the output of a hypothetical contract amongst every person affected by them.

The approach is one of law and economics; I subject the legal rules found in the integration agreement and the national and regional investment laws to a contractarian analysis using a hypothetical bargain model.[2] In terms of the above criteria, legal rules are subjected to a cost/benefit analysis and where the costs to the parties or to society as a whole, are likely to exceed the gains from their adoption, the rules are said to be economically inefficient, and in need of revision. It is through this analysis that I suggest that both the ECOWAS integration agreement and the investment regime be revised to usher in a state of efficiency and equity, first between the Member States of the integration grouping *inter se*, and between host states and foreign investors.

In this thesis, chapter one explores the complementarity between trade and investment, chapter two looks at the theoretical foundations of both foreign direct investment and economic integration, as well as the practical strategies adopted by states in West Africa for the liberalization of trade. The chapter also discusses the problems that have been encountered along the way and makes suggestions to enhance the integration effort. Chapter three discusses the locational factors for FDI, and its principal theme is that though important, liberalization of the legal regime alone is insufficient to attract foreign

---

[2] The contractarian analysis of law was first clearly developed by Richard Coase in "The Problem of Social Cost" (1960) 3 J.L.& Econ. 1. F.H Buckley, M.Gillen, and R. Yalden, in *Corporations: Principles and Policy* 3rd ed., (Toronto Emond Montgomery 1993), also discuss corporate law rules using the framework of a hypothetical bargain model.

investment. Policy and non-policy variables like the level of economic development, market size and purchasing power, growth rates as measured by GDP per capita, the availability and access to production inputs, and the political stability of markets are all shown to figure more prominently in investors' location decisions than attractiveness of the regulatory regime. It is argued further in this chapter that the liberalization of investment laws ought to take into account the special development needs of the countries in the region,- a regime of 'developmental liberalization'. The soft law rules elaborated in international codes of conduct and the concept of corporate social responsibility are then discussed. Principally, the chapter argues that the time has come for internationally binding prescriptions to be included in a future agreement on foreign investment to govern corporate conduct. In chapter four, I look specifically at the rules relating to FDI in West Africa from the national, bilateral and regional points of view. Due to the extensive similarity between the national laws, and to avoid unnecessary repetition, I adopt the investment laws of four West African countries, Ivory Coast, Ghana, Mauritania and Nigeria as a framework for discussion. These laws are analyzed using the criteria of economic efficiency outlined above. In chapter five, I attempt to suggest a framework for improving the investment climate in West Africa by the gradual harmonization of investment laws, with the ultimate aim of adopting a single agreement to regulate investment in the region. Chapter six provides a summary of the main arguments and outlines a few policy implications.

CHAPTER ONE: TRADE AND INVESTMENT- A Relationship of Complementarity.

Modern international economic relations can be conveniently traced back to the end of the Second World War when the victorious powers, notably Great Britain and the United States, embarked on negotiations to carve out ways for post-war international economic reconstruction and development. The upshot of these negotiations was the agreement reached at Bretton-Woods in 1944 which called for the creation of the International Monetary Fund (IMF), (which would be charged with maintaining exchange rate stability, and assisting countries facing balance of payments crises to deal with those crises), the International Bank for Reconstruction and Development (IBRD) (to provide reconstruction capital), and the International Trade Organization (ITO) (to oversee the negotiation and administration of a new world trading regime).[3]

These institutions laid the foundation for the future economic relations between states and gave impetus to trade negotiations under the auspices of the General Agreement on Tariffs and Trade (GATT),[4] geared towards the opening up of national markets by the gradual elimination of tariffs to inter-state commerce. Under GATT negotiations, tariffs on manufactured goods from developed states have been reduced

[3] M.J Trebilcock and R Howse., *The Regulation of International Trade*, (London & New York: Rutledge, 1995) at 20.

[4] The Havana Charter of 1948 which created the I.T.O never came into force largely due to opposition in the United States Congress which viewed it as a constraint on domestic sovereignty. As an interim measure, some of the parties to GATT which was signed in 1947, signed a Protocol of Provisional Application of the GATT to come into force at the beginning of 1948. The Parties to the Protocol were Australia, The Kingdom of Belgium, Canada, The French Republic, The Grand Duchy of Luxembourg, The Kingdom of the Netherlands, The United Kingdom of Great Britain and Northern Ireland, and the U.S.A

from about 40% in 1947 to below 4% in 1994.[5] The increased market access engendered by the collapse of barriers to trade also meant that there was greater mobility of capital and resources and the consequent move towards a global market place. This is particularly evident in the activities of multinational corporations which embarked on integrated international production and marketing strategies to take advantage of the improved global market access. The result was a boom in the flow of international investment. The World Trade Organization (WTO) estimates an annual global investment flow between 1985 and 1995, of roughly $60 to $315 billion.[6]

With respect to developing countries, a significant post-war development was the creation of the United Nations Organization with the objects, *inter alia,* of maintaining international peace and security, and developing friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.[7] In 1960 the General Assembly passed Resolution 1514 (XV), *a Declaration on the Granting of Independence to Colonial Countries and Peoples,* paving the way for the political emancipation of most of the countries in the developing world including Africa. However, soon after attaining independence, African countries, like other newly independent states, woke up to the reality that political independence was of little significance if it was not followed by economic independence and indigenous control of the means of production. According to Sornarajah, "...the newly independent states agitated not only for the ending of the economic dominance of the former colonial powers

[5] UNCTAD *World Investment Report 1996: Investment, Trade and International Policy Arrangements* (New York & Geneva: 1996) at 96.
[6] WTO Press/57 9th October 1996 at 2/3
[7] Charter of The United Nations Art.1

within their states but also for a world order which would permit them more scope for the ordering of their own economies and access to world markets."[8] Developing countries therefore rallied together in international fora especially at the United Nations, where they secured the passing of a Resolution on a *New International Economic Order* (NIEO),[9] as well as one on *Permanent Sovereignty Over Natural Resources*[10] and a *Charter on the Economic Rights and Duties of States.*[11] The latter was particularly contentious with respect to the issue of compensation for expropriated property. Whereas the industrialized countries advocated for payment of prompt, adequate and effective compensation, capital importing developing countries disagreed that this reflected customary international law and preferred payment of 'appropriate' compensation and even this was expressed in the hortatory 'should' form in the Charter instead of a binding obligation.[12] Due to this controversy, the Charter had to be carried by majority vote with most countries of the developed world either voting against it or abstaining.[13]

Newly independent African countries also realized that in view of their size and state of economic development, they had to act together in order to transform the newly acquired political independence to economic independence. It was this realization that gave impetus to the development of economic integration movements in the region as a

[8] M Sornorajah, *The International Law on Foreign Investment* 1[st] ed., (Cambridge: Grotious Publications Cambridge Univ. Press. 1[st] ed. 1994), at 1
[9] G.A Res.3201 (1974)
[10] G.A Res. 1803 (1962)
[11] G. A. Res. 3281 (1974)
[12] See Article 2 (2) (c.) of the Charter.
[13] H.M. Kindred *et al, International Law Chiefly as Interpreted and Applied in Canada* 5[th] ed. (Toronto: Emond Montgomery 1993), at 21.

strategy to overcome the disadvantages of small geographic and demographic size and set the continent on the path to economic growth and development.[14] As Foroutan put it,

> The appeal for some form of [regional integration] in [Sub-Saharan Africa] is almost intuitive. The SSA countries are very small in economic terms. In 1989, the Gross National Product (GNP) of all SSA countries put together was equal to that of Belgium. They are the poorest in the world with a *per capita* GNP of $340 in 1989...and are very poorly endowed with human and physical capital. Common sense thus dictates that for countries with such characteristics it is economically justified to integrate their markets.[15]

Economic integration was therefore for Africa, like other parts of the developing world, a policy option to attain economic independence and reduce hitherto dependence on imperial powers.

In the context of West Africa, several integration groupings came into existence like the Economic Community of West African States (ECOWAS),[16] the West African Economic Community (CEAO),[17] the Mano River Union (MRU)[18] and the defunct Sene-Gambia Confederation that was established in 1981 after an abortive *coup d'etat* in The Gambia and suffered an acrimonious end in 1989.[19]

This study focuses on ECOWAS because it is the most broadly-based integration movement in the sub-region and its membership comprises those of all the smaller

---

[14] S.K.B Asante, *The Political Economy of Regionalism in Africa- A Decade of the Economic Community of West African States* (New York: Praeger 1985), at 26

[15] F Foroutan, "Regional Integration in Sub-Saharan Africa: Past Experience and Future Prospects" in J De Melo, and A Panagariya, eds., *New Dimensions in Regional Integration* (Cambridge: Cambridge Univ. Press, 1993) at 234

[16] *Treaty of the Economic Community of West African States,* 28th May 1975. [**hereinafter ECOWAS Treaty**].The original members were Nigeria, Ghana, Togo, Liberia, Guinea, Guinea-Bissau, Gambia, Senegal, Ivory -Coast, Sierra-Leone, Mali, Benin, Mauritania, Niger, Upper-Volta (now Burkina-Faso). Cape Verde joined later as the sixteenth member.

[17] *Treaty of the West African Economic Community,* May 1973.[**hereinafter CEAO Treaty**]. The members were Benin, Burkina Faso, Ivory Coast, Mali, Mauritania, Niger and Senegal. C.E.A.O was dissolved on March 15th 1994. In its and in place of the hitherto West African Monetary Union, (UMOA), the Parties except Mauritania, formed the West African Economic and Monetary Union (UEMOA).

[18] Declaration establishing the MRU signed on October 30th 1973. The members are Guinea, Liberia and Sierra-Leone.

[19] Foroutan *supra* note 15, at 240

movements.[20] Moreover, ECOWAS has already made significant progress towards a policy-led integration of West Africa through adoption of its constitutive treaty of 1975 as revised in 1993, and the adoption and implementation of several protocols and decisions for the free movement of persons, residence and right of establishment, a trade liberalization scheme, and a community industrialization program. 'Policy-led integration' focuses on the reduction of trade barriers, by liberalizing trade among member countries, to create a free-trade area and if a customs union is formed, by adopting common external trade policies towards third countries. It is contrasted with 'investment-led integration' which occurs when the activities of firms, not government policy, serve as the driving force behind regional integration. In such a situation, firms adopt an integrated operational structure in a particular region, and this is often encouraged by liberal trade policies, but even where such policies do not exist, the pattern of intra-firm and intraregional trade may serve as an impetus for closer regional integration.[21]

The ECOWAS experience so far has been one of policy-led integration and some progress has been made in that area. The original ECOWAS Treaty of 1975[22] called for the creation of a *customs union* within a transitional period of 15 years (from the date of the definitive entry into force of the Treaty); this program was revised by the new Treaty of 1993 and its scope broadened. Article 35 of the revised Treaty provides for the

---

[20] Indeed as will be discussed in the following pages, the existence of several integration movements in the sub-region, is part of the problem rather than a solution to the region's development efforts. I argue later on that member states ought to rationalize these efforts towards a single all-embracing movement like ECOWAS, and do away with linguistic and colonial divisions and cleavages.

[21] UNCTAD *World Investment Report* 1992: *Transnational Corporations as Engines o f Growth*. (U.N New York and Geneva 1992),at 35-36

[22] Articles 12, 13, and 14 of the Treaty

progressive establishment of a *customs union* within 10 years effective from January 1 1990, when the trade liberalization scheme was launched. Within this union, customs duties and other charges of equivalent effect, as well as quota and quantitative restrictions shall be removed and a common external tariff adopted. Member states also hope to achieve the status of an *economic union* within a maximum period of fifteen (15) years from January 1 1990.[23]

Despite the progress made, the region is still quite far from the desired level of integration-led growth. Intra-regional trade still remains insignificant, non-tariff barriers still exist[24] and the implementation of community decisions and programs lag behind schedule.[25] According to UNCTAD, the intra-trade of ECOWAS countries accounted for only 2.9 per cent of their total trade in 1970. This fraction increased to 10.1 per cent in 1980, but slowed down again in the 1980s so that in 1985, intra-community trade accounted for only 5.2 per cent of total ECOWAS trade. In 1991 this figure had risen again to 9.1 per cent.[26] As a percentage of total ECOWAS exports, trade with the rest of Sub-Saharan Africa amounted to 3.6 per cent in 1980, rising to 6.4 per cent in 1990.[27]

It is against this background of integration-led development that I argue *inter alia*, that due to the small size of the national economies of the region, the level of economic

---

[23] ECOWAS Treaty 1993 Art. 54

[24] Y. Omorogbe, "The legal Framework for Economic Integration in the ECOWAS Region: An analysis of the Trade Liberalisation Scheme" 5 Afr.J.Int'l. &Comp. L, 355 at 360-361

[25] Between 1978 and June 1993, twenty-eight protocols and conventions were signed by ECOWAS member States. As at June 1993, the ECOWAS Secretariat reported that: one member (Ghana) had ratified all 28 agreements; twelve member States had ratified between 23 and 27 agreements; two member States had ratified 18 agreements; and one member State had ratified only three agreements.

[26] UNCTAD *Handbook of Economic Integration and Cooperation Groupings of Developing Countries* Vol. 1 *Regional and Subregional Economic Integration Groupings.* (New York: U.N. 1996), at 21. **(hereinafter Handbook of Economic Integration)**

[27] Foroutan, *supra* note 15 at 241. Table 8.2

development and industrialization, and the trade pattern of the area, the policy-led integration efforts in the region ought to be complemented by a regional policy on foreign investment. Such investment can bring to the area not only capital, but also new technology and skills. An investment boom will also enhance the employment figure for West Africa and generally stimulate economic development.

Indeed, due to the decrease in development assistance, and the increasingly limited possibilities of raising commercial bank loans, many of the world's poorest countries and the debt-burdened African countries in particular, have turned to FDI in order to stimulate economic growth.[28] The experience of the newly industrializing countries whose economic progress is attributed to export-oriented foreign investment, gave impetus to the competition for FDI.[29] This trend is also present in West Africa where the past two decades have witnessed a flurry of new investment laws aimed at liberalizing the entry of foreign investment, and the dishing out of attractive fiscal and other investment incentives, as well as guarantees for the protection of the new investments.[30] Despite this wave of regulatory reform, the countries of the sub-region, as indeed Africa as a whole, continue to perform badly in the global competition for FDI. In

---

[28] WTO Press /57 *supra* note 6 ,at 4. **See also** N. Kofele-Kale, "Investment Codes as Instruments of Economic Policy: A Cameroon Case Study" (1991) 25 Int'l Lawyer, #4 at 822 **[hereinafter *Cameroon Case study*]**.

[29] Sornarajah, *supra* note 8 at 2.

[30] N. Kofele-Kale, "Host-Nation Regulation and Incentives for Private Foreign Investment: A Comparative Analysis and Commentary" (1990) 15 N.C.J.Int'l & Com.Reg at 361. **[hereinafter "Host-Nation Regulation"]. According to Prof. Kofele-Kale, a survey of African investment legislation since the 1960s reveals three distinct waves or generations. First the 1960s and early 1970s which was an era of policy restrictiveness on the entry, activities and operations of foreign investors. Second, the late 1970s and early 1980s, when the liberalization of foreign investment regimes was the dominant trend. Third, after 1984, in response to the structural adjustment and stabilization programs of the World Bank and IMF, many governments further eased restrictions on foreign investment by streamlining and simplifying screening procedures and easing bureaucratic delays.**

the context of discussing FDI policy liberalization in Africa, and its impact on flows of FDI, UNCTAD wrote that:

> Despite the widespread liberalization of FDI policies, FDI flows did not respond impressively. Although the total value of FDI flows into Africa nearly doubled from an annual average of $1.7 billion during 1981-1985, to an average of almost $3 billion during 1986-1990, that increase did not give rise to much optimism concerning prospects for FDI in that region, not only because these investments were concentrated in few countries, but also because they were quite modest when compared to FDI flows to other regions of the developing world: average annual FDI flows into Africa as a proportion of all inflows in developing countries declined between these two periods from 13 per cent to 11 per cent...In addition, during the early 1990s, flows into many African countries stagnated while those to other developing countries continued to increase. As a result Africa's share declined further to 6 per cent by 1992, thus underlining the marginalization of that continent in relation to FDI...[31]

This shows that more than a liberal regulatory regime is necessary to attract the desired amounts of foreign capital. Other factors like economic and political stability, market size, as well as access to production inputs, loom quite large in investment decisions. As a result, it is my view that none of the countries in the region can singly make an impact as a host to FDI. It is suggested, ECOWAS countries ought to pool their efforts together in order to improve the overall investment climate and potential of the region. Such improvement will require harmonization of investment policies, and ultimately within the framework of ECOWAS' integration scheme, the adoption of a regional agreement on investment. Such an approach will complement the policy-led integration efforts that have been underway since 1975, as firms hopefully adopt regional production and management strategies to take advantage of the enlarged regional market and the policy harmonization at the trade and investment levels. In addition to the greater legal certainty and predictability that will come with harmonized regional rules, an integrated investment market will also create significant scale economies for

[31] UNCTAD *World Investment Report* 1994: *Transnational Corporations, Employment and the Workplace* (New York and Geneva: U.N, 1994), at 93.

multinational corporate investment. In West Africa, such integration will create a market of close to 200 million people.[32]

Indeed, experience has shown that most regional integration efforts cannot be starkly classified as being either policy-led or FDI-led; they tend to fall somewhere between the two extremes as shown by both NAFTA and the European Union experience.[33] In North America, in the context of the 1989 Canada-United States Free Trade Agreement, early integration measures (eg. the automotive pact) and years of intraregional tariff-lowering led to a large degree of integration at both the trade and production levels. Trade in automobiles was low before the 1965 removal of tariffs on automobiles and thereafter, automotive trade, mainly intra-firm, surged as did flows of FDI in the industry.[34] In the E.C, especially after the 1992 Single Market Program, and the liberalization of service industry, TNCs reacted by adopting integrated regional strategies.[35] Community TNCs therefore were in the forefront of the campaign for the 1992 program because they perceived that their international competitiveness was being hampered by the lack of a unified regulatory regime in their home region: "...the 1992 Single Market program- the best example of far-reaching integration at the policy level- facilitated intraregional FDI flows and encouraged the further regionalization of production, as witnessed by the rapid growth since 1985 of intra-EC...FDI".[36]

[32] The region had a population of 193.7 million in 1990. See UNCTAD *Handbook of Economic Integration supra* note 26, at 16
[33] UNCTAD *World Investment Report* 1992, at 36-37.
[34] Ibid.
[35] Ibid.
[36] Ibid at 37

It is this capacity of international production to react to regional economic integration and the collapse of trade barriers, that make international trade and investment so inextricably intertwined. Liberalization of international trade policy may spur investors to adopt integrated production strategies to take advantage of the greater regional mobility and an enlarged market. Where the regional grouping adopts an external tariff or quantitative restrictions that threaten to exclude products from outside, FDI may provide a vehicle through which foreign companies secure a part of the regional market. An example of barrier-jumping FDI is the reaction of Japanese automobile producers to United States import quotas on their products. Japanese car manufacturers including Toyota, Nissan, Mazda and Honda established U.S assembly plants to bypass the import quotas.[37] On the other hand, even in the absence of such an integrated trade policy, international investors may adopt integrated transborder production and marketing strategies which may create a need for a regional policy framework to regulate their activities.

---

[37] J. Atik, "Fairness and Managed Foreign Direct Investment", (1994) 32 Colum. J. Transnat'l L. 1, at 39. **(hereinafter Fairness and Managed FDI).**

CHAPTER TWO: INTEGRATION, INVESTMENT AND DEVELOPMENT:

Theoretical Foundations and Practical Strategies

A. Theories of Foreign Direct Investment

Foreign direct investment involves the transfer of assets, both tangible and intangible[38] from one country to another for the purpose of use in the latter, to generate wealth under the total or partial control of the owner of the assets. In contrast, portfolio investment occurs where there is a movement of money for the purpose of buying an equity interest in a firm[39] formed or functioning in another country; the distinguishing feature being that in portfolio investment there is a distinction between management and control of the firm and the share ownership in it.[40]

Until recently, two main theories prevailed in the field of foreign direct investment-the *classical theory* and the *dependency theory.*[41] Classical theory views foreign investment as wholly beneficial to host economies because of the benefits which it brings to the host market in terms of capital, technology, employment, skills and infrastructure development. For these reasons, classical theory argues that foreign investment ought be protected by international law, since such protection will facilitate the flow of the investment and lead to economic development in the recipient states.[42]

---

[38] Whereas in the past the notion prevailed that foreign investment could involve only the transfer of tangibles, this has since changed and it is now widely accepted that intangible assets like technology, know-how and the many varieties of intellectual property rights could be the subject of international investment and therefore need legal protection.

[39] The term 'firm' is used here generically to refer to both companies or corporations and partnerships, both of which can be legal vehicles for the carrying out of an international investment venture.

[40] Sornarajah, *supra,* note 8 at 4

[41] Ibid. I adopt the broad classification made by Sornarajah. However even within these broad classes, differences exist in formulation and emphasis. For a critical review of six theoretical approaches, see T.J. Biersteker, *Multinationals, the State, and Control of the Nigerian Economy,* (Princeton: Princeton Univ. Press 1987), at 11-51.

[42] Ibid. Also Sornarajah, *supra* note 8.

The classical theory is criticized on the ground that the resource flows that occur as a result of foreign investment, benefit only the elite in society and not the people as a whole. This criticism is rendered mainly by advocates of the *dependency theory* of foreign investment who proffer the distributional argument that economic development means the meaningful distribution of resources of the state among the people as a whole.[43] For the dependency school, foreign investment is a strategy which foreign multinational corporations adopt to entrench the economic hegemony of their home states over the host states, leaving the latter in a state of perpetual periphery and underdevelopment. According to this theory, foreign investment is bad because it is a tool of economic imperialism.[44] This thinking prevailed in most parts of the developing world at the time of independence, and gave rise to intense economic nationalism which resulted in the nationalization of various investments from hitherto foreign owners.[45]

However, the trend in modern investment regulation is a move away from both the classical and dependency theories; it is a *middle-path* that recognizes that even though foreign investment by multinationals can in some cases be harmful to host states, nevertheless, if properly harnessed, it could serve as an engine for growth in developing

[43] This aspect of dependency theory closely resembles the liberal internationalist view that economic growth does not equal development, unless it is accompanied by a fair distribution of income. See Biersteker, *supra* at 19.

[44] Indeed even the dependency school is divided into 'vulgar' and 'sophisticated' dependentistas. Whilst the former sound a more prominent rejection of all forms of foreign control, and view development as the creation of socialism, the latter are less strident and view multinationals "as the organizational embodiment of international capital" which play a key role in creating and maintaining a system of dependent development. See Biersteker *supra* note 41, at 27-38.

[45] Sornarajah, *supra*, note 8 at 13. See also T.I. Ogowewo , "The Shift to the Classical Theory of Foreign Investment: Opening up The Nigerian Market", (1995) 44 Int'l & Comp. L.Q, 915 esp. at 916-917 where he explains that adherence to the dependency theory led to the enactment of "anti-investment laws" by Nigeria in the 1970s, because of the view that foreign control of significant sectors of the economy, may impede economic development.

countries.[46] The middle path requires a mix of regulation and openness, as opposed to hostility to foreign investment; a policy that ensures the smooth and secure operation of the investment, but also fosters the socio-economic and development objectives of the host state. Indeed, the success of the newly industrialized states of Hong Kong, Singapore, Taiwan and South Korea are attributed in part to such a mixed policy.[47] This new policy approach is also present among the countries of West Africa several of whom have recently revised their investment codes to tailor the regulatory regime to the realization of the twin objectives of attaining a favorable investment climate for the foreign investor and achieving the economic goals of the host state.[48] As Kofele-Kale put it, "...African states since the early 1960s have attempted to create an environment conducive for private foreign investment....The belief then and now is that such investment will spur economic growth and development since it brings with it new scarce resources-capital, technology, management, and marketing skills- otherwise absent in the host nations."[49]

B. Theories of Economic Integration

The classical theory of economic integration has been predominantly associated with the work of Jacob Viner who assessed the desirability of customs unions from the

---

[46] Sornarajah, *supra* note 8. An example of the middle-path is the structural perspective on FDI which recognizes that FDI has "considerable potential for both good and evil", and can have adverse effects on indigenous entrepreneurship, foreign exchange costs, restrictive business practices, training, and consumption and production technologies. See Biersteker, *supra* note 41 at 24.
[47] Sornarajah, *supra* note 8 at 49.
[48] Examples of recent investment legislation in the sub-region can be found in Ivory Coast (1984), Guinea-Bissau and Togo (1985), Guinea (1987), Mauritania, Niger and Nigeria (1989), and Ghana (1994).
[49] "Host-Nation Regulation", *supra* note 30 at 361-362.

viewpoint of whether or not they increased world welfare.[50] He distinguished between two effects: *trade creation* and *trade diversion*. In the context of a customs union, trade creation describes a "...a shift from the consumption of highest-cost domestic products in favor of the lower-cost products of other member states....Trade diversion refers to a shift in the source of imports from lower-cost sources outside the regional bloc to a higher cost source within it."[51] According to the Vinerian analysis, a customs union raises the world's welfare if its trade-creation effect outweighs its trade-diversion effect.[52] With respect to developing country groupings, the classical theorists argue that because trade diversion (at least in the short term), will obviously prevail over trade creation, as members shift from low cost producers in the developed world to high cost producers in the regional grouping, customs unions are not suitable for such countries due to the negative impacts of trade diversion on world welfare and the welfare of members of the grouping.[53]

This analysis has however been subject to intense debate and the relevance of the classical theory to developing countries questioned by several contemporary scholars.[54] In the first place, most of the learning on integration theory is based on the European experience, which is different from, and in any case, inappropriate for wholesale implantation to the situation in developing countries like the ones in West Africa. In fact,

---

[50] J. Viner, *The Customs Union Issue*, (New York: Carnegie Endowment for Int'l Peace, 1950).
[51] P Robson, *Integration, Development and Equity: Economic Integration in West Africa.* (London: George Allen & Unwin, 1983) at p6.
[52] U Ezenwe, *ECOWAS and the Economic Integration of West Africa*, (New York: St. Martin's Press, 1983), at 43-44.
[53] Viner, *supra*, note 50. **See also** R.G. Lipsey, "The Theory of Customs Union: A General Survey", (1960) 70 Econ. Jrnl. 496.
[54] **See** Robson, *supra* note 51 at 6. **See also** Ezenwe, *supra* note 52 at 43-47 and Asante, *supra* note 14 at 10- 12.

the critical factors on which the classical theory is based, are the ones which developing countries are trying to change through regional integration, by changing the structure of production and trade and ushering in a new mechanism for regional specialization.[55] Secondly, it has been argued that the desirability of economic integration among developing countries, should not be evaluated according to the static Vinerian analysis based on trade creation or trade diversion, but rather on dynamic factors like the manner in which integration affects the rate of growth of GNP of participating countries.[56] From the developing country perspective, the analysis should arguably be based on such considerations as the economies of scale brought about by an integrated market, the cumulative improvement in relative or absolute terms of a member country's, or the region's economic position, the effect on the volume and location of investment, and the transaction cost savings as a result of harmonized trade policies.[57] Furthermore the purpose of economic integration differs as between developed countries on the one hand, and developing countries on the other. Whereas for the former the principal objective of integration is to aid the development of pre-existing industries through trade expansion and increased competition, in developing countries, the purpose is to accelerate economic growth. For this reason, an analysis of the desirability of economic integration in developing countries like those in West Africa, should recognize it as an approach to economic development rather than a tariff issue.[58] Indeed Robson also argues that economic integration may still be desirable among developing countries even if the

[55] Asante, *supra* note 14 at 11.
[56] Ezenwe, *supra* note 52 at 44.
[57] Ezenwe, *supra* note 52 at 45.
[58] Ibid. Also Asante, *supra* note 14 at 11.

conditions for "...static trade creation do not exist, so long as there are sufficient gains to be anticipated from the prospective rationalization of new production or, indeed, from the rationalization of investment in the regional infrastructure."[59]

In conclusion, it seems that the orthodox theory of regional integration is largely inapplicable to developing countries for three main reasons;

(i) the theory is based on static factors in developed European economies, factors which developing countries are trying to break away from by the strategy of integration;

(ii) integration theory should recognize that there is a valid case for protection for certain industries in developing countries[60] and take account of the role of policy harmonization in developing country integration groupings;[61] and,

(iii) most significantly, economic integration among developing countries should be treated as a strategy for economic development, rather than as a tariff issue.

It is for this difference in the underlying objective for integration between developed and developing countries that in the latter context, it is more aptly referred to as *developmental regionalism*; it is designed not only to expand trade, but also to encourage new industries, to help diversify national economies and to increase the region's bargaining power with the developed nations.[62] It is to this concept of developmental regionalism in West Africa that we shall turn next.

---

[59] Robson, *supra* note 51 at 14

[60] Ibid. at 6-7. Such protection according to Robson, may be either for the purpose of increasing income or the rate of growth, or in order to attain certain non-economic objectives that are sought for their own sake.

[61] Ezenwe, *supra* note 52 at 57.

[62] J.W. Sloan, "The strategy for Developmental Regionalism : Benefits, Distribution, Obstacles and Capabilities" (1971) 10 J. of Common Market Studies, 138 at 143. See also Asante, *supra* note 14 at 12.

(C) DEVELOPMENTAL REGIONALISM IN WEST AFRICA

The concept of developmental regionalism is premised on the notion that since most countries in the developing world are too small to undertake successful national development efforts on their own, there is a need for them to pool their national efforts in a regional framework for economic cooperation, that will enhance their economic potential, induce regional specialization, and increase the bargaining power of the region *vis-à-vis* the outside world. The objective of this strategy is to enhance the economic development of both the individual nation states and the region as a whole, a development that otherwise might not have been possible through individual national effort. It is therefore a joint collaborative effort by countries sharing a regional identity to achieve economic development.[63]

In West Africa, the state of the individual economies is such that regionalism provides the only viable strategy for the attainment of national development goals. Most of the countries are too small economically and too poor to make an impact on the global economic scene. The region also includes a few land locked countries which rely heavily on their coastal neighbors for access to external markets. According to estimates by the UNCTAD, only half of the sixteen members of ECOWAS have a population exceeding 5 million people. Total GDP for the region in 1990 stood at US$ 72.53 billion, and had been growing at an average annual rate of 1.6 percent over the previous 10 years. The per capita income of the group averaged US$375 in 1990. Over half of the ECOWAS

[63] Ibid at 159-160. See also K.F. Kufour, "Law, Power, Politics and Economics: Critical Issues Arising out of the New ECOWAS Treaty" (1994) 6 Afr.J.of Int'l & Comp.L 429

Member States have been classified as being among the least developed countries in the world. Total exports amounted to US$19.68 million in 1991, whilst imports for the same year were US$ 15.21 billion. Total intra-ECOWAS trade in 1991 amounted to a paltry US$ 1.43billion.[64]

In addition, the pattern of production in the region is such that most of the countries rely on only one or two products for their exports, and economic activity is heavily concentrated on extractive industry and agriculture. According to Foroutan, fourteen out of the sixteen ECOWAS countries derive over 60 per cent of their export revenues from just one or two commodities.[65]In fact some of the countries rely on a single commodity for the bulk of their foreign exchange. Writing in 1983, Ezenwe observes that in Ghana cocoa accounted for about 65 percent of export income, in Liberia iron ore (60 percent), Senegal groundnuts (70 percent), Nigeria Petroleum (90 percent), and Mauritania iron earned 84 percent of foreign exchange. Even these exports are directed to the industrialized markets of the West in accordance with the colonial history of the countries of the region.[66] The result has been continued dependence of the sub-region on trade with the former metropolitan powers. Consequently, intra-area trade constitutes only a small fraction of total ECOWAS trade.[67]

---

[64] UNCTAD *Handbook of Economic Integration, supra* note 26, at 16

[65] Foroutan, *supra* note 15 at 243.

[66] Asante, *supra* note 14 at 92

[67] UNCTAD *Handbook of Economic Integration supra* note 26 at 21. See also C.E. Enuenwosu "Trade Liberalization and Finance- The ECOWAS Experience" in A.A. Owosekun ed., *Towards an African Economic Community (Lessons of Experience From ECOWAS)* (Ibadan: Nigerian Institute of Social and Economic Research 1986), 154 at 156. Ezenwe puts the figure at 3.6 percent in the early 1980s. Writing in 1993, Y. Omorogbe, *supra* note 24 at 361, estimated that intra-ECOWAS trade was as low as 4 % of recorded trade in the region and that even when allowance is made for unrecorded trade, the level would still not exceed 10%.

With respect to industrialization, it is recognized that only Nigeria due to it's enormous size, population and resources, and to a lesser extent Ghana and Ivory Coast, have the capacity to set up any heavy industry based on their domestic markets; most of the other Member States possess neither the resources nor the skills required to set up viable export oriented industries.[68] Since the purpose of the regional cooperation is not only to reduce dependence, but also to create a base for export oriented industrialization, economic integration was a logical policy option for countries in the sub-region. In the words of Nicholas Plesscz, "...it can be asserted without any exaggeration that West Africa, with it's irrational imbroglio of small, and sometimes ridiculously small nation states, is perhaps the region in the world where economic integration, or at least the avoidance of disintegration is most imperative for economic development..."[69] The above development objective, together with the desire to reduce dependence on hitherto metropolitan powers and increase their bargaining power, gave impetus to the integration movement in West Africa as in other parts of the developing world.

As an endeavor to give effect to the strategy of developmental regionalism, the new ECOWAS Treaty recognizes the "overriding need to encourage, foster and accelerate the economic and social development of ...states in order to improve the living standards of ...peoples".[70] It further emphasizes the conviction that the harmonious economic

---

[68] Estimates by UNCTAD for 1990 show that Nigeria accounted for 56% of total ECOWAS population and 45% of total GDP. **See also** M.E. Burfisher and M.B. Missiaen, "Intraregional Trade in West Africa", in J.E. Okolo and S. Wright eds., *West African Regional Cooperation and Development* (Boulder: Westview Press 1990), who estimate that Nigeria accounted for 53% of population and 68% of GDP for the whole region.

[69] N.G. Plesscz, *Problems and Prospects of Economic Integration in West Africa,* (Montreal: Mcgill Univ. Press 1968), at 24.

[70] Preamble to the 1993 ECOWAS Treaty.

development of the Member States calls for "effective economic cooperation and integration".[71]

In this part of the paper, I will concentrate on the ECOWAS trade liberalization scheme and analyze how far it has succeeded in attaining the goal of increased intra-regional trade through the creation of a larger market, and the hoped-for economic improvement. In this endeavor, the scheme will be briefly described, the progress made and problems encountered will be discussed and the prospects for the future analyzed.

In the following pages, I argue that despite the attractiveness of the ECOWAS trade liberalization scheme and the progress attained so far in its implementation, the region needs more than so-called 'negative integration' measures to attain the desired levels of economic development. In addition to tariff reductions, elimination of quantitative restrictions and non-tariff barriers to trade, it is submitted that ECOWAS should adopt 'positive integration' measures like harmonized policies in the fields of industry, transportation, fiscal and financial policy and most important, a regional policy on investments. It is clearly my view that the adoption of harmonized rules or a single investment regime is the most important policy question to which the countries of the sub-region ought to direct their attention. This argument is based on three principal reasons: firstly, due to the minuscule size of most of the countries in the region, it is unlikely that any of them has the industrial capacity to adequately serve the integrated market with the required factors of production or indeed the requisite amount of finished goods; secondly, due to the state of industrialization in the sub-region, none of the

[71] Ibid.

countries has the capacity to produce the kind of goods or services to effectively compete on a global scale, or to bring to fruition the desired export-oriented growth; - - therefore foreign capital and technology will be needed to enhance the local capacity and technological and human resources; thirdly, as a result of the enlarged market created by elimination of tariff and non-tariff barriers to trade, there will exist in West Africa the sort of scale economies that multinational enterprises are looking for to locate their operations and thus be a catalyst for greater investment.

The pith of the argument is therefore to emphasize the insufficiency of the negative integration measures to attain the region's development objectives and also that so long as investment law reform and liberalization, is limited to the national level, the region will continue to lag behind other regions in the global competition to attract investment capital. Accordingly, I submit, ECOWAS ought to adopt a common policy on foreign investment. To this extent, it is further my argument that trade liberalization and foreign direct investment are complementary components of a successful strategy of integration-led regional development.

The argument is therefore in contrast to the school of thought that views foreign investment and the activities of multinational enterprises as instruments of economic imperialism intended to reduce the developing countries to a state of perpetual periphery and dependence.[72] Inasmuch as I share the concerns of both authors with respect to

---

[72] See the views of S.K.B. Asante in his work noted in 14 *supra*, where he advocates a policy of disengagement from the international economic system for West Africa, to one for collective self -reliance and self - sustaining development. In his view, experience in other African regional groupings show that multinational enterprises have been a disintegrative factor, as they capture the integrative effort for their profits and consequently hijack the gains of integration from the region to their home countries. To reduce this relationship of dependence, he argues that the activities of the multinationals ought to be strictly regulated, and control transferred to indigenous Africans. Similar sentiments are expressed by Ezenwe

dependency and self-reliant development, I am respectfully unable to adhere to a policy of disengagement from the international economy. The world today has grown closer to a global economy and market place than ever before. One of the most important forces behind this global trend is the activities of multinational enterprises, which have in reaction to the greater mobility of capital, persons, services, payments and factors of production resultant from multilateral trade negotiations, embarked on integrated international production and marketing strategies to take advantage of the global market place. This trend has provoked the adoption of policies in other parts of the world like Europe, North America, Latin America, and Asia to facilitate the investment climate for foreign multinationals, which bring with them new capital, technology, skills and jobs, and thus contribute to economic and industrial development. Any region of the world that shies away from this development is likely to remain marginalized from the global trend. In essence, if West Africa is to attain the goal of economic development, and to prevent the region's marginalization in the field of international investment, as it has for a long time been in the field of international trade, it must open its doors to foreign capital, technology and skills that come with foreign investment. The debate therefore ought not, in my view, to be whether West Africa should accept foreign investment by multinationals, but rather on *how* the investment regime should be structured to attain the twin objectives of regional and national economic development, as well as a safe, secure

---

supra note 52, who advocates at pp152-153 that "Non- African multi-national corporations operating in West Africa should be replaced by indigenous multinational firms, if a large part of the benefits of integration is to be retained in the region".

and smooth investment climate for the multinationals.[73] It is this end result that we shall call an efficient and equitable investment regime.

The thesis therefore adheres to the school of thought that strikes a *middle path* between the classical and dependency theorists, and argues that foreign investment can be beneficial to any regional integration grouping if it is properly harnessed to prevent abuse and to assure mutual gain. In other words the regime for FDI ought to be so structured as to effect a Pareto-superior outcome between investors and host states.

(1)The ECOWAS Trade Liberalization Scheme

In pursuance of the objective to integrate the different national markets into a single regional market, the ECOWAS treaty of 1993 provides for the progressive establishment of a customs union within ten years from January 1 1990, when the Trade Liberalization Scheme (TLS), was launched. Within this union, Customs duties and other charges with equivalent effect, as well as quota, quantitative and like restrictions and prohibitions should be eliminated, and a common external tariff established.[74] Under art. 54, Member States undertake to attain full economic union within five years of the creation of a customs union. If this scheme operates according to schedule, there should exist in West Africa an economic union by the year 2005. However, as will be discussed

[73] In fairness to the learned author Asante *supra* note 14, he points out at 117 that "...direct foreign investment can be an important stimulus to economic growth and social development ...so long as the interests of the foreign investor and host government are congruent...[t]he debate, therefore, is not on whether foreign firms will participate in the ECOWAS integration process or not; but rather on how, under what conditions and what mix..."
[74] Art. 35

below, this is an extremely ambitious program especially in the light of the history of implementation of measures and programs in the region.

Under art.13 (2) of the old treaty, Member States were required to consolidate their import duties (i.e not impose new duties and non-tariff barriers or increase existing ones) within a period of two years from the "definitive entry into force" of the treaty. In 1978, the ECOWAS Authority decided that the period of consolidation should commence with effect from May 28 1979.[75] This was attained and art. 40 (4) of the new treaty binds Member States to the consolidated import duties. The Trade, Customs, Immigration, Monetary and Payments Commission recommended a schedule for the implementation of the program for the elimination of customs duties and charges of equivalent effect on imports and this was approved by the Authority in May 1980. Under it, the first stage of the implementation program involving the elimination of tariffs on unprocessed goods and traditional handicrafts, was achieved by May 28 1981. That date also marked the end of the period for tariff consolidation. Article 36 of the revised Treaty therefore provides for the duty-free circulation of community-originating unprocessed goods and traditional handicraft products within the region.

Even though this was a significant step forward in the quest for market integration in West Africa, it did not have much impact on the overall trade pattern for three main reasons. Firstly, most of the countries in the region produced traditional crops and goods usually for domestic consumption and even if sufficient quantities existed for export to the sub-region, there was insufficient demand in view of the fact that similar or substitute

[75] The Authority is the Assembly of Heads of State and Government. It is the supreme law-making authority for ECOWAS. See art.7 of the Treaty.

products were being produced in most of the other countries. Secondly, a significant proportion of intra-regional trade especially in unprocessed goods continued to be carried out underground initially because of the tariff barriers that forced traders to sneak into other territories with their wares; but even after the liberalization of trade in unprocessed goods, the underground trade still continued because a significant number of traders were allegedly still operating under the misapprehension that their goods were contraband.[76] Thirdly, the different national currencies in the region also gave rise to price differentials in regional products and traders not uncommonly crossed borders to take advantage of such differences.[77]

It is not surprising therefore that some regional leaders resort to border closures in violation of their treaty obligations to counteract this illegal trade.[78] The border closures have been explained on the basis that "the severity of the economic problems faced by ...national leaders and the lack of resources available to them predisposes the leadership in integrative systems among developing countries to seek immediate and dramatic gains in the...national systems which they represent."[79]

Whether this be a sound basis for violation of treaty obligations or not, ECOWAS leaders seem to have recognized that market integration will be less meaningful unless trade in industrial products was also liberalized. As a result, by decision A/DEC.18/5/80,

---

[76] Omorogbe *supra* note 24, at 360.

[77] A. A. Agyemang "Trade Liberalization Under the Treaty of the Economic Community of West African States (ECOWAS): Some Preliminary Highlights of Legal and Economic Problems (1990) 24 J.W.T 57, at 65.

[78] This is currently the position along the Gambia/Senegal border which has remained closed for at least five years now.

[79] L.K. Mytelka, "The Salience of Gains in Third World Integrative Systems," (1973) 25 World Politics, 236 at 240.

the Authority adopted a scheme for the gradual liberalization of trade in industrial products originating from Member States under which tariff barriers on such products should be eliminated over a period of four years. After several postponements, a revised program was adopted by the Authority and launched on January 1 1990. It covered 25 approved products from eight Member States with provision for additions to the list.[80]

This program divided the countries in the region into three groups according to their level of industrialization and products were divided into 'priority' and 'non-priority'. For group 1 countries (i.e. the least industrialized ECOWAS countries) namely Burkina Faso, Cape Verde, Gambia, Guinea-Bissau, Mali, Mauritania and Niger, tariffs on priority products were to be reduced by 12.5 percent annually over eight years and tariffs on non-priority products by 10 percent annually over ten years. For group 2 countries (Benin, Guinea, Liberia, Sierra-Leone, Togo), tariffs on priority products were to be reduced by 16.6 percent annually over six years and tariffs on non-priority products by 12.5 percent annually over eight years; finally for the more industrialized countries of Ivory Coast, Ghana, Nigeria and Senegal, which were in group 3, tariffs on priority products should be reduced by 25 percent annually over four years and tariffs on non-priority products by 16 percent annually over six years. This schedule was however revised in 1992 and the new periods for eliminating tariffs on community originating industrial products stands at 10 years for group 1 countries, 8 years for group 2 countries and 6 years for group 3 countries.[81]

[80] UNCTAD *Handbook on Economic Integration, supra* note 26 at 19.
[81] Clause C (2) *ECOWAS Trade Regime* (Irene Printers),Isolo , Nigeria.

To benefit from the scheme, each product must satisfy the community's rules of origin and obtain the requisite approval for inclusion in the ECOWAS trade liberalization scheme. Goods are said to be of community origin when:

(a). they are produced from materials of community origin whose value is equal to or higher than 40 percent of the total cost of the raw materials employed in their production or whose quantity is equal to or higher than 60 percent of the total cost of raw materials employed;

(b) they are produced from materials of foreign or indeterminate origin whose CIF value does not exceed 60 per cent of the total cost of materials employed or whose quantity is equal to or more than 40 percent of all raw materials employed in its manufacture;

(c)have received in the process of production a value added of at least 35 percent of the ex-factory price before tax; and,

(d) be manufactured by enterprises in which Community nationals hold an equity share of at least 25 percent.[82]

However, not much progress has been made with respect to the establishment of a common external tariff. Preparatory work on the formulation of the tariff and data collection to prepare a format for taking an inventory of member states' product protection mechanisms both commenced in 1993.[83] It is important that member states pay close attention to this as the establishment of such a tariff, together with the

[82] Under the previous trade liberalization schedule, the community equity ownership was structured on a graduation from 20 to 51 percent i.e. to benefit from the scheme, the products had to be produced by enterprises at least 20 % of whose capital was owned by community citizens between 1981-1983, 35 % for 1983-1989, and 51 % after 1989.

[83] UNCTAD, *Handbook of Economic Integration supra* note 26, at 20.

harmonization of other trade policy measures, will hopefully eliminate competitive distortions among the countries in the region. A common external tariff will also offer protection to infant industry, encourage the utilization of an enlarged regional market and hopefully minimize the incidence of unrecorded cross-border trade. Indeed it has been said that "...a common tariff is ...the backbone and distinguishing characteristic of any customs union".[84]

Harmonization of customs documentation is underway and in mid-1993 the ECOWAS Secretariat reported that twelve out of the sixteen member states had printed the relevant customs documents.[85] It is, however, not clear to what extent they are being used. The 1983 summit also approved a program for the establishment of an automated system for customs data (ASYCUDA) management, to be located in Lome, Togo. The system was installed in 1990 and is now in operation in most member states.

(2) Free Movement of Persons and Right of Establishment

In realization of the fact that an integrated regional market will require free movement of labor, capital and other factors of production, the ECOWAS Authority also concluded a protocol on Free Movement of Persons, Residence and Establishment in 1979. Probably this has been the most successful of the ECOWAS protocols. Article 2 of the Protocol provided to Community citizens the right to enter, reside and establish in the territory of other member states. Implementation was to be over a period of fifteen (15) years from 1979 divided into three phases; (a) phase I- right of entry and abolition of

[84] Asante *supra* note 14, at 94.
[85] UNCTAD *Handbook of Economic Integration, supra* note 26, at 20.

visas, 1979; (b) phase 2- right of residence, 1984; and (c) phase 3- right of establishment, 1989.[86] Under the first phase of the program of implementation, community citizens possessing valid travel documents could enter the territory of other Member States and stay for a period of 90 days without a visa, provided that where a visitor has reason to stay beyond the ninety day period, he must obtain permission to do so from the relevant authorities of his host state.[87]

This first phase of the program came into force in 1980, phase two in 1986 and phase three was signed in 1990 and ratified in 1991. The program is thus in the third phase of implementation.[88] In addition, ECOWAS travel certificates have been adopted and are being used in some member states and residence permits are in the process of harmonization.[89]

Like other aspects of the integration effort, this protocol has, despite its remarkable success, suffered some hitches along the way. The prospect of a massive influx of foreign labor in a region bedeviled by large scale unemployment prompted most ECOWAS countries to take a cautious approach to the question of establishment for fear of losing political favor at home. Thus Nigeria expelled immigrant non-Nigerian community citizens in 1983, and again in 1985 ostensibly because they had failed to regularize their stay in that country.[90] Also when the late President Felix Houphouet-Boigny of Ivory Coast attempted to introduce dual citizenship in 1965 within the Council

---

[86] *Protocol Relating to Free Movement of Persons, Residence and Establishment*, 1979 Art. 2 (3). Official Journal of the ECOWAS vol. 1 15th June 1979.
[87] Ibid. Art. 3
[88] UNCTAD *Handbook of Economic Integration supra* note 26, at 27.
[89] Ibid.
[90] I.A. Gambari, *Political and Comparative Dimensions of Regional Integration: The Case of ECOWAS*, (London: Humanities Press Int'l. 1991) at 46-47.

of the Entente, which would allow non-Ivorian migrant workers to obtain Ivorian citizenship alongside their original nationality, the indigenous population rose up in opposition for fear of losing their jobs to people from other countries. The Scheme had to be abandoned.[91]

(D) PROBLEMS AND PROSPECTS

I have already referred to the non-complementary production structure in the region which has in part resulted in the low volume of intra-area trade. Also referred to, is the difference in the levels of development and industrialization among the Member States of ECOWAS, the "partnership of unequal partners",[92] that has impeded progress in the implementation of regional programs for the liberalization of trade and other integration measures. The fear or lack of enthusiasm on the part of the smaller states is based on the belief that most of the benefits of integration will accrue to the more developed partner countries especially Nigeria.[93]

Also of significance is the absence of a uniform monetary and payments system in the region which has impeded the flow of services and capital. The region has ten different currencies, nine of which are non-convertible. Only the CFA franc, currency of the members of the West African Economic and Monetary Union (UEMOA), enjoys limited convertibility.[94] The integration effort has also been considerably hampered by inadequate transport and communications links in the region. Road, rail, maritime and air

[91] Ezenwe, *supra* note 52 at 133.
[92] Ibid. at 151.
[93] O.S. Knowles, "ECOWAS : Problems and Potential" in J.E. Okolo and S.Wright eds., *West African Regional Cooperation and Development*, (Boulder: Westview Press, 1990) at 149.
[94] These are the former French colonies except Guinea, i.e, Benin, Burkina Faso, Ivory Coast, Mali, Niger, Senegal and Togo.

transportation links were developed to facilitate commercial exchange with the West and largely remain so. Telecommunications remains a nagging problem. There is no doubt that an adequate regional transportation and communications infrastructure is indispensable to the smooth operation of an integrated regional market and to this end, it is important that ECOWAS has over the years paid attention to the problem. At present more than 80 percent of the ECOWAS trans-West Africa highway program has been completed and donors have expressed interest in funding the balance.[95]

Of greater significance from a trade liberalization, and integration point of view however, is the fact that customs duties continue to constitute a significant proportion of the revenue of a number of countries in the region, and for this reason, implementation of the tariff elimination program has been less successful than desired. Figures for 1990 indicate that Gambia derived 50 percent of its total government income from customs duties; Benin 49 percent; and Burkina Faso 47 percent.[96]

In realization of this heavy dependence on tariff revenue, Article 48 of the ECOWAS treaty provides a mechanism for the compensation of Member States which suffer losses as a result of the implementation of the trade liberalization scheme. The Protocol on Compensation for Revenue Loss (1980), provides that the loss of revenue in any year is to be assessed as equal to the difference between the total revenue that would result from the duties and taxes applicable to commodities before the coming into force of the Treaty (if they originated from a third country enjoying most favored nation treatment), and the amount actually collected as a result of the application of the Treaty.

[95] UNCTAD *Handbook on Economic Integration supra*, note 26, at 25.
[96] Agyemang, *supra* note 77 at 62.

Exporting member states were required to make compensatory payments to the Fund in respect of losses occasioned by their exports. By Decision A/DEC 19/5/80, the Authority decided that the contribution of a Member State to the compensation budget will be based on the country's share in the value of total intra-Community exports of originating manufactured products. During the first five years of the implementation of the compensation mechanism, (i.e 1991 - 1996), 20 percent of the contribution of the more industrialized Member States of Ivory Coast, Ghana, Nigeria and Senegal will be distributed to the less developed Member States. During the second five years, the 20 percent will be shared among all ECOWAS member states.

This compensation mechanism is to operate through the ECOWAS Fund for Compensation, Cooperation and Development established under article 21 of the revised Treaty. The purposes of the Fund, as stipulated in Article 2 of the Protocol Relating to the Fund include;

- to provide compensation and other forms of assistance to Member States which have suffered losses due to the application of the Treaty's provisions;
- to provide compensation to member states which have suffered losses as a result of the location of community enterprises; and
- to guarantee foreign investments made in Member States by enterprises established in pursuance of the treaty's provisions on the harmonization of industrial policies.

The Fund, through its various compensatory functions, is one of the institutions designed to facilitate an equitable and balanced development in West Africa. Bearing in mind the insufficiency of the compensation mechanism to attain the desired levels of equity and balance, the Fund is also charged with responsibility, within the framework of the ECOWAS industrialization program, to ensure an equitable distribution of community industrial projects and programs. This is important within ECOWAS where a huge disparity exists in the level of industrialization between the countries, and because of the fact that in the absence of such a distribution mechanism, industries tend to cluster around the more industrialized urban centers consequently alienating the less developed areas from the benefits of the integration-induced development. For example in CEAO. most of the industries are located around Abidjan and Dakar, and in the defunct East African Community, Nairobi had the concentration of most industrial and commercial activity.[97]

Concerns over equity and balance in the framework of regional integration among developing countries are important for the further reason that a number of integration schemes have either failed or encountered severe problems due to uneven distribution of the benefits and costs of integration.[98] In the light of this experience it is important that the ECOWAS Fund is making progress in the implementation of it's programs. Since it's inception in 1983, the Fund had by 1992 ending, provided loans to Member States of US$ 51.0 million, for the development of telecommunications, road infrastructure, industry and rural development. It had also disbursed grants of over US$ 918,000, and financed several telecommunications projects from the "special fund" created for that purpose.[99]

[97] Asante, *supra* note 14, at 102.
[98] The political crises that started in the Central American Common Market (CACM) from 1965, the collapse of the West Indian Federation in 1962, the East African Community, the West African Customs Union (UDAO), and the Customs Union of East African States (UDEAO), were all attributed to problems arising from the distribution of costs and benefits. See Asante, *supra* note 14 at 101.
[99] UNCTAD *Handbook on Economic Integration supra* note 26, at 28.

Despite the progress made, the Fund has in recent years been suffering from acute financial difficulties for the implementation of its programs. The problem mainly has been the tardy or non-payment of member's contributions to the fund and to the Executive Secretariat.[100] It goes without saying that this undesirable situation must be addressed if ECOWAS is to avoid the fate suffered by other erstwhile integration schemes in the developing world. This point is fortified by the fact that the ECOWAS Secretariat has itself recognized the issue of distribution of costs and benefits as a difficult problem that has accounted for the lukewarm attitude of the less developed Member States and their failure to participate in a sustained manner in the integration effort.[101]

Looked at from the point of view of economic efficiency criteria, it is submitted that an efficient integration arrangement is one that promises that each country will be better off joining the integration effort than staying out of it. In other words, the transformation that ensues in a country's economic position as a result of joining an integration grouping ought to be Pareto superior. Where this is not the case, then, at least, those countries acquiring most of the benefits of the integration effort, should be in a position to compensate those who benefit least - - the Kaldor Hicks standard or potential Pareto superiority. When the ECOWAS Treaty is subjected to this analysis, the conclusion seems inevitable that the provisions *per se* are economically inefficient because the operation of the tariff reduction schedule *simpliciter*, will leave the least

---

[100] Ibid. As at June 1993, total arrears in contributions to the Executive Secretariat amounted to over US$ 30 million.

[101] UNCTAD, *Handbook of Economic Integration*, *supra* note 26 at 17.

developed members of the community worse off than before the integration effort. It is submitted that it was as a result of the realization of this shortcoming in the integration structure, that further rules were negotiated in the form of the Protocol on Compensation so as to attain the desired level of efficiency, equity and balance.

There is also the question of the existence of other integration movements in the region which ECOWAS has to contend with. The two most significant are the former West African Economic Community (CEAO), which was dissolved in 1994 and replaced by the West African Monetary and Economic Union (UMEOA), and the Mano River Union (MRU), between Guinea, Liberia and Sierra-Leone. At least on one occasion, the potentially disintegrative effect of these other groupings dawned on ECOWAS when in 1980, both CEAO and the MRU applied for derogation from the MFN principle so as to enable them to apply within their respective groupings the preferential tariff arrangements that they had entered, without extending the same concessions to other ECOWAS Member States.[102]

To resolve this potentially disintegrative problem, ECOWAS mandated a committee to study the problem and make recommendations to the Authority of Heads of State and Government. The problem was solved temporarily by allowing the simultaneous application of the three systems; CEAO and MRU to apply their internal regulations among their respective member-countries, and in their relation with other ECOWAS Member-States, to apply the ECOWAS regulations. It was also resolved to consolidate the tariff rates of the two smaller groupings and that ECOWAS customs and

[102] Ezenwe *supra* note 52 at 145.

statistical documents should apply from January 1 1982.[103] As problems arising from the existence of other integration groupings in the region could possibly pose a threat to the overall success of the ECOWAS effort, Member States have evinced a desire to rationalize their regional integration efforts and to this end, Article 2 of the new Treaty provides that ECOWAS "...shall ultimately be the sole economic community in the region..."

Apart from these general structural and administrative problems, the Community also faces certain legal problems which must be addressed so as to facilitate a more cohesive integration program. In the context of trade liberalization, a discernible omission in the Treaty's provisions is the failure to prohibit *export duties* and charges of equivalent effect on products from member states. Article 35 provides for the elimination of duties and charges on Community originating *imports.* It may be more appropriate, and probably better enhance intra-Community trade, if ECOWAS adopts a prohibition or program for the elimination of duties and charges on Community-originating exports. This is particularly so if ECOWAS intends to promote export oriented industrialization through international investment. To this end, it is instructive that Article 16 of the Treaty of the European Community abolishes all duties and charges of equivalent effect on exports.[104] Secondly, a cursory reading of the ECOWAS Treaty will reveal the existence of several vague or ambiguous phrases which could be the subject of dispute between parties. This is particularly so in light of the fact that the treaty is authentic in both English and French. This, together with the fact that several Member States have, over

[103] Ezenwe, *supra* note 52 at 145-146. **See also** Omorogbe, *supra* note 24, at 358.
[104] Agyemang, *supra* note 77, at 62.

the years not lived up to their obligations with respect to payment of dues, ratification of protocols, and implementation of programs, stresses the need for a mechanism for resolution of disputes and for making definite pronouncements on areas of ambiguity in the provisions of the Treaty. It is hoped that the Community Court of Justice established under Article 15 of the Treaty and whose powers and functions are stipulated in Protocol A/P.1/7/91, will assume this all important function without further delay and thus mark another giant step towards economic union in West Africa.

The significance of a functional judicial structure within ECOWAS, or any other integration grouping for that matter, cannot be overemphasized. International commercial intercourse and the integration of sixteen national markets into a single regional market, are inevitably bound to encounter friction and disputes over the range of measures necessary for their successful realization, particularly over questions of protectionism and national sovereignty. Such a scheme calls for a supranational authority for the resolution of the difficult questions that may arise, and indeed for filling in gaps where necessary to facilitate a successful accomplishment of the integration endeavor.

It is this crucial dispute resolution role that the European Court of Justice has carried out so eminently and in doing so, established the supremacy of the Community and its laws throughout the European Union. Thus the European Court defined concepts like "quantitative restrictions"[105], "measures having equivalent effect"[106], and

[105] In Case 2/73 *Geddo v Ente Nationale Risi* [1973] ECR 865 at 870, the Court held that quantitative restrictions "...cover measures which amount to a total or partial restraint of, according to the circumstances, imports, exports, or goods in transit".

[106] In Case 8/74, [1974] ECR 837, *Procureur du Roi v. Dassonville*, the Court defined this term as "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade."

"...developed principles like non-discrimination and proportionality to govern the operation of [EC] law, ensured that member states observed [EC] law and interpreted the Treaty to give effect to the fundamental and overriding objectives of the [EC]".[107] But perhaps the most important jurisprudential contribution of the Court is its establishment of the pre-eminence of Community law over national law in case of conflict. In *Flamino Costa v. ENEL*,[108] the Court said;

> By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a community of unlimited duration, having...powers stemming from a limitation of sovereignty, or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, have thus created a body of law which binds both their nationals and themselves. The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity...The executive force of community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty...and giving rise to the discrimination prohibited by Article 7. In any case, the obligations undertaken under the Treaty creating the Community would not be unconditional but merely potential if they could be affected by subsequent legislative acts of the signatories of the Treaty...[109]

With respect to ECOWAS, art. 19 of the Protocol on the Community Court provides that decisions of the Court shall be final and immediately enforceable. It is however unlikely that the ECOWAS court will follow the reasoning of the European Court, primarily because Community law in ECOWAS is not automatically binding. Decisions of the ECOWAS Authority enter into force sixty days after their publication in the Official Journal of ECOWAS and thereafter bind both Member States and institutions of the Community.[110] Under art. 89, provisions of the Treaty and accompanying Protocols enter into force upon ratification by at least nine signatory States, and Protocols

[107] Agyemang, *supra* note 77 at 73.
[108] [1964] ECR 585.
[109] In Agyemang, *supra* note 77 at 73-74.
[110] Art. 9 (6) of the Treaty.

bind only Member States that have ratified them. Since such ratification invariably involves the parliamentary procedures of individual Member States, it rules out the direct applicability of Community law.

The ECOWAS regime therefore adheres to the *dualist* concept of international law, as opposed to *monism* which views both international law and municipal law as part of a universally binding body of legal rules. As such, the direct effects principle enunciated by the European Court with respect to Community law cannot be applied within ECOWAS under its present legal regime. This does not however detract from the institutional and functional significance of the Court which could still serve well in bringing disputes to a speedy and definitive conclusion, clarifying ambiguity in Community law, and performing essential gap-filling functions.

The above problems, together with the different legal traditions inherited by Member States from their colonial masters, and the lack of harmonized rules on even domestic law matters of contract, tort, corporate law, and rules of procedure (especially with respect to the recognition and enforcement of judgments), underline the need for greater legal rationalization within ECOWAS.

This chapter discussed ECOWAS' integration effort form the viewpoint of 'negative integration' through the elimination of tariff and non-tariff barriers to trade. There is no doubt that despite the hurdles, significant progress has been made towards the creation of a common West African market where goods, services and capital can float freely. Nonetheless more needs to be done to accomplish the desired level of integration and development. It is my suggestion that ECOWAS adopt harmonized rules or a single legal regime on investments both to complement the trade liberalization component of the integration effort, and to usher in a new wave of investment capital, as well as the technology, jobs and new skills that come with it. It is my view that such a policy will give greater impetus to the quest for regional economic development. The next chapter addresses the investment issue.

CHAPTER THREE: FOREIGN DIRECT INVESTMENT- THE LOCATIONAL FACTORS

In view of the nature of foreign investment, usually requiring a greater degree of permanence and longevity, the factors that influence investors' decision whether or not to locate in a particular market are inextricably linked to certain fundamental economic, political, and regulatory variables present in each country. This relative permanence of investment ventures distinguish them from trade relations, which usually do not require a market presence and can be carried out through agents, representatives and other unrelated parties or through a network of import/export transactions. As a result, foreign investment carries a significant risk factor and a decision whether or not to invest in a particular location, often involves a calculation of the market specific risk both from a commercial and non-commercial point of view, *vis-à-vis* the potential returns on the investment. It is only when the projected returns outweigh the risk element, that a market is deemed a favorable destination for international investment. Viewed in the framework of our analysis, international investors therefore make their location decisions using the criteria of economic efficiency. As a result, when investors make an entry into a particular market, they project that gains from that location, will outweigh the costs. In essence, it is submitted that investors subject the legal regime and other economic and political variables that constitute a nation's investment climate, to a rigorous cost/benefit analysis, and decide whether, engaging in a particular investment venture, will leave them better or worse off.

A. DO LEGAL RULES MATTER?

An attempt to suggest a framework for improving the investment climate of a country or region must start with an understanding of what motivates investors when they make their location decisions. Here I discuss the extent to which the legal regime of a country influences investor decision to set up production there.[111] According to Dunning's eclectic paradigm, investors enter a market only where they can utilize ownership, location and internalization advantages at the same time.[112] Under this view, a country's legal regime is an aspect of its location advantage, and its impact on investor decision is linked to their ability to exploit the other advantages. In my view, there is a dynamic relationship between legal and economic variables in determining investment location. Even though market forces that affect investors' bottom-line are important, the law plays an important role in regulating relationships, implementing bargains and in allocating risk. A useful example of this instrumental function of the law in an investment relationship, is the use of legal rules for the protection of intellectual property rights, particularly technological information, which often constitutes a significant element of investors' ownership advantage. Investors that enjoy such ownership advantages are unlikely to enter markets where they do not have sufficient legal guarantees for the protection of their technology.

---

[111] I am grateful to Christopher Waters of the Institute of Comparative Law at Mcgill, for drawing my attention to this point.

[112] J.H. Dunning ed., *The Theory of Transnational Corporations*, Vol.1, UNLTNC (London: Routledge, 1993).(**hereinafter** ***Theory of TNCs***).

Cheryl Gray and William Jarosz attach more weight to the role of law in influencing investors' location decisions.[113] For Gray and Jarosz, a nation's legal system can affect investor decision in three ways: first, it can alter the price of factors of production like labor and capital; second, it can alter transaction costs, as in the case of lengthy bureaucracy in securing *ex ante* approval to invest, and *ex post* costs of implementing the investment agreement and settling disputes; and third, it can determine the types of risks that investors must bear.[114] A legal regime that increases factor prices and transaction costs, or forces investors to bear risk, has adverse incentive costs on flows of foreign direct investment, by preventing investors from taking advantage of location or ownership advantages.[115]

I submit that the legal regime is a significant consideration in investors' location decision, but it cannot operate in a vacuum. Market characteristics in terms of economic stability, growth potential, demographic size and purchasing power, as well as political stability, are factors that either motivate or discourage investors from entering particular markets. As a result, any attempt to explain investor location solely on the basis of economic or legal considerations, will be inadequate. There is in my view, a dynamic relationship between these two elements in determining investment location.

An optimal investment climate is one in which, *inter alia,* suitable macro economic conditions exist so that the national economy is on the path to growth, a reasonable GDP per capita exists as a signal of market potential and purchasing power,

---

[113] C.W. Gray, and W.W. Jarosz, "Law and the Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe" (1995) 33 Colum. J. Transnat'l. L, 1-40.
[114] Ibid.
[115] Ibid.

there is a reasonably functional infrastructure, in terms of both physical and human resources, as well as a suitable regulatory environment for investment.[116] This analysis shows that more than a liberalized investment regime is necessary to improve a country's investment climate. A favorable investment climate is the product of a combination of economic and regulatory factors that potentially assure investors profits on their investment, and guarantees them protection against non-commercial risk elements arising from political and governmental action. It is suggested that a country that provides such an environment, as well as reasonable regulation to harness the investment and ensure that it is channeled in line with the development needs of the host country, attains the optimal investment environment-an equitable and efficient outcome. Indeed, it is the absence of this mix of FDI determinant variables that accounts substantially for Africa's unattractiveness as an investment destination. This unattractiveness is reflected by the flow of investment capital to the region.

According to UNCTAD, in 1994 Africa as a whole had an accumulated FDI stock of $53 billion which was the least for all developing countries. In fact whereas other parts of the developing world experienced significant growth in their levels of FDI inflows so that it accounted for the bulk of their resource flows, Africa, and especially Sub-Saharan Africa, has been experiencing a negative growth in terms of its proportion of FDI inflows to developing countries. FDI flows to the region remained in the $2-$4 billion range

[116] UNCTNC, *The Determinants of Foreign Direct Investment: A Survey of the Evidence*, (New York: U.N 1992).

throughout the 1980s, reflecting a decline from 11% of the developing country total in 1986-1990, to 6% in 1991-1993, and to 4% in 1994.[117]

The question that inexorably follows from this situation is why has Africa performed so badly in its bid to attract international investment as compared to other parts of the developing world? It seems that the region does not compare favorably with other developing areas in view of the level of economic development of countries as measured by GDP per capita, the small size of national markets as measured by total GDP or size of population, and the growth of domestic markets. These three elements have been conclusively established to be fundamental determinants of a favorable investment climate, together with other factors like the availability of infrastructure, political stability and a transparent and liberal legal regime.[118]

B. ECONOMIC FACTORS

The need to maintain a sound economic environment that includes stable and consistent macroeconomic policies conducive to long term planning and sustainable growth, is *sine qua non* to a country's attempt to attract foreign investment. This is due to the fact that such a climate not only promises investors that their investments will not be subject to unpredictable and volatile non-market forces, at least from the point of view of

[117] UNCTAD *World Investment Report 1995- Transnational Corporations and Competitiveness*, (New York and Geneva ,U.N 1995), at 84. **(hereinafter World Investment Report 1995).** It is to be noted that despite this relative decline in the proportion of FDI flows to developing countries, Africa's FDI stock grew in absolute terms but even this growth was concentrated in a few countries especially the oil producing countries of Egypt and Nigeria who together accounted for two-thirds of its stocks and flows.
[118] UNCTAD Division on TNCs and Investment, *Foreign Direct Investment in Africa* (New York and Geneva: U.N 1995), at 64. **(hereinafter UNCTAD FDI in Africa). See also** I.F.I. Shihata, *Legal Treatment of Foreign Investment: "The World Bank Guidelines"*, (Boston: Martinus Nijhoff Pubs. 1993) at 20. **(hereinafter Legal Treatment of FDI).**

government policy, but also that so long as a stable economic regime is in existence, there exists a potential for growth, and hence of profits. In other words, it reduces the risk perception of particular markets from an investors' viewpoint or increases investor confidence.

The view that market characteristics loom large in investors' location decision, is shared by scholars of repute. Shihata writes that,

> ...[p]erceptions of unfavorable climates and volatile economic policies have continuously discouraged investors from seeking projects in developing countries. Investors' behavior shows a consistent preference for "safer" investments even when they are commercially less viable. Their reluctance to invest larger volumes in developing countries in recent years is not simply a result of a dearth of investment opportunities.[119]

For Africa in particular, UNCTAD has found that not only do significant investment opportunities exist, but the investment that has taken place has been highly profitable, to the extent that in most of the years between 1980 and 1993, the rate of return in Africa was higher than the average for all developing countries, exceeding that in both Latin America and the developed world for all years except two. Only Asia outperformed Africa during this period, and because that region has been experiencing a decline in rate of return in the 1990s, Africa remains the region with the highest rates of return.[120]

Government policies on convertibility and transfer of foreign exchange, are particularly important for foreign investors in order to fulfill their obligations with respect to credit, dividends, profit and payments. A country that lacks such an enabling

---

[119] I.F. I. Shihata *MIGA and Foreign Investment* (Dordrecht: Martinus Nijhoff 1988), at 6.**(hereinafter MIGA and Foreign Investment).**
[120] UNCTAD, *FDI in Africa*, *supra* note 118 at 73.

framework is unlikely to attract significant foreign investment. In Africa, this requirement has over the years been problematic due to the countries' acute balance of payments difficulties, which had necessitated restrictions on the free external flow of foreign currency.[121] Foreign exchange 'queues' became common in several countries, as governments allocated such funds by turn, depending upon availability and priority. In more recent years, the problem has been significantly ameliorated through the process of liberalization of investment laws, as several new investment codes, *inter alia,* guarantee the free convertibility and transfer of funds. [122]

Transfer of profits and similar international payments arrangements also require appropriate and adequate financial intermediation systems like banks, other financial institutions, and a capital market, not only for the smooth and efficient conduct of the intermediation function, but also to help mobilize additional funds where necessary for the operation of the business sector. A liberalized trade regime, favorable tax policies in terms of overall tax rates, the avoidance of double taxation, as well as adequate human and physical infrastructure, are all prerequisites of the economic climate of a country that influence investors' location decisions. As stated above, such a climate promises economic growth and increased purchasing power, without which investors are unlikely to be attracted. It is worth noting in this context that the high rates of domestic growth, low costs of production and lucrative domestic markets, characterized by rising consumer

[121] Kofele-Kale, "Host Nation Regulation", *supra* note 30 at 382.
[122] For examples see Ivory Coast's *Code des Investissements* 1984 Art. 9, Ghana's Investment Promotion Center Act 1994 section 27, and Nigeria's Second Tier Foreign Exchange Market Act 1990 section 14, which allows repatriation of funds from an investment in Nigeria by applying for permission to do so from the Central Bank of Nigeria.

purchasing power, accounted for the recent trend in flows of FDI to Asia and the Pacific region which were the highest among all developing countries.[123]

A priori, an improvement of Africa's performance in the global competition for FDI, will require, among other things, that the region experience higher growth rates and better prospects for overall economic development for these are the pointers to profitability of business ventures. This view is fortified by the finding that major transnational corporations have not invested in Africa on the same scale as other regions of the developing world because of "continuing uncertainty regarding prospects for economic development ..."[124]

Moreover, whereas some countries in the region are endowed with enormous natural resources,(and this is particularly so in West Africa), underlining the region's competitive advantage in that respect, at least for resource intensive industry, other factors do not so favorably tilt in favor of the continent. An outstanding example of this is the labor sector both in terms of cost and productivity. Whereas cost of labor in Africa is believed to be relatively cheap, this is realistically not so especially when compared to other parts of the developing world. According to UNCTAD, by the mid 1980s, costs of production in Sub-Saharan Africa were frequently as much as double those in low-income Asia.[125] A 1989 World Bank study[126] found that the cost of rail transport was 2.8 times higher, and wages of unskilled workers in the construction sector 1.4 times higher

---

[123] UNCTAD *World Investment Report 1992,.at 22.*
[124] Ibid.at 29
[125] UNCTAD *FDI in Africa,* at 39.
[126] World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth* (Washington: The World Bank, 1989), table 1.1, p.27.

in Sub-Saharan Africa. Compared to other parts of the developing world, this state of affairs, alongside other factors, made Africa a less attractive choice for multinational investors.

C. POLITICAL CONSIDERATIONS.

The political climate of a country is another significant factor in the overall attractiveness of its investment climate. This factor involves not only governments' policy and ideological orientation towards foreign investment, but also the stability and continuity of the political order. Predictability of future government action or at least the assurance of a stable state of affairs is therefore a facet of the overall investment climate.

In West Africa, even though all the countries adhere to the free-market philosophy of economic policy as evidenced by their various efforts to encourage private sector participation in the economy, this has not been accompanied by the desired level of political stability. Political volatility is manifested by the incessant *coups d'état* in the region as well as the scourge of civil war and internal strife in a number of countries. According to Welch, the sixteen Member States of ECOWAS accounted for close to half of the successful *coups d'état* in Africa between 1958 and 1990.[127] Since that time successful *coups* have again taken place in Sierra-Leone (1992, 1996 and again in 1997), Nigeria in 1993, and Gambia had its first successful *coup* in 1994. From the point of view of the investment climate, some of these *coups* have significant implications due to the fact that it is not uncommon for the incoming regimes to divest previous investment on

[127] C.L. Welch, Jr. "The Military Factor in West Africa: Leadership and Regional Development" in S.E. Okolo & S.Wright, *West African Regional Cooperation and Development* (Boulder: Westview Press 1990), at 159.

grounds of illicit or irregular practices on the part of investors, with the complicity of ousted government officials, or for various tax measures. In both Sierra-Leone and Gambia after the 1992 and 1994 military takeovers respectively, Commissions of Inquiry were set up to investigate alleged corrupt practices including in the privatization of hitherto state owned enterprises.[128]

Whilst the state's power to nationalize or expropriate foreign business in the national interest cannot be questioned, as it is an attribute of national sovereignty, State responsibility on the other hand requires, if the international system is to enjoy any degree of certainty, reasonable respect for obligations undertaken by and on behalf of the state, as these are presumed to succeed individual governments. Moreover whatever the legal or moral justification for nationalization may be, it is a factor that prospective investors will take into consideration in evaluating the attractiveness or otherwise of particular locations.

Political risk perceptions may also have both quantitative and qualitative effects on host developing countries.[129] As mentioned above, investors may refrain from investing in a politically volatile territory and thus affect the quantum of investment capital flows thereto; qualitatively, due to the risk perception, investors are likely to engage in only short-term investments with potentially high rates of return, even where the country or region's comparative advantage really lies in longer term investments. As

---

[128] In Gambia for example, such Commissions of Inquiry led to Government's repossession of Gambia Airways which had been previously privatized, and an equity possession in Novotel Kombo Beach, shares which the previous government had divested itself of. The military government also rescinded the Management Leasing Contract of the national power and water company and replaced it with a new state owned enterprise, the National Water and Electricity Corporation (NAWEC), on the ground of a fundamental breach of contract by the lessees.

[129] Shihata, *MIGA and Foreign Investment*, *supra* note 119 at 15.

such, even though there may still be some flow of investment funds, it may not be in the direction of the country or region's development needs.

The Sierra-Leone *coup* of May 25, 1997 raised interesting issues from the point of view of West African regional cooperation because the ECOWAS Authority, in an action endorsed by the Organization of African Unity and the United Nations, dispatched a contingent of troops led by Nigeria ostensibly to restore the elected civilian government of Ahmed Tejan Kabba, who appealed to ECOWAS to restore him.[130] The Nigeria led force bombarded Sierra-Leone army positions and clashed with the revolutionary Sierra-Leone forces who were unwilling to relinquish their hold on power and negotiations are ongoing with a view to facilitate a peaceful hand over of power.[131]

Unlike the ECOWAS intervention in Liberia, which was justified on the basis of the untold humanitarian calamity that befell that country in the wake of the civil war, and therefore justifiable under the international law principle of international humanitarian intervention, the Sierra-Leone intervention seems to be a wholly ideological or politically motivated one, intended and professed to be for the purpose of restoring the democratic order.

Apart from the obvious question of the legitimacy of such an intervention on the basis of the ECOWAS Protocol on Mutual Assistance in Defense, there is the other question of the import of such a precedent for state practice in the region, and the moral basis for the intervention especially in view of the fact that Nigeria, the strongest advocate and leader of the intervention, itself labors under the rule of a military

---

[130] "O.A.U Speaking in One Voice", *The Weekly Review*, June 6 1997, at 29.
[131] "A Military Takeover", *The Weekly Review*, May 30 1997, at 23.

dictatorship, with less than an enviable human rights record. It will be interesting to see how the situation is resolved, and what the reaction of ECOWAS will be to a future *coup* in other countries of the region especially the more militarily powerful ones. For present purposes, the May 25 Sierra-Leone *coup,* marks another deficit in the overall attractiveness of West Africa as a stable and secure investment destination.

In addition, the wars in Liberia[132] and Sierra-Leone, as well as the separatist revolt in the Casamance region of Senegal, have left the region stranded with millions of refugees and displaced people at the mercy of countries struggling to maintain their own people.

There is no doubt that all the above factors militate adversely against the flow of investment to the region and the situation calls for urgent and serious attention. Political instability of a state or region demonstrates it as a risky investment destination and consequently scares investors away. Apart from the economic and regulatory variables therefore, the political situation also impinges significantly on the investors' decision and for West Africa, is one of the areas to which close attention ought to be paid in order reduce the risk perception of the region as an investment locale or to increase investor confidence. As Shihata put it, "Governments which enjoy political and social stability, and have established institutions to ensure continuity and smooth transitions without the pains of abrupt or violent changes, greatly contribute to the evolution of an attractive investment climate".[133]

[132] Liberia has recently embarked on a promising road to peace. Democratic elections were held in July this year, which the former rebel leader Charles Taylor won. See "An Olive Branch", *The Weekly Review,* August 1 1997, at 28.
[133] Shihata, *MIGA and Foreign Investment, supra* note 119, at 8.

D. REGULATORY ISSUES.

The regulatory aspect of the investment climate has attracted more attention and discussion than any other aspect. Such attention varies from national policies, which seek to enhance the regulatory framework by the enactment of 'liberalized' investment codes, to academic comment and expert analysis, which help delineate what is or is not acceptable within a 'liberalized' regulatory regime. As with trade liberalization, the liberalization of foreign investment policies is part of the overall process of liberalizing national economies through the reduction or elimination of distortions arising from discriminatory government policy and legal rules.

Traditionally, investment regime liberalization was thought to involve the removal of restrictions with respect to entry and establishment of foreign investment, ownership and control, various operational restrictions like performance requirements, employment generation, foreign currency remittance and the grant of attractive investment incentives.[134] Even though the removal of such restrictions is a significant aspect of the liberalization process, it is an incomplete approach. The process of liberalization involves, in addition to removing restrictions, the adoption of positive standards for the treatment of investors. In the view of the OECD, a liberal FDI policy "...is one in which government interference- - by laws, regulations, policies or practices - - is kept to a minimum or is non-existent....Similarly the conditions under which the foreign enterprise will operate should be the same as those applying to domestic

[134] A. A. Fatouros "Towards an International Agreement on Foreign Investment" in *Towards Multilateral Investment Rules* OECD Documents, at 60. **(hereinafter "International Agreement on FDI").**

firms."[135] Under this definition, liberalization involves not only the removal of policy and legal distortions, but also the concept of national treatment for foreign investors. Furthermore, in a study of FDI liberalization, UNCTAD concluded *inter alia* that:

> ...a working definition of the FDI liberalization process includes the avoidance of discriminatory market-distorting measures by tempering or eliminating restrictions on, and special incentives to, TNCs by governments, the establishment of certain positive standards of (equal) treatment and protection for foreign affiliates and the introduction of certain controls and prudential supervision to ensure the proper functioning of the market...[136]

It seems, if one accepts the above definitions, that the process of liberalization of FDI policies is two-pronged; a 'negative' aspect in the sense of the removal of policy distortions, and a 'positive' aspect involving the adoption of standards of treatment. But even this two-pronged approach is in my view, inadequate from a developing country point of view. It fails to make any prescription for investor conduct. I argue later on in this chapter, that the process of liberalization ought to involve not only measures to protect investors and investments, but also binding norms to regulate international corporate conduct. At this stage, I will consider the elements of the liberalization process seriatim and revisit the concept of liberalization later.

1. Removal of Distortions

(i) Entry and Establishment- It is an attribute of the principle of national sovereignty recognized by customary international law that states have the right to admit or exclude aliens from their territory. This includes both natural and juristic persons. It is in the exercise of this right that governments have enacted laws to control the entry and establishment of non-nationals in their territory. This international law right is recognized

---

[135] R.Lee, "Multilateral Rules to Promote the Liberalization of Investment Regimes" in *Towards Multilateral Investment Rules*, OECD Documents, at 69.
[136] UNCTAD *World Investment Report 1994*, at 288.

and expressed in art. 2 (a) of the United Nations *Charter on the Economic Rights and Duties of States* which gives each state the right "to regulate and exercise authority over foreign investment... ."[137] Restrictions imposed by states in exercise of this right have been justified on the grounds of national security, public order and vital national interests. In addition, developing countries have placed restrictions on entry and establishment to promote various development objectives. Key sectors of the economy like minerals, utilities, mass communications, and public transportation are in many developing countries reserved either wholly for government corporations or joint ventures between government and national investors, or solely for local entrepreneurs.

In effect, even though the ideal situation is to create an "Open FDI"[138] regime that assures complete unrestricted market access to all sectors of the economy, this does not operate in practice due to reasons of national security, public policy or development objectives. Indeed this is the situation even in countries with more 'liberal' investment regimes like the United States and Canada.[139]

But do we need legal rules to regulate FDI access? Liberalization of investment access in integration groupings, particularly the European Union, have adopted a rule-based approach by legislating a right of establishment.[140] Using standards of fairness and

[137] G. A Res.3281 (1974).

[138] The phrase is that of Jeffrey Atik in "Fairness and Managed FDI", *supra* note 37.

[139] In the former, the 1988 Exxon-Florio Amendment to the *Omnibus Trade and Competitiveness Act* gave the Federal Government power to block any proposed investment that appears to threaten national security, whilst the *Foreign Investment Review Act* in the latter laid down extensive screening and approval procedures for foreign investment to determine if the investment would be of 'significant benefit' to Canada in terms of increasing employment and exports, technology transfer, and advancement of national industrial and economic policies. The upshot was a U.S challenge of the Canadian measures before a GATT dispute settlement panel. The *F.I.R.A* Act was repealed and replaced in 1985 by the *Investment Canada Act.*

[140] Articles 52-54 of the E.C Treaty deal with the right of establishment. Article 52 abolished restrictions on the "freedom of establishment". Article 53 prohibits new restrictions on the right of establishment, and

realism, Jeffrey Atik proffers a regime of "Managed FDI" as an alternative to formal investment rights. A regime of "Managed FDI" "will involve active administration by host and home country officials, who will monitor and evaluate the reciprocal balance (cost/benefit) of FDI flowing between them on a continuous basis".[141] Since rule-based approaches have an automatic claim to fairness through an equivalency of obligations, they fail to capture, in Atik's view, the reality of FDI, which is quite often valent.[142] He therefore argues that "Managed FDI" accords more with the FDI relationship since it allows investment access to be ceded on a discretionary, case-by-case basis by the host country, taking into account the merits of the particular investment proposal, the cumulative effect of FDI within the host country and, the reciprocating policies of the home country.[143]

Thoughtful and intriguing as it may be, Atik's proposal is in my view fraught with difficulty. It calls for a discretionary administrative evaluation of investment proposals on an *ad-hoc* basis, rather than a rule-based approach to the regulation of investment access. Whilst this approach may work in countries with sophisticated administrative sectors and skilled manpower for its implementation, it may not operate well in developing countries. The discretionary nature of the process may be a source of uncertainty for investors, and there is the risk that investors may make extra efforts to induce administrative officials. As a result, it is my submission that investment access in developing countries ought to

---

article 54 established a general program for dismantling existing investment restrictions within the EU. See Atik, "Fairness and Managed FDI", *supra* note 37.

[141] Atik, "Fairness and Managed FDI", *supra* note 37 at 32.

[142] Ibid at 37.

[143] Ibid at 35.

be regulated by formal legal rules, clearly elaborated to avoid exercise of improper discretion and avoid legal uncertainty. Atik's concern for fairness, it is submitted, can be taken care of by a carefully drafted law that takes into account the interests and concerns of both investors and host states. In my view, this fairness standard would be covered by legislating for an economically efficient legal regime.

(ii) Ownership and Control- It is desirable that investment laws also remove restrictions on ownership and control of investment enterprises. As will be seen in the next chapter, several investment codes in West Africa either contain, or used to contain requirements for local equity participation by either government, nationals of the host state, or that a certain percentage of the managerial or professional staff must be nationals of the host state. Undoubtedly, this was a reflection of the policy to encourage indigenous enterprise and to ensure national control over the economy. In other words, it was a manifestation of economic nationalism. In the most extreme form of such requirements among developing countries, Decision 24 of the Andean Pact 1971, included fade-out requirements of foreign ownership, and corporations that did not fade out such ownership could not benefit from preferential tariff treatment of the Andean Common Market (ANCOM).[144] Such restrictions impinge negatively on the investment climate as investors attach significance to control of enterprises in which they invest and even the Andean Pact has done away with fade-out requirements under the revised investment rules.[145]

[144] R.Grosse, "The Andean Foreign Investment Code's Impact on Multinational Enterprises" in P. Robson (ed), *Transnational Corporations and Regional Economic Integration* (London & New York: UNLTNC Vol 9, 1993), at 266.
[145] See Decision 291 of the Commission of the Cartegena Agreement 1991 reproduced in UNCTAD/DTCI/30(VOL II), *International Investment Instruments: A Compendium* (New York and Geneva: U.N 1996) at 447.

***(iii) Operational restrictions*-** Investment codes are also replete with requirements especially in developing countries for employment generation, domestic content minima, or performance requirements aimed at promoting exports, import substitution, or the encouragement of local production. Such restrictions, whether imposed conditionally prior to entry, or tied to the offer of investment incentives, are less than desirable in a liberal FDI regime and can cause market distortions especially when granted on a discriminatory basis.

In the context of developing countries, particularly in Africa, such requirements are the means used to attain the economic development and other social programs of the host states. In recognition of this special position of developing countries, the Uruguay Round Agreement on Trade Related Investment Measures (TRIMS) exempts developing countries from the obligation not to apply any investment measures inconsistent with the national treatment obligation under Art III, and the prohibition of quantitative restrictions under Art XI of the GATT.[146] In addition, Article 5 of the TRIMS Agreement requires that within 90 days of the entry into force of the WTO Agreement, all Parties shall notify the Council for Trade in Goods of all non-conforming TRIMS they are applying and to eliminate them within five years for developing countries and seven years for least developed countries.

It seems therefore, the measures imposed by these countries are not inconsistent with their multilateral trade obligations. However, their effect on investor perception of the attractiveness of the countries' investment climate, can hardly be gainsaid. Moreover,

---

[146] Art 4 Agreement on Trade Related Investment Measures, 1994.

notwithstanding their accommodation at the international trade level, such measures could distort international investment. It is submitted, a gradual reduction or elimination of these requirements, will redound to a more favorable perception of the investment climate.

(iv)Authorization and reporting- Several countries also impose requirements for prior authorization of investment ventures. Some of these requirements, especially in developing countries, are intended to tailor the investment program to the development needs of the country and, provided they are not unduely bureaucratic and cumbersome, are strictly speaking not inconsistent with the existence of a liberal investment regime. In this respect, it is worth noting that several countries in West Africa have set up 'one-stop shops' for the screening and authorization of prospective investment.[147]

It seems to me that though it may be too early for many developing countries to completely eliminate approval procedures, their effect might be curtailed by avoiding screening potential investments for financial viability - a process that is complex and technical and for which few countries have the technical and human resources.[148] Moreover a clear and unequivocal elaboration of approval rules that allows little latitude for the invocation of individual discretion on the part of approving officials, will reduce the delays experienced in this area, as well as curtail the possibility of 'extra efforts' to secure approval. Such measures will hopefully result in transaction cost savings for

---

[147] Examples are Nigeria's Industrial Development Committee, Ghana's Investment Promotion Centre, the Ministry of Industry in Ivory Coast, and the National Investment Promotion Authority in Gambia.
[148] UNCTAD *FDI in Africa*, at 80-81

potential investors and hence contribute to a more positive perception of the investment climate in countries in the region.

*(v) **Incentives-*** Investment incentives are perhaps the most widely used tool by governments in developing countries to attract foreign investment. Such incentives are generally intended to balance out the risk perception in host countries, or to increase the rate of return of investment undertakings. As will be discussed in detail in the next chapter, such incentives are both capable of introducing distortions and are quite often redundant in the sense that they cannot substitute for the fundamental economic and regulatory determinants of FDI, in the absence of which incentives may only represent avoidable financial sacrifice on the part of host nations. This is because many incentives, particularly fiscal incentives like tax holidays and duty remission, are dished out to all foreign investors, new as well as those already established, even though some of them might have invested in the market in the absence of the incentives. To the extent that investment incentives represent government revenue forgone to investors whose location decisions would not have differed without them, they represent unnecessary wealth transfers from the public to the private sector.[149] Obviously more important than expensive incentives are an appropriate economic environment and regulatory framework.

2. Measures to Increase Investor Confidence.

(i) No Expropriation Without Compensation- State sovereignty also confers on governments the right to expropriate assets and properties including investment ventures

[149] UNCTAD, *Incentives and Foreign Direct Investment* (New York &Geneva: U. N. 1996),at 11-12. See also Shihata, *Miga and Foreign Investment supra* note 119, at 9.

of aliens. Despite an initial prohibition against such expropriation, international law now recognizes the sovereign right of states to expropriate foreign property provided such expropriation is for a public purpose, non-discriminatory in form, effected with due process of law and accompanied by the payment of prompt, adequate and effective compensation.[150] Almost all the investment codes in West Africa either prohibit expropriation or provide for the payment of compensation upon expropriation. Such guarantees are without doubt important as they are relevant for the security of investment ventures.

(ii)Dispute Settlement- Equal access to the impartial and efficient judicial system of host countries for the settlement of investment disputes and the enforcement of awards is an undeniable attribute of a liberal investment regime. Moreover, more and more countries actually stipulate the option of international third party settlement of investment disputes by arbitration through the facilities of institutions like ICSID, UNCITRAL, ICC etc. either after failure of settlement attempts, or upon exhaustion of local remedies. The possibility of international dispute settlement has increased investor confidence in developing countries several of whom hitherto displayed open distrust for international dispute resolution because, in their view, it impinged on national sovereignty.[151]

3. Standards of Treatment

[150] This is the so-called Hull formula named after U.S Secretary of State C.Hull who used it in his diplomatic exchange with the Mexican government in respect of the Mexican nationalization of 1938. This formula has however been the subject of controversy especially from the developing countries, most of whom adhere to a different formulation and treatment standard . For an interesting account of the debate See S.K.B. Asante, "International Law and Foreign Investment : A Reappraisal" (1988) 37 I.C.L.Q 588. **(hereinafter "International Law and FDI")**.

[151] This attitude was most evident in Latin America where the Calvo doctrine held sway according to which disputes between foreign investors and the host state had to be settled through national adjudicatory mechanisms.

The question of standards of treatment with respect to FDI clusters mainly around the notion of non-discrimination. This notion has three facets to it: the first involves the question of non-discrimination between aliens from different countries (the MFN standard), the second involves non-discrimination between foreign investors and nationals of the host state, (the national treatment principle), and the third involves the question of discrimination in favor of foreign investors by the grant of investment incentives.[152]

The MFN standard is widely accepted in the context of international trade.[153] Even there, it is subject to several exceptions particularly with respect to arrangements in a customs union or free-trade area. The standard has, on the other hand, not found expression in as many investment laws. However, bilateral investment treaty practice of several developed states contain a MFN clause.[154]

The national treatment obligation implies that "...in principle foreign affiliates and domestic firms in similar situations should receive the same treatment, regarding such things as establishment, ownership and control, full access to courts and other authorities and equal protection under the law..."[155] It is pertinent to observe here that despite its formulation in the above terms, the national treatment obligation does not adequately address all the fact situations *vis-à-vis* foreign affiliates and nationals. A specific example is the issue of transfer of funds. A general prohibition on such transfers

[152] Fatouros "International Agreement on FDI", *supra* note 134 at 55.
[153] J Atik, "Fairness and Managed FDI" *supra* note 37 at 28.
[154] Examples are the United States, Germany and Switzerland. The APEC Investment Principles and the CARICOM Guidelines for use in the negotiation of bilateral treaties also contain MFN clauses.
[155] UNCTAD, *World Investment Report* 1994, at 292.

applying to both foreign and domestic investors alike, satisfies the notion of national treatment; however, due to the special position of foreign investors in terms of outside links with parent companies and other business affiliates, most investment codes make provision for the free transfer of funds in the form of profits and remittances and some cases of capital.[156]

The third aspect of the non-discrimination principle, the special offer of incentives to foreign investors has already been dealt with above. In the next chapter, I will return to the relationship between incentives and the flow of foreign investment to the country granting them.

4. Investment Liberalization Revisited

The above discussion shows the *desiderata* for a liberal investment regime. Only a cursory review will show that the optimal investment climate in terms of all the above requirements does not exist anywhere in the world, be it in national legislation or bilateral or regional arrangements. The reality is that investment regulation is a mix of regulation and openness and the concept of a 'liberalized investment regime' can therefore at best represent an approximation of a reasonable degree of liberalization that enables the smooth operation of the investment undertaking and at the same time reflects the development and other social objectives of the host state. Indeed as stated by UNCTAD, though

> Total governmental control is generally incompatible with the very notion of the market[,] yet, total liberalization, in an extreme sense, could imply the absence of a functioning legal system. A normative framework is indispensable for ensuring the proper functioning of a market economy, and this entails the application of rules and controls. At the same time, liberalization is a dynamic process, moving in a certain

[156] Fatouros, "International Agreement on FDI", *supra* note 134, at 55.

direction. A country's pertinent policies and measures at a particular point in time can therefore only be described as more (or less) liberalized.[157]

Apart from the fact that the concept of liberalization outlined above really does not operate in practice anywhere, it suffers from a further shortcoming- - it does not require any obligation on the part of foreign investors apart from the implicit one of conducting their business in accordance with the laws and regulations of host states. Traditionally, international law has not specifically sought to regulate the activities of multinational corporations on the basis that corporations are artificial persons, having their nationality in the countries of their incorporation or principal place of business.[158] As such, they are still regarded as subjects of municipal law. On the other hand, international law has whether fortuitously or by design, conferred extensive rights on such corporations not least of which are the standards of treatment previously referred to with respect to nationalization and expropriation of property. Notwithstanding the fact that unless an investment agreement gives legal standing to the corporate investor, claims on the basis of the above international law standards have to be brought by the investors' home state in exercise of the duty of diplomatic protection, because the direct beneficiaries of these claims are the corporate investors, it is arguable that the rights amount in fact to investors' rights. As a corollary of this right, I submit, the time has come for international law to prescribe obligations for the behavior of multinational enterprises.

[157] *World Investment Report*, 1994 at 287.
[158] On the legal status of corporations at international law, and the duty of diplomatic protection, see the decision of the I.C.J in *Barcelona Traction, Light and Power Co.*, [1970] I.C.J Rep.3

Negotiations on a United Nations Code of Conduct on TNCs agreed on several important principles of investor conduct but failed to reach agreement on aspects of legal treatment for investors and investments.[159] Efforts were also made within the United Nations system to develop specific prescriptions for TNC conduct like the 1977 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and in 1980 the General Assembly adopted a set of Multilaterally Agreed Equitable Principles for the Control of Restrictive Business Practices. Negotiations in the framework of UNCTAD for an international Code of Conduct on Transfer of Technology however did not result in the adoption of an instrument.[160]

A recent international instrument on foreign investment is the World Bank Guidelines on the Treatment of Foreign Investment. However, those guidelines deal only with treatment of investors by host governments; they do not include rules on investor conduct as these were already adequately elaborated in the Draft U.N Code on TNCs.[161]

At the regional level, the OECD in 1976, adopted a Declaration on International Investment and Multinational Enterprises that included an instrument on national treatment of foreign-controlled enterprises and a set of voluntary Guidelines for MNEs.[162]

The increasing international consensus that is emerging from these efforts it is hoped will serve as an important base upon which to construct an effective multilateral agreement on investment sometime in the future. Areas of concern particularly to

---

[159] S.K.B. Asante, "The Concept of a Good Corporate Citizen In International Business" (1989) ICSID Rev, 1-38. **(hereinafter "Concept of a Good Corporate Citizen").**

[160] Fatouros "International Agreement on FDI", *supra* note 134 at 49.

[161] Report to the Development Committee on the Legal Framework for the Treatment of Foreign Investment in Shihata, *Legal Treatment of Foreign Investment, supra* note 118 at 193.

[162] Fatouros, "International Agreement on FDI", *supra* note 134 at 49.

developing countries relate to the effect of multinational investment on the environment, labor, skills and technology transfer and taxation. Improper conduct in these areas can frustrate the development objectives of host nations (for example through the denial of revenue by abusive transfer pricing), affect sustainable development (as inappropriate environmental policy and practices), and perpetuate dependence (as the transfer of antiquated or inappropriate technology or unsuitable human resource development plans). The Bhopal disaster in India and the Royal Dutch Shell/Ogoni dispute in Nigeria, over environmentally harmful production methods, make the need for these prescriptions ever more imperative.[163]

In pursuance of the above argument, it is submitted that a liberal investment regime ought to include, in addition to the above requirements for the benefit of investors, also the concept of social responsibility or good corporate citizenship on the part of multinational enterprises. The concept of good corporate citizenship is grounded in the values of individual countries and implies that TNCs have an obligation to act as responsible members of societies that grant them legal standing.[164] On the other hand, corporate social responsibility is a related, but broader concept, that involves notions of voluntary corporate conduct that is both acceptable and beneficial to various social constituencies that surround business enterprises. In terms of social contract theory, corporate social responsibility involves both *minimal* and *maximal* dimensions.[165] The former reflects minimum expectations by society in which business entities operate that

[163] P. Lewis, "After Nigeria Represses, Shell Defends its Record", *New York Times* Feb. 13 1996, at 1.
[164] UNCTAD, *World Investment Report 1994*, at 313-314.
[165] Ibid. at 318.

some benefit will accrue to the society from the activities of the enterprise and secondly that the enterprise must not intentionally do harm, or that the benefits to society from enterprise activity must outweigh the harm done.[166] Maximal corporate social responsibility standards require that, in addition to the above minimal dimension, corporations voluntarily provide further benefits to the host society. A further distinction ought to be drawn between corporate social responsibility and corporate philanthropy; whilst the former focuses on the nature of a firm's operations and includes both the minimal and maximal dimensions above, philanthropy "...is a fully voluntary action generally guided by self-interest considerations..."[167]

In the context of domestic legal systems, arguments for corporate social responsibility have revolved around the fiduciary duties of corporate management, the issue being whether corporate management owe duties, and therefore ought to exercise their functions exclusively to maximize shareholder gain or, whether they owe a broader duty to other stakeholders or constituencies that are affected by the activities of the corporation like employees, suppliers, customers, and local communities. This is the so-called corporate stakeholder debate which was sparked off by Berle and Means in a work published in 1932.[168] The traditional view that Berle and Means sought to challenge was that corporate directors and officers owe their fiduciary duties to shareholders and therefore the basic management objective was the maximization of shareholder gain.[169]

---

[166] Ibid.
[167] Ibid.
[168] A.A. Berle, Jr. & G .C. Means, *The Modern Corporation and Private Property* (1932) cited in F.H. Buckley, *et al, supra* note 2 at 555.
[169] W.G. Katz, "Responsibility and the Modern Corporation" (1960) 3 J. L. & Econ. 75 in Buckley *et al, supra* note 2.

This view was the rationale behind cases like the Michigan Supreme Court decision in *Dodge v. Ford Motor Co* (1919), and the English case of *Parke v Daily News Ltd.*, (1962) both of which rejected attempts by corporate management to engage in corporate philanthropy over the protest of dissenting shareholders, on the ground that management responsibility was owed primarily to shareholders. In the view of Berle and Means, the separation of ownership from control characteristic of the modern widely held corporation, make it undesirable that management power be exercised solely for the maximization of shareholder gain. According to them, true ownership involves not only risk but active participation in management. A passive investor who abdicates management responsibility thus has no justifiable claim to the full fruits of the enterprise.[170] They concluded,

> ...that the claims of stockholders to ownership rights should not prevent the carrying out of a community program 'comprising fair wages, security to employees, reasonable service to their public, and stabilization of business'. To Berle it seemed conceivable- indeed 'almost essential if the corporate system is to survive- that 'control' of the great corporations should develop into a purely neutral technocracy, balancing a variety of claims by various groups in the community and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity.[171]

Whilst I do not subscribe to the view that corporate income ought to be distributed to other stakeholders as a matter of public policy, I agree that corporate management power ought to be exercised with sensitivity to the interests of constituencies other than shareholders. In the specific case of multinational corporate investors, it is submitted, the effect of their activities on host nation economies and society in general, ought to be taken into account in the formulation of a regulatory framework for international

[170] Ibid.
[171] Ibid.

investment. This need is particularly acute in the case of MNEs operating in developing countries where there is a trend to liberalize FDI policies, "...but governmental or free market regulating mechanisms are not yet fully formed or effective."[172]

In my view, a regulatory framework that takes on board the interests and concerns of both host states and investors, will usher in a level of balance between the protection of investor interest and national development - -a situation we refer to here as an efficient and equitable investment regime. In terms of economic efficiency criteria, a one-sided investment regime that prescribes standards of treatment and protection for investors and their investments, without laying down corollary prescriptions for investor behavior, has the potential that the costs to society in general may outweigh the benefits to the investors and their host governments - - an inefficient legal regime.

The need for economically efficient legal structures to regulate international investment is, in my view, particularly acute in developing countries, and liberalization from the vantage point of these countries, ought to take into account their special development needs- -it can at best be termed 'developmental liberalization'. Already, a precedent exists for international corporate obligations in the international conventions on the protection of the seas from pollution which impose obligations on both states and enterprises.[173] Moreover, under chapter 11(B) of NAFTA, an international trade treaty for the first time gave private investors the right to ask for a dispute settlement panel to be set up, where the investor is of the view that a host country has breached an obligation under

[172] *World Investment Report* 1994, at 314.
[173] Fatouros, "International Agreement on FDI" *supra* note 134, at 57.

the investment chapter.[174] It is submitted that a logical next step in the progressive development of this area of international law, is a framework for internationally binding norms to govern the conduct of transnational corporate investors.

In pursuance of this argument, the words of Fatouros are quite instructive. He said *inter alia:*

> ...the once clear and definite distinction between the private and public areas of international economic law and practice is now blurred...The need for cultivating the possibility of international prescriptions governing the conduct of TNEs and other investors (that is to say, providing for their rights as well as obligations) flows from the very developments that have led to the increasing concern with the international legal framework for FDI. The formulation of prescriptions on the conduct of economic actors at the international rather than merely the national level, is becoming increasingly necessary because of the continuing globalisation of the world economy. A high degree of compatibility, if not uniformity, among national legal policies and rules appears appropriate to ensure the degree of predictability, stability and transparency that transnational economic actors require for their optimal operation. The need for and the continuing importance of national policies and measures, for the exercise of jurisdiction by states over activities in their territory, cannot of course be gainsaid. Yet, while international rules ensuring fairness and the lack of discrimination at the national level may still be adequate in the great majority of cases, substantive international prescriptions may well be appropriate in an increasing number of particular cases and topics.[175]

Having looked at the requisites of an optimal investment climate in the above pages, it is proposed to examine in the next chapter the regime for regulation of FDI in West Africa from three dimensions- national, bilateral and regional regulation. With respect to national regulation, the regulatory situation in four West African countries - - Ivory Coast, Ghana, Mauritania and Nigeria will be explored as examples. This approach is taken for two reasons; firstly due to space limitations, it is not possible to examine the investment laws of sixteen countries in any useful manner and the treatment here is just for the purpose of illustration; secondly a detailed country by country treatment will be superfluous and is in any case unnecessary, because an examination of the law of the

[174] Trebilcock and Howse, *supra* note 3, at 297.
[175] Fatouros, "International Agreement on FDI", *supra* note 134, at 58.

countries in the region shows extensive similarity, thus suggesting a strong imitation pattern. Ivory Coast, Ghana and Nigeria are considered in ECOWAS parlance, alongside Senegal, as the relatively 'industrialized' countries of the region both in terms of level of economic development and market size. It is therefore worth examining their investment laws. Moreover, they have all taken steps in the 1980s and 1990s, to liberalize their investment laws in a bid to attract investment capital. Mauritania is considered one of the less developed countries of the region, but its investment code is interesting from the point of view of investment code competition in West Africa; it illustrates the extent to which even the less developed countries in the region have gone to attract investment capital and the consequences such competition holds for the overall development of the region.

Due to the vast amount of literature on bilateral investment treaties (BITs), present elsewhere, no extensive treatment will be undertaken here; they are mentioned for the sake of completeness and to illustrate a further attempt by West African nations to promote investment.[176] The proliferation of BITs is another illustration of the law's role in influencing investment decisions. BITs perform signaling functions to the international community that foreign investment is welcome to the parties to the BIT.[177]

At the regional level, despite the absence of a regional investment code, some ECOWAS protocols have significant bearing on the investment climate of the region and

---

[176] A non-exhaustive list of examples of recent writing on BITs are J. Voss, "The Protection and Promotion of European Private Investment in Developing Countries" (1981) 18 *CMLR* 363; F.A Mann, "British Treaties for the Promotion and Protection of Investment" (1982) 52 *BYIL* 241; K.Kunzer, "Developing a Model Bilateral Investment Treaty" (1983) 15 L. & P. in Int'l Bus. 273; J.W. Salacuse, "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries" (1990) 24 Int'l. Lawyer 655.

[177] C.W. Gray and W.W Jarosz, "Law and Regulation of FDI", *supra* note 113 at 18.

they will therefore be considered in outline. The two main ones are the Protocol on the Fund for Cooperation, Compensation and Development, and the Protocol on Community Enterprises. The object here is to show that even though they represent a move in the right direction, these protocols are too limited in scope and application, to substitute for the desired level of policy harmonization necessary for the region to make a leap as a host to FDI.

CHAPTER FOUR : THE LEGAL REGIME FOR FOREIGN INVESTMENT IN WEST AFRICA

(A) *National Laws*

(1) Entry, Establishment and Sectoral Limitations

Ghana's *Investment Promotion Centre Act* 1994[178] governs the entry and establishment of foreign investment in the country. Under that legislation, foreign investment is permitted in all sectors of the economy[179] except those listed in schedule A to the Act.[180] Moreover the Act does not apply to mining and petroleum enterprises.[181] Under the Ivorian code,[182] utilities, public railroads, bus and airline transportation, local refining of petroleum and cigarette production are reserved for the state,[183] otherwise all other sectors are open to foreign investment.

After going through a number of measures to indigenize the Nigerian economy,[184] the Nigerian government in 1989, adopted the *Nigerian Enterprises Promotion Act.*[185] That law, opened up all sectors of that country's economy to foreign investment except for forty areas which were largely small scale and less capital intensive businesses. Even for these areas reserved for Nigerians, foreign investment is permitted where it involves a

---

[178] Act No. 478 of August 29th, 1994 reproduced in ICSID *Investment Laws of the World*, Release 93-5, (New York: Oceana, January 1995).
[179] Ibid section 19.
[180] Ibid section 18.These are generally low capital intensive small businesses like market sales, petty trading, hawking, taxi service and car hire (which is open to non-Ghanaians with a fleet of at least ten new cars),pool betting (except football pools), and operation of beauty saloons and barber shops.
[181] Ibid section 17.
[182] Law No. 84 - 1230 dated November 8th, 1984 reprinted in ICSID *Investment Laws of the World* Release 87- 1(New York: Oceana 1987).
[183] Kofele-Kale "Host Nation Regulation", *supra* note 30 at 379-380.
[184] For an interesting account of Nigeria's indigenization program, see F. Beveridge "Taking control of Foreign Investment: A Case Study of Indigenisation in Nigeria" (1990) 40 I.C.L.Q 302.
[185]Due to the fact that this legislation is not published in the ICSID compilation or any other source available to me, the information on Nigeria contained herein is derived mainly from secondary sources.

capital infusion of up to twenty million naira.[186] Moreover the Act does not apply to the banking and insurance sectors, nor does it apply to petroleum and mining industries.[187] Prior to this enactment, the Government in 1988 also passed the *Industrial Development Coordination Act*[188] with the object of streamlining the procedure for the entry and administration of foreign investments in the country. The Act set up an Industrial Development Committee (IDC), with responsibility for the issuance of permits and approvals for foreign investment.[189] This committee therefore became Nigeria's "one stop shop" for foreign investment approvals. This trend in curtailing the administrative rigmarole can be seen in the other countries as well. Ghana's Investment Promotion Centre, and Ivory Coast's Ministry of Industry are respectively charged with handling all matters relating to the registration or approval of foreign investment. Overall the move towards "one stop" approval agencies is expected to save costs and time and thus boost investor confidence in these countries.

The Mauritanian law does not reserve any areas for local businessmen or government investment.[190] It contains a list of twenty sectors fixed "according to the needs and imperatives of national development" in which investments made either by nationals or non-nationals or through joint ventures, can benefit from the code's guarantees and benefits.[191]

---

186 C. Ubezonu "Some Recent Amendments to Laws affecting Foreign Investment in Nigeria" (1993) 8 ICSID Review 123, at 129. (**hereinafter "Recent Investment laws"**).
187 Ibid.
188 Cap 178, Laws of the Federation of Nigeria (1990).
189 Ubezonu, *supra* "Recent Investment Laws", note 186 at 123.
190 Ordinance No. 89.013/CMSN, dated January 23, 1989, reprinted in ICSID *Investment Laws of the World* Release 93-1 (New York: Oceana, 1993).
191 Ibid. article 1.

(2) Ownership, Control and Capitalization Requirements

None of the four countries impose limitations on the equity participation of foreign investors in investment enterprises. In effect, this means that, subject to the sectoral restrictions previously referred to, foreigners can own 100 per cent equity in any investment enterprise. However, various capitalization requirements exist for particular sectors or, as preconditions for the grant of incentives under their respective codes.

In Ghana, where a foreign investor wishes to enter a joint venture with a Ghanaian in a sector other than one reserved exclusively for local investment, the investor must make a capital contribution of at least US$10,000, or, where the enterprise is wholly foreign owned, a US $50,000 capital injection is required.[192] In the case of Ivory Coast, Decree No 84 -1231[193] which implements the investment code, provides in article 2 that small and medium size enterprises, in order to benefit from the incentives granted under the Act, must be capitalized up to at least forty million and not more than 200 million CFA francs and provide between 5 and 50 permanent jobs for Ivorians. The investment code also makes provision for investors to negotiate special "investment agreements" with the state where they intend to embark on investment projects "of exceptional economic and social value for development of the country".[194] Under the implementation

[192] Section 19 (2) Investment Promotion Center Act 1994. The section also requires a US $ 300,000 capital and at least 10 employment positions for Ghanaians for trading enterprises.
[193] *Investment Laws of the World* Release 87-1 May 1987 (New York Oceana, 1987).
[194] Investment Code Chapter III, Art. 22.

decree, such investments require a capitalization of at least 5 thousand million CFA francs.[195]

(3) Measures to Increase Investor Confidence

As the preponderance of opinion on the investment climate in West Africa, as indeed the rest of Africa concludes, one of the main reasons for the region's continued poor performance in the global competition for FDI is that investor confidence is low in view of the level of economic development, small national markets and political and economic volatility.[196] It is therefore not surprising that several West African countries have taken measures in the context of investment liberalization to enhance investor confidence. Measures to increase investor confidence have taken the form of guarantees with respect to availability, convertibility and free transfer of foreign currency, security of title to investment, in the form of prohibitions against compulsory disinvestment except where necessary in the public interest, and provisions for international third party dispute settlement.

(i) Availability and Transfer of Foreign currency: Two trends are discernible from the investment laws we are studying. The first adopted by Ivory Coast,[197] Ghana,[198] and Nigeria,[199] expressly guarantee the free transfer by investors of funds accruing from the investment, either for the purpose of paying dividends, fees, or in some cases of capital.

[195] Article 17 Implementation Decree. Similar provisions can be found in Articles 14 and 16 of the Mauritanian Investment Ordinance. Reference has also been already made to the Nigerian Act of 1989 which required a 20 million naira capital investment where a non-Nigerian wishes to invest in a sector reserved for local entrepreneurs.
[196] UNCTAD *FDI in Africa*, at 37-39.
[197] Article 9 Investment Code 1984.
[198] Section 27 Investment Promotion Center Act 1994.
[199] C. Ubezonu, "Doing Business in Nigeria by Foreigners: Some Aspects of Law, Policy, and Practice" (1994) 28 Int'l Lawyer No.2, 345 at 356. **(hereinafter "Doing Business in Nigeria")**.

Whereas Nigeria[200] requires approval for such transfer, and Ivory Coast permission for exchange, (which is in any case routinely granted),[201] Ghana's investment law guarantees the "unconditional transferability through any authorized dealer bank in freely convertible currency" of dividends, profits, fees, payments or other remittances.[202] It is submitted that such guarantees also imply the availability, or at least, lack of restriction on foreign exchange.[203] The second trend, practiced by Mauritania, involves both an explicit guarantee of the availability of foreign exchange through the Central Bank of Mauritania, and a guarantee of its free remitability.[204]

(ii) Settlement of Disputes: The post-war independence movement rekindled feelings of nationalism in several developing countries. In the context of commercial relations, this nationalism gave impetus to a yearning for indigenous control of the productive sectors of the economy. The immediate result, was nationalization or indigenization of foreign businesses. Moreover, even for the few businesses that either remained foreign owned or were joint ventures with host nations or local partners, there continued severe hostility towards foreign dominance and control. In the context of investment dispute settlement, this hostility was manifested in a distrust for foreign or international resolution of

---

[200] A foreign investor wishing to remit funds from Nigeria must apply to the Central Bank of Nigeria and the Federal Ministry of Finance for approval. The application must be supported by evidence of "approved status", a tax clearance certificate, audited accounts of the company, a resolution of the board declaring the dividend (where the remittance sought is that of a dividend), and a statement as to the legality of the dividend. See Ubezonu Ibid.

[201] N. Kofele-Kale "Host Nation Regulation", *supra* note 30 at 381.

[202] Section 27.

[203] The Nigerian position however creates some difficulty because on January 24th 1994, the Nigerian Government released Monetary, Credit and Foreign Exchange Trade Guidelines which pegged the rate of exchange at a fixed rate for all transactions. This meant that the regime of free convertibility under the Second Tier foreign Exchange Market Act no longer prevailed. See Ubezonu "Doing Business in Nigeria" *supra* note 199, at 358.

[204] Articles 3.3 and 4.of the Investment Ordinance.

investment disputes involving host states and foreign investors. The developing country view was that this constrained domestic sovereignty. The high watermark in this attitude was the position adopted by most Latin American nations who, true to their adherence to the Calvo doctrine, insisted on resolution of investment disputes through host nation judicial systems.[205]

However, alongside the shift in attitude to foreign investment which accompanied the severe debt crisis of most developing countries, the drying up of official development assistance, and the consequent resort to private foreign investment as a source of capital, policies towards dispute settlement changed, and even states that were previously hostile to foreign investment gradually adopted international mechanisms for the settlement of investment disputes.[206]

In West Africa, several investment codes provide for international resolution of investment disputes. The investment law of Ghana provides that parties shall first attempt to amicably settle all disputes.[207] However, where this fails, the dispute may be submitted for international arbitration either under the UNCITRAL arbitral procedure, the provisions of a bilateral or multilateral investment agreement to which the host nation and the investor's home state are parties, or some other national or international dispute resolution mechanism agreed to by the parties.[208] Moreover, section 29(3) of the Act

[205] Asante, "International Law and FDI" *supra* note 150, at 591. The Calvo doctrine insisted both on the principle of non-interference in the internal affairs of other sovereign states, and that aliens are not entitled to greater rights and privileges than those available to nationals. As a result, the Latin American states opined that international law standards of treatment were satisfied by giving equal treatment to aliens as accorded to nationals.
[206] Sornorajah, *supra* note 8.
[207] Section 29 (1).
[208] Section 29(2).

provides that where an investor and the Ghanaian government are unable to agree as to the method of settling disputes, the choice of the investor shall prevail. Both the Ivory Coast[209] and Mauritanian[210] codes provide for dispute resolution through the provisions of bilateral investment treaties to which they and the investors' home country are parties, or through the ICSID mechanism, or where the investors' home country is not a party to the ICSID Convention, for the ICSID "Additional Facility".[211]

This trend however is absent in the Nigerian context where, according to Ubezonu, the *Nigerian Enterprises Promotion Act* of 1989 seems to exclude recourse to judicial settlement of disputes and provides instead for parties to petition the President of Nigeria who may "confirm or reverse the decision or take such other measures in relation to the petition as he may think just and reasonable."[212] As the author rightly pointed out, such an exclusionary clause "might well create misapprehensions in the foreign investment community".[213] In my view, it also represents an unnecessary political interference in an issue that squarely lies within judicial competence. Furthermore, there seems to be some inconsistency in Nigeria's investment dispute resolution policy. An illustration of this inconsistency is the fact that for certain sectoral investments, Nigeria has agreed to international dispute resolution. Thus in its Liquefied Natural Gas (LNG) venture, under which a company (Nigeria LNG Limited), was incorporated to finance,

---

[209] Article 10 Investment Code 1984.
[210] Article 7 Investment Ordinance 1989.
[211] The "Additional Facility" was established in 1978 and allows ICSID to administer certain proceedings between states and nationals of other states which fall outside the scope of the convention in particular proceedings where one of the parties is not a Contracting State or a national of one. See I.F.I. Shihata "Promotion of Foreign Direct Investment- A General Account, with Particular Reference to the Role of the World Bank Group" (1991) 6 ICSID Review, 484 at 506.
[212] Ubezonu, "Recent Investment Laws" *supra* note 186 at 129.
[213] Ibid.

develop, construct and operate a gas liquefaction plant, the Nigerian government agreed to submit disputes arising under the agreement to arbitration under the ICSID mechanism where the parties fail within 90 days to reach an amicable settlement.[214]

(iii) Expropriation and Compensation: The question of expropriation of invested alien property opens up the debate over the customary international law recognition and protection of acquired rights, which initially gave rise to the prohibition against expropriation of alien property, on the one hand, and the position adopted by most developing countries towards so-called international minimum standards for the treatment of aliens.[215] It is beyond the scope of this thesis to conduct an extensive discussion of the debate, but suffice it to state that the question was polarized between the western/industrialized countries on the one hand, who advocated that respect for the international minimum standard required fair and equitable treatment or good faith in relations with aliens. On the other hand, developing countries rejected the existence of an international minimum standard, or that even assuming that there was such a standard, it was satisfied by according the same treatment to aliens as that accorded to nationals.[216]

The nationalist fervour that swept the developing world soon after the Second World War, was translated into coordinated action by the Group of 77 countries at several international fora, particularly the United Nations. Through joint action, they spearheaded and secured the adoption of United Nations resolutions on *Permanent Sovereignty over*

---

[214] C. E. Emole "Nigeria's LNG Venture: Fiscal Incentives, Investment -Protection Schemes and ICSID Arbitration" (1996) 8 African Journal of International and Comparative Law (*RADIC)*, 169 at 174.
[215] Asante, "The Concept of a Good Corporate Citizen" *supra* note 159.
[216] This was the position adopted by Latin American countries under the Calvo doctrine.

Natural Resources[217], and the *Charter of the Economic Rights and Duties of States*[218], both of which emphasized the sovereign right of states to regulate the activities of transnational corporations operating in their jurisdiction and to expropriate invested property subject to the payment of compensation.

Customary international law now concedes the sovereign right of host states to expropriate foreign property, but requires that the expropriation must be for a public purpose, non-discriminatory, be conducted in accordance with due process of law and be accompanied by prompt, adequate and effective compensation.[219] This formulation, was challenged by developing countries in Latin America, Asia and Africa who regard it as "unduly onerous and tantamount to the imposition of a virtual embargo on the ability of developing countries to take appropriate measures to restructure their economies".[220] Their view was that "appropriate" compensation ought to be paid in case of expropriation.[221]

In West Africa, rejection of the Hull formula is apparent from the investment laws of Ivory Coast, Ghana and Mauritania.[222] Both Ghana[223] and Mauritania[224] guarantee the

---

[217] GA Resolution 1803 (XVII), 1962.
[218] GA Resolution (XXIX), 1974.
[219] See the views of Mr. Justice Harlan in *Banco National de Cuba v. Sabbatino* (1964), 84 S.Ct.923, at 940-941. **See also** C.D. Wallace, *Legal Control of the Multinational Enterprise* (The Hague, Martinus Nijhoff 1982) at 249-257. **(Hereinafter *Legal Control of the MNE*).**
[220] Asante, "International Law and FDI" *supra* note 150, at 600. He also notes at 596, that a realistic assessment of the evidence and sources of international law from the end of world war II, cannot sustain the Hull formula as valid principles of contemporary international law.
[221] Ibid. at 601. It is this standard of compensation that is stipulated in Article 2 (2) (c) of the Charter of Economic Rights and Duties of States. **See also** A. A. Fatouros, "Transnational Corporations: Looking for an International Legal Framework for Transnational Corporations" at 535, in *Transnational Corporations and World Development*, (New York: Routledge, 1996). Published on behalf of UNCTAD Division on TNCs and Investment. **(hereinafter "Looking for an International Legal Framework for TNCs").**
[222] It is not clear what the position is in Nigeria due to non-accessibility of its investment law. However it is assumed that that country follows the practice in most states in the sub-region of including requirements for compensation for expropriated private property in their constitutions. But the fact that under the N.E.P

security of title to foreign investment by forswearing expropriation or nationalization, except where necessary in the national interest or for a public purpose. Where this is the case, the Ghana code provides that "fair and adequate" compensation must be paid "without undue delay",[225] and for Mauritania, "exact and appropriate compensation, the amount of which will be determined according to the usual practices and rules of international law".[226] The Ivorian law seems closer to the formula adopted by states that subscribe to the Calvo doctrine. It does not make an express reference to the issue of expropriation but under Article 8, all investors are assured equal treatment under Ivorian law and foreign investors are assured national treatment with respect to their investments.[227]

(iv) Standards of Treatment: The requirement to adopt non-discriminatory standards of treatment as between different foreign investors, and between foreign investors and nationals, is perhaps the area that countries in West Africa are furthest from attaining the desired liberalization. Already, mention has been made of the sectoral reservations that several countries maintain, as well as the minimum capital requirements for foreign investment in certain sectors of the economy. These are strictly speaking not in harmony with a non-discriminatory investment regime. In any case, they are counterbalanced by the offer of attractive investment incentives to foreign investors, incentives which are not

---

Act 1989, investment disputes should be referred by petition to the President significantly attenuates the validity of this assumption.

[223] Section 28 Investment Promotion Center Act 1994.

[224] Article 5 Investment Ordinance 1989.

[225] Section 28(2).

[226] Article 5.2.

[227] This is subject to measures applying to all foreign nationals and reciprocity for Ivorian nationals by the investor's home state.

always available to local entrepreneurs. Moreover, as in other aspects of international economic relations, the sector restrictions are arguably justified in view of the special development needs of the countries concerned. Subject to such sectoral reservations, the investment laws of Ivory Coast[228] and Mauritania[229] provide for national treatment of, and non-discrimination between foreign investors.

(4) Incentives: Corporate law scholarship in the United States speaks of a 'corporate charter competition'.[230] It takes the form of states adopting corporate charters that are favorable to corporate management and for this reason, it has been argued there is a 'race to the bottom' which the state of Delaware is winning because it has a lax corporate law statute that allows corporate managers to take advantage of shareholders more effectively than the statutes of other states.[231]

The proliferation of investment codes in West Africa, with their generous offer of incentives in the form of tax holidays, duty remission, accelerated depreciation allowances etc., reflects a competition among these countries to attract foreign investment. The rationale for the grant of the incentives is that such fiscal generosity will lure investors to the economies granting them. This section will test the validity of this rationale against the findings of empirical studies conducted to determine the effect of investment incentives on the location decision of multinational corporate investors.

---

[228] Article 8 Investment Law 1984.

[229] Articles 5 and 6 Investment Ordinance 1989.

[230] F.H. Buckley *et al, supra* note 2 at 523.

[231] W.L. Cary, "Federalism and Corporate Law: Reflections Upon Delaware", (1974) 88 Yale L.J. 663. ***Contra:*** R.K. Winter "State Law, Shareholder Protection and the Theory of the Corporation" (1977) 6 J.of Leg. Studies, 251. He argues that Delaware is in fact winning a "race to the top".

In economic theory, investment incentives are intended to correct two kinds of market failures; the first being the failure of markets to reflect the positive spillovers or externalities of the production process and the second from market failure to reflect the dynamic benefits that come with expanded production, declining unit costs, and the strengthening of domestic industry.[232] The latter is the classic infant industry argument for protection. The rationale here is that because production creates positive spillovers that do not accrue to the benefit of the producers, (i.e. the investors), there is a "wedge" between the private and social rates of return and it is this wedge that incentives are meant to fill. It follows that, in order for the grant of investment incentives to be economically efficient, the cost to the state or society granting them, must not be greater than the benefit that the state or its citizens acquire from the externalities. In other words, the value of the incentives must not exceed the wedge between private and societal gains. However, such a cost/benefit analysis of the value of investment incentives is said to be problematic.[233]

In view of this calculation problem, application of the incentive program must be carefully managed, lest the costs to society exceed the benefits, and thus render the whole program inefficient. This is particularly important in light of the fact that several investment laws grant incentives to all investors including those that might have invested in the market without them. For example, Ghana's investment law grants income tax and customs duty incentives[234] to all enterprises established under its provisions, while Ivory

[232] UNCTAD *Incentives and FDI*, at 9-10.
[233] Ibid. at 12.
[234] Sections 23 and 24 of the Investment Promotion Center Act.

Coast[235] and Mauritania[236], both grant generous tax exemptions, customs duty reductions and accelerated depreciation allowances. In addition, section 25 of the Ghana law and article 22 of the law of Ivory Coast, provide that investors could negotiate special incentive packages with their host states. There is no mechanism in these laws to determine the significance of these incentives for investors. They seem to assume that the incentives are necessary to lure investors to the particular economies or sectors. It is my submission that this assumption, may well be mistaken. As a result, where fiscal incentives are granted to investors whose location decision would not have differed without them, they represent a pure wealth transfer.[237]

With the above theoretical background, the empirical evidence will now be examined to see the extent to which investment incentives weigh in the location decision of foreign investors.

UNCTAD reviewed two groups of empirical studies with respect to the incentive effect on TNC location decision. The first two by Barlow and Wender (1955),[238] and Robinson (1961),[239] concluded that other policy variables like currency convertibility, political instability, limited markets and sources of supply, and non-policy issues like maintaining market share or market expansion, were more important determinants than incentives in the investment -location decisions of multinational investors.

---

235 Articles 17-21 Investment law 1984.
236 Articles 17 - 25 Investment Ordinance 1989.
237 UNCTAD *Incentives and FDI*, at 12.
238 E.R.Barlow, and I.T. Wender *Foreign Investment and Taxation* (Englewood Cliffs: Prentice Hall, 1955).
239 H.J. Robinson *The Motivation and Flow of Private Foreign Investment* (Palo Alto, CA: Stanford Research Institute, 1961).

More recently, a survey of 52 TNCs conducted in 1984 found that among nineteen FDI locational factors, host country inducements ranked seventh in importance for investors to developing countries, and eight for those to developed countries.[240] Furthermore, Guisinger and Associates[241] are reported to have found in a study of 74 investment projects in the automobile, computer, food processing and petrochemical industries, that companies frequently did not even consider incentives in making their location decisions and that incentives were mere sweeteners, making attractive locations simply more attractive. According to this study, economic and long-term strategic considerations concerning inputs, production costs and markets, were more important determinants of the location decision of multinational companies.[242] The studies suggest that when multinational investors make their location decisions, markets characteristics are more important than incentives.

Two other recent studies have been conducted on the significance of fiscal incentives on the flow of foreign direct investment. The 1982 Lim study, concerned the incentive regimes of 27 LDCs for the period 1965 - 1973.[243] It concluded that there was no support for the believe that the provision of fiscal incentives is necessary to attract foreign investment or that the greater the generosity of these incentive programs, the greater would be the level of such investment. For the Lim study, more important

[240] UNCTAD *Incentives and FDI,* at 42 - 43.
[241] *Investment Incentives and Performance Requirements* (New York: Praeger 1985), in UNCTAD *Incentives and FDI.*
[242] UNCTAD *Incentives and FDI.*
[243] D. Lim, "Fiscal Incentives and Direct Foreign Investment in Less Developed Countries" (1983) 19 J. of Dev. Studies, 207.

determinants were the availability of natural resources and a proven record of economic performance.[244]

Inspired by the Lim study, Ndiva Kofele-Kale conducted an empirical study of the effect of fiscal incentives on the flow of FDI using data from three African countries.[245] His study found that even though the offer of generous incentive packages is positively related to the flow of foreign direct investment to the country offering it, other factors like natural resource endowment, growth rate of the national economy and level of economic development, were more significant in determining the flow of foreign investment. In fact, according to Kofele-Kale, investors give priority to natural resources, growth rates, economic development and generosity of the incentive package in descending order.[246]

(i). Flawed Rationale of Incentive Competition : The above empirical studies confirm that more than a generous offer of investment incentives is necessary to attract foreign investment. In other words, the studies illustrate the insufficiency of investment incentives as a bait for multinational investors. To the extent that this conclusion is valid, it reveals a fallacy in the rationale underlying the West African countries' offer of incentives. This conclusion is fortified by the fact that despite the offer of these

---

[244] Lim's results in fact showed that "fiscal hyper-generosity" may operate as a disincentive rather than an incentive as it may be a signal of an economy in desperation. He however subscribes to the finding of Shah and Toye in "Fiscal Incentives for Firms in Some Developing Countries: Survey and Critique" in J.F.T. Toye, ed., *Taxation and Economic Development*, (London: Frank Cass 1978), of an 'illusory compensating effect' whereby LDCs lacking natural resource endowments and technological and labor skills offer incentives to compensate for this shortfall. Competition among such countries result in ever more generous incentives and consequently, foreign investors make their location decisions according to criteria other than the attractiveness of the incentive package. The compensation effect thus becomes illusory.

[245] N. Kofele-Kale, "The Political Economy of Foreign Direct Investment: A Framework for Analyzing Investment Laws and Regulations in Developing Countries" (1992) 23 L & P in Int'l. Bus. 619. **(Hereinafter "Political Economy of FDI")**. The countries covered were Cameroon, Ivory Coast, and Kenya. His study was a two-time series regression analysis with the time periods (1960 -1976) and (1977 - 1987), chosen to coincide with major changes in the investment regimes of the sampled countries.

[246] Kofele-Kale, "Political Economy of FDI", *supra* note 245 at 665.

incentives, Africa as a whole, and West Africa for that matter, continues to lag behind other developing regions of the world in terms of investment capital inflow.[247] Moreover, if, at least theoretically, incentives are intended to cover the wedge between the private and social rates of return for projects that create positive spillovers, they are economically efficient only when the costs to society, do not exceed the benefits. However, the intense competition among countries to attract FDI reveals a prisoner's dilemma. The competition is such that each country is likely to give up more than is necessary to cover the wedge- - thus ending up worse than if they had not granted incentives at all. This prisoner's dilemma nature of investment incentive competition stresses the importance of collaborative efforts in a regional setting either to curtail incentives by the harmonization of national policies, or by agreeing to eliminate incentives altogether. Indeed both Namibia[248] and Kenya have at the national level adopted a policy of not granting fiscal incentives to investors and emphasize instead market characteristics and national treatment of foreign investors. Kenya's official position is that "[I]nvestors with projects that contribute to Kenya's development goals should be able to earn attractive profits without any special tax incentives. Thus tax holidays, special depreciation rules, customs duty and sales tax remissions, and other special tax treatment will generally not be used to promote investment."[249]

---

[247] See figures compiled by UNCTAD, cited in chapter one.

[248] S.C. Vasciannie "The Namibian Foreign Investments Act: Balancing Interests in the New Concessionary Era" (1992) 7 ICSID Rev., 114-140. See also UNCTAD *FDI in Africa*, at 1(Box 1).

[249] Sessional Paper No.1 of 1986 on Economic Management for Renewed Growth (Kenya) in Kofele-Kale "Host Nation Regulation" *supra* note 30, at 390.

Regional collaboration on investment incentives will limit the rivalry for investment capital between countries in the region, and shift the competition from intra-regional to an inter-regional focus. This approach will increase the bargaining power of member states of the regional grouping as against other regions, as well as multinational investors, create a larger market with similar incentive regimes, and allow the implementation of a regional investment strategy that will locate investment projects in accordance with regional specialization and national comparative advantage. Moreover, the intra-regional competition is likely to have more adverse effects on the economies of the poorer member states who, because of their heavy reliance on receipts from fiscal revenue, can ill-afford the significant amounts of funds forgone each year as a result of the grant of investment incentives. In line with the harmonization of investment policy that will be advocated in the next chapter as part of the measures necessary to improve the investment climate in West Africa, it will be suggested that countries in the region ought to collaborate in their grant of investment incentives. Such collaboration can take the form of either setting ceilings on the incentives that can be granted by member states,[250] or in the near future, by eliminating incentives altogether.[251] Instead of incentives, West African countries should concentrate on improving the fundamental market characteristics like level of economic development, growth rates, and general

[250] An example of this approach can be found in the 1973 CARICOM *Scheme for the Harmonization of Fiscal Incentives to Industry* reproduced in UNCTAD/DTCI/30(Vol. II) *International Investment Instruments: A Compendium* (New York & Geneva: U.N, 1996). That scheme set ceilings on the types of fiscal concessions and limits on the duration of benefits that could be granted.

[251] International disciplines on FDI incentives can also be found in the Treaty of Rome which gave the European Commission wide powers to control state aid to industry which distorts or threatens to distort competition.(article 92). Also the 1984 Second Revised Decision of the OECD Council of Ministers on International Investment Incentives and Disincentives made provision for consultations where the flow of FDI to a member country is adversely affected by incentives or disincentives granted by another member

economic stability, which have all been established to be more important determinants of investment location than incentives.[252]

(ii)Incentives and the WTO Subsidies Agreement : The Uruguay Round Subsidies Agreement provides five fact situations the existence of any of which would be deemed to be a subsidy. These situations are: where there is a financial contribution by government or any public body in which the government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion); potential direct transfers or liabilities (e.g. loan guarantees); government revenue that is due but is forgone (e.g. tax credits); government provision of goods or services other than general infrastructure; and, government payments to a funding mechanism or direction given to a private body to carry out any of the foregoing functions.[253] The Agreement distinguishes between actionable, non-actionable, and prohibited subsidies. Under Article 3.1, subsidies contingent in law or in fact upon export performance and subsidies contingent upon the use of domestic rather than imported inputs, are prohibited. Actionable subsidies are specific forms of government assistance to firms or industries that cause injury to the domestic industry of another country, or that nullify or impair benefits accruing to another member under the GATT, or which occasion serious prejudice to another Member.[254]

As with other aspects of international trade law, this Agreement also makes provision for the special position of developing countries. Under Part VIII, the provisions

---

state.

[252] See studies referred to earlier.

[253] Article 1.1.**See also** Trebilcock & Howse *supra* note 3, at 131.

[254] Article 5.

on prohibited subsidies do not apply to least developed countries, and other developing country signatories must, within an eight year period, bring themselves into compliance with the prohibited subsidy provisions.[255] Moreover, the Article 6.1 presumptions relating to the existence of serious prejudice arising from the existence of actionable subsidies do not apply to developing countries. A Member alleging that a subsidy given by a developing country is actionable on the ground of serious prejudice, must provide positive evidence to substantiate its claim.

It is submitted that but for the above exemption and the grace period, fiscal incentives granted by West African countries in order to encourage investment could be classified as subsidies. Even though the Subsidies Agreement is intended to regulate government policy which distort the international trade in goods, there is no doubt that it ought to be taken into account in elaborating an international agreement on investment due to the linkages between trade and investment and the fact that it is the output of the production process (goods), that the whole GATT seeks to regulate.

B. *Bilateral Investment Treaties* [256] - In addition to the measures at the national level to attract FDI, West African countries have also entered bilateral treaties for the promotion and protection of foreign investment with several developed countries. Such treaties usually provide for standards of treatment including the international law standard of fair and equitable treatment, as well as payment of compensation in accordance with

[255] Trebilcock & Howse *supra*, note 3, at 133.
[256] On the juristic debate of whether such treaties create norms of international law or are *lex specialis*, See Sornarajah, *supra* note 8, especially at 225-275. See also Asante, "International Law and FDI", *supra* note 150. As it is not the focus of the present study, no further reference will be made to the debate.

traditional international law formulae which, as already discussed, they largely rejected in multilateral negotiations.[257] In addition, the treaties also contain provisions on national and MFN treatment, transfer of payments, repatriation of profits, compensation in case of loss due to armed conflict, nationalization or expropriation and the settlement of disputes. As of January 1 1995, sixty-four such treaties were signed by countries in West Africa since independence in the 1960s.[258]

Table 4.1

Host Country	Number of Bilateral Treaties					Investor Country
	1960s	1970s	1980s	1990s	Total	
Benin	1	1	1		3	Germany, Switzerland, U.K.
Burkina Faso	1	1			2	Switzerland, Tunisia
Cape Verde				5	5	Austria, Germany, Netherlands, Portugal, Switzerland.
Ivory Coast	6				6	Denmark, Germany, Italy, Netherlands, Sweden, Switzerland.
Gambia				1	1	Switzerland
Ghana			4	3	7	China, Denmark, Germany, Netherlands, Romania, Switzerland, U..K.
Guinea	3		1	1	5	France, Germany, Italy, Switzerland, Tunisia
Guinea-Bissau				1	1	Portugal

[257] But see the views of Asante in "International Law and FDI", *supra* note 150, where he argues that the standards stipulated in BITs, do not represent the *opinio juris* of developing countries on general international law.
[258] See Table 4.1 *infra*.

Liberia	2	1	1		4	Belgium-Luxembourg, France, Germany, Switzerland.
Mali		2	1		3	Germany, Switzerland, and Tunisia
Mauritania		1	3		4	Belgium-Luxembourg, Germany, Switzerland, Tunisia
Niger	2			1	3	Germany, Switzerland, Tunisia
Nigeria	1			3	4	France, Germany, Netherlands, U.K
Senegal	3	2	5	1	11	Argentina, France, Germany, Rep. of Korea, Netherlands, Romania, Sweden, Switzerland, Tunisia, U.K, U.S.A
Sierra- Leone	1		1		2	Germany, U.K
Togo	2		1		3	Germany, Switzerland, Tunisia.

Source: UNCTAD/DTCI/19 Foreign Direct Investment In Africa, 1995.

The table also shows that Tunisia is the only developing country that had bilateral treaties with some West African nations, and none but Senegal has a bilateral investment treaty with the United States. The treaties that have been signed in any case illustrate yet another attempt by countries in the region to signal to the rest of the world that foreign investment is welcome.

C. *Regional Regulation*

(1) Multinational Enterprises and Regional Economic Integration- The interaction between multinational enterprises and regional economic integration blocs has been the subject of various studies in the past, and the discussion is ongoing.[259] Economists have identified two principal approaches to analyze MNE reaction to regional economic integration. These are the 'international economics' approach and the 'industrial organization' approach.[260] The former explains MNE reaction in terms of the orthodox theories of trade creation and trade diversion, arguing that the expanded market induces inter-industry product specialization by bloc members according to comparative advantage. The international economics approach has been criticized on the grounds that it assumes a perfectly competitive world with no transaction costs, it excludes inter-country factor mobility, and disregards ownership and internalization considerations.[261] The alternative industrial organization approach, focuses on how a MNE's decision to engage in FDI is affected by integration. Under the eclectic paradigm proposed by Dunning, the propensity of a firm to engage in FDI instead of other forms of international production like licenses or exports, depends on a combination of three elements; its ownership-specific advantages in the form of proprietary intangible assets *vis-à-vis* its actual or potential rivals; its locational advantages in the foreign market; and internalization opportunities that derive essentially from market failure; (the OLI paradigm).[262] According to this model, a MNE will engage in FDI only if it can exploit all three advantages simultaneously.

[259] For a recent study from an international economics perspective, see P. Robson "Transnational Corporations and Regional Economic Integration" in *TNCs and World Development* (New York: Routledge, 1996) at 448-466. **(hereinafter "TNCs and Regional Economic Integration").**
[260] Ibid at 450-457.
[261] Ibid at 450-451. 'Internalization' allows a TNC to bypass the operations of the market, and so to reduce transaction costs.
[262] J.H. Dunning, *Theory of TNCs,supra* note 112.

In his study of MNEs in the context of European integration, Kindleberger introduced the concepts of investment creation and investment diversion to characterize foreign MNE response to economic integration.[263] According to Kindleberger, investment creation reflects firm reaction in the form of establishment of new production plants within the integrated market, to secure market share that would otherwise be cut off by tariff and non-tariff barriers. This is the so-called 'tariff-jumping FDI'. Trade creation from the MNE point of view, involves the reorganization of production within the integrated market to take advantage of scale economies and specialization. According to Kindleberger, investment diversion describes the effects of trade creation on MNEs established in the region prior to integration. This characterization is also criticized for failing to "capture the full complexity of the effects of regional integration on FDI".[264] In Robson's view, a more comprehensive, albeit inadequate taxonomy, is proposed by the U.N Transnational Corporations and Management Division.[265] The UNTCMD approach identifies four main types of response by TNCs to regional economic integration. These are:

- defensive import-substituting investment which is a response to trade diversion;
- offensive import-substituting investment which describes the growth effects of market integration;
- reorganization investment which is a response to trade creation; and

[263] C.P. Kindleberger, "European Integration and the International Corporation", in P. Robson, ed., *Transnational Corporations and Regional Economic Integration,* Vol. 9, UNLTNC (London: Routledge 1993), at 87-98.
[264] Robson, *supra* note 259 at 455.
[265] Ibid.

- rationalized investment which describes a response to the cost-reduction effects of integration.[266]

Under the above characterization, whether trade and investment are complementary or substitutes will depend on the type of investment response.

With respect to MNEs and developing country regional integration, the general consensus seems to support the two basic conclusions reached by Vaitsos in 1982.[267] The first is that due to their preoccupation with market share and market expansion, MNEs generally promote integration among developing countries only "if the latters' markets are quite small and only if such firms were not involved, through parallel foreign direct investment, in the countries concerned prior to the initiation of regional cooperation".[268] Indeed this is believed to have been responsible for the increase of FDI to Central American countries following the creation of the Central American Common Market[269]. Secondly, Vaitsos concluded that in the case of developing countries with comparatively large domestic markets and some industrial production capacity, "contrary to widely held conceptions and despite their acknowledged advantages in market integration over national firms, MNEs do not always favor effective economic integration," and this is

---

[266] UNTCMD, "The Effects of Integration on the Activities of Transnational Corporations in the European Community: Theory and Empirical Tests", in P.Robson, ed., *Transnational Corporations and Regional Economic Integration,* Vol. 9, UNLTNC (London: Routledge, 1993), at 99-123.
[267] C. Vaitsos "The Role of Transnational Enterprises in Latin American Economic Integration Efforts: Who Integrates and with Whom?" (UNCTAD, 1982).
[268] Ibid at 8.
[269] UNCTAD "The Role of Transnational Enterprise in Latin American Economic Integration" in P.Robson, ed., *Transnational Corporations and Regional Economic Integration,* UNLTNC Vol. 9 (London: Routledge, 1993) at 241-264. **(hereinafter "TNEs in Latin American Integration"). See also** D.Chudnovsky "Latin American Economic Integration and Multinational Enterprises: Issues in the Industrial Integration of Argentina with Brazil" in Robson, ed., *TNCs and Regional Economic Integration,* at 283-293.

especially so for MNEs that already had a presence in the regional market.[270] On the other hand, MNEs without regional subsidiaries are believed to use the opportunity offered by regional integration to make an initial entry, to secure market share.[271]

However, it is noteworthy that even in cases where they are said to promote integration, MNEs do so in order to secure increased profit margins promised by the enlarged market, and greater integration with their home markets, rather than production deepening or specialization in the integrated market.[272] Thus in Central America, because of the high extraregional content of domestic manufactures, the integration induced FDI led to a spurious process of industrialization and little value added.[273]

Despite these concerns, it is submitted that FDI can be an important catalyst for the capital, technology and skills necessary for the industrial take-off of developing countries. What is necessary it seems to me, is an effective regulatory regime and a policy orientation within the framework of regional integration, that prevents MNEs from capturing the integration agenda for their own purposes, but at the same time allows them a reasonably liberalized setting within which to operate. In other words, a mix of regulation and openness is necessary to facilitate mutual benefit to investors and host countries. On a consequential analysis of the regime for FDI, the desirable transformations are those that leave both investors and host states satisfied that they have struck an advantageous bargain. It is my suggestion that this outcome can be attained by

---

[270] Vaitsos, *supra* note 267 at 5.
[271] Chudnovsky, *supra* note 269 at 284.
[272] For an example of market fragmentation and unhealthy national competition induced in a regional grouping by MNE activity, see "Report of the ECA Mission on the Evaluation of UDEAC and the Feasibility of Enlarging Economic Cooperation in Central Africa" (1981) in Robson ed., *TNCs and Regional Economic Integration* at 294-302.
[273] UNCTAD "TNEs in Latin American Economic Integration", *supra* note 269 at 249.

formulating a legal regime that is sensitive not only to the need for investor protection, but also disciplines investor conduct.

The argument for a comprehensive regional investment policy is supported by the ECA conclusion that in the case of Central Africa, the "ability of TNCs to thwart efforts at regional industrial planning is heightened by the lack of a coherent, regional, industrial strategy and by the lack of a well-functioning regional financial institution."[274]

The above will be a useful background against which to view the sub-regional regulatory framework for multinational investment in West Africa. The object of such an approach is that ECOWAS will hopefully learn from the experience of the other integration groupings, avoid their mistakes, and chart a course of action that will facilitate the realization of the region's development objectives, as well as create a suitably liberalized regime for multinational investment. Already, assuming the validity of the conclusions of Vaitsos outlined above, MNEs *should* promote economic integration in West Africa in view of the region's small national markets as well as the fact that a significant number of them are yet to make an entry into the region.

(2)ECOWAS' Regulatory Regime- A discussion of the ECOWAS investment regime must of necessity start with the grouping's industrial policy. The ECOWAS "Industrial Policy and Programme" approved in 1979, identified ten priority sectors necessary for the industrial development of the region. These are food processing, building and construction materials, wood processing, telecommunications and electronics, petrochemicals, pharmaceuticals, iron and steel, and automobile and related industries.[275]

---

[274] ECA Report (1981), *supra* note 272.
[275] Asante, *supra* note 14.

To develop these priority sectors, ECOWAS also adopted a Protocol on Community Enterprises in 1981 "to promote regional interaction between the Member-States, serve as a stabilising element, and contribute to the development of priority sectors."[276] To promote investment in the above priority industrial sectors, the protocol made provision for approval of enterprises as "Community Enterprises" so as to benefit from the incentives, advantages and benefits granted under the protocol. This status could be conferred on enterprises 51 percent of whose equity was owned by community citizens, entities, governments or their agencies of two or more member-states, a majority of Board members of the enterprise must be community citizens, enterprise operations must affect at least two states, it must be capitalized to the tune of 200,000 units of account or 150,000 units of account for less developed countries in the region, and the enterprise must promote the development programs and policies of the community.[277] Furthermore an enterprise applying for community status must be incorporated and locate its head office in a member state.[278]

On performance requirements, the protocol provides that in conferring the status of community enterprise, the Council shall take into account the contribution of the proposed enterprise to development of the community and in particular, the less developed members thereof. The Council should also consider the extent to which the enterprise shall make use of regional resources. Enterprises are further expected to yield a 35 percent value added in the process of manufacture, create job opportunities, elaborate

[276] Ezenwe, *supra* note 52 at 162.
[277] Article 3.1 ECOWAS Protocol Relating to Community Enterprises 1981.
[278] Article 3.2

a manpower development program on managerial and technical skills, and transfer technology. Community enterprises must, in addition, promote intra-regional trade, generate exports, and adopt suitable environmental and pollution control policies and practices.[279]

Enterprises that meet the above requirements are entitled to extensive investment guarantees and benefits both to enhance security of title, and to promote profitability. Their products are also free from tariff and non-tariff restrictions within the community and are entitled to protection from competing imported like goods.[280] Moreover, article 4.4 stabilizes the regime of incentives and benefits by providing that they shall not be subsequently altered to the disadvantage of the enterprise. Under this scheme, community enterprises are guaranteed MFN treatment with respect to industrial, financial and other incentives and advantages, and national treatment with respect to sectors in which they are allowed to invest; under the latter provision, it is significant that incorporation as a community enterprise allows it to invest in sectors reserved exclusively for nationals of Member States.[281] Expropriation, nationalization or other compulsory acquisition of the property or investment of a community enterprise is prohibited except under exceptional circumstances, for a public purpose, and accompanied by the payment of "fair and adequate" compensation;[282] free convertibility and transfer of funds, as well as personal remittances of expatriate staff are guaranteed,[283] and various fiscal concessions are

[279] Article 3.3
[280] Article 4.11

[281] Article 4.7
[282] Article 4.1-4.4.
[283] Article 4.8

granted. Thus such enterprises are entitled to import duty drawbacks, up to ten years customs duty exemption on plant, machinery and equipment necessary for the investment, carry over of business losses for tax purposes, and financial grants for new investments and reinvestments.[284] Furthermore, the protocol confers authority on the Council of Ministers to grant monopoly rights for a specified period or a region of the community, to enterprises that invest in a priority sector with respect to a new industrial or economic activity.[285] To cap it all, article 4.12 confers on the Council of Ministers an omnibus power to grant additional benefits, incentives or advantages to community enterprises.

To complement this incentive and guarantee structure, a further attempt was made to protect regional investment. The Protocol on the Fund for Cooperation, Compensation and Development empowers the ECOWAS Fund to, *inter alia,* guarantee foreign investments made in Member-States by community enterprises.[286]

(D)Synthesis of Regulatory Regime: The above illustrates the main features of the regulatory regime for FDI in West Africa. There is no doubt that subject to restrictions intended to harness the flow and benefits of such investment to their development needs, countries in the region have at the national level, taken serious steps towards liberalizing their investment laws. In effect, even though they have not attained the optimal level of investment liberalization characterized by unrestricted market access, and non-discrimination, (which level is not attained by any country), it is fair to state that there

[284] Article 4.9
[285] Article 4.10
[286] Article 2 Protocol on the Fund for Cooperation, Compensation and Development 1979.

exists a large measure of liberalization. Measures to promote investment have been adopted at the national, bilateral and regional levels through a variety of investment incentives and guarantees.

When all these pieces are put together, there seems to exist a viable regulatory framework for FDI in the region. But this conclusion would be hasty, and would ignore important attributes of the present framework that make it less illuminating than it appears at first sight. Already, mention has been made of the fratricidal competition for investment capital that is being run through the grant of fiscal concessions that few of the countries in the region can realistically afford. This scenario is replicated at the regional level, where, as seen under the Protocol on Community Enterprises, investment incentives are extensively used to lure foreign investment. As a result, the regional framework suffers from the same flawed rationale as national laws. It similarly calls for revision.

But this point apart, the ECOWAS investment program suffers from other shortcomings as well. Crafted at a time when the avoidance of dependence and the encouragement of collective self-reliance were high on the agenda of most developing countries and their integration groupings, the protocol is a classic example of a policy to phase-out alien in favor of indigenous control of production. As stated by Asante,

> ...[a]lthough the regional company concept has the potential for offering access to the West African sub-region for foreign capital, ...it is certainly not one that primarily is designed for the facilitation of foreign corporate activities in the sub-region. The ECOWAS company concept is fundamentally African; it will be African owned, African controlled, and above all it is a citizen of West Africa.[287]

[287] Asante, *supra* note 14 at 123.

In the light of the above, it is not surprising that the Protocol has not had any significant impact on the flow of investment to the region. Moreover, whereas concerns for dependency and self-reliance are indubitably genuine, and probably more so at the time the protocol was adopted, one may be hard-pressed to drive home the argument that they ought to inform regional investment policy today. Globalization of markets and production, changing attitudes on the part of multinational companies and their home states, as well as the end of the cold war and its attendant East/West ideological divide, have all made it less imperative for developing countries to adopt policies on the basis of ideological predisposition. It is submitted that the present state of the global economy, realistically calls for the adoption of policies and rules on the basis of market forces. According to Sornarajah,

> the view which was once held that multinational corporations were a threat to the sovereignty of developing states may not arouse the same degree of concern any more. The developing states have built up confidence in dealing with these corporations. Multinational corporations, in turn, have often left behind the role of being instruments of the foreign policy of their home states.[288]

As a consequence, the time has come to revisit the present patchwork of investment rules and for ECOWAS Member-States to work collectively in formulating policies and rules for the attraction of FDI to the region. The approach being suggested here is a gradation from gradual harmonization of investment laws to ultimate uniformity through the adoption of a single investment code. It is this framework for improving the investment regime in West Africa that I shall address next.

[288] Sornarajah, *supra* note 8 at 45.

CHAPTER FIVE: FROM HARMONIZATION TO UNIFORMITY: A FRAMEWORK FOR IMPROVING WEST AFRICA'S INVESTMENT REGIME

The conclusion reached in the previous chapter, that national liberalization efforts were an inadequate response to the need to attract larger inflows of investment capital to West Africa, leads one to the logical question of what can or ought to be done to improve the region's investment regime. In view of the differences in levels of economic development, and legal traditions of the countries in the region, a single prescription to improve the national regulatory regimes of ECOWAS Member States must of necessity, be tailored to reflect this variance. Such an all-embracing formula can therefore hardly be found. Moreover, striving to improve individual national systems will merely perpetuate the inter-country competition for investment capital that has characterized the region. This thesis eschews any attempt to formulate a single prescription for improving investment regulation at the national level. Instead, I attempt to suggest a scheme for improving the regional regulatory regime, by the pooling of national systems towards a regional focal point. It is suggested that countries in the sub-region ought to harmonize their investment laws gradually, with the aim of adopting in the not too distant future, a single investment code for West Africa.

(A) Approaches to International Harmonization

The concept of law harmonization is a form of cooperative inter-governmental response to problems arising from regulatory differences in national legal systems. In the case of the regulatory regime in West Africa, the problem that harmonization is intended to address is the unattractiveness of the investment climate that has been the result *inter* *alia* of the lack of a regional policy governing international investment. To this end, harmonization can be loosely defined as an attempt to make the regulatory requirements or governmental policies of different jurisdictions identical or at least more similar.[289] With respect to all harmonization efforts, a determination has to be made as to the *degree* of harmonization required and the *scope* of the harmonization effort. The former refers to the extent of similarity or difference between the laws after harmonization, and "[t]he degree to which a harmonization requirement continues to tolerate difference is called the harmonization 'margin'".[290] Thus, an attempt at progressive harmonization for countries with significant national sensitivity, is likely to tolerate a greater harmonization margin. On the other hand, the scope of a harmonization claim "...determines the coherence and hence normative validity of that claim".[291]

Harmonization claims also have both a normative and non-normative component.[292] A normative harmonization claim is one that is based on a further claim that the law of a particular jurisdiction ought to be conformed to a "better" standard. In other words, it is based on a third standard. The non-normative component merely claims that the different laws should be made more similar without any normative judgment as to either of them.

In view of the absence of a general international agreement on foreign investment, and the consequent lack of an optimal investment regime against which to measure the

---

[289] D.W.Leebron, "Lying Down with Procustes: An Analysis of Harmonization Claims" in *Harmonization and Change*, 25th Annual Workshop on Commercial and Consumer Law (Toronto: Fac. of Law, Univ. of Toronto 1995), at 3.
[290] Ibid at 7.
[291] Ibid.
[292] Ibid at 11.

sub-regional framework, the claim to harmonize West Africa's investment regime is essentially a non-normative claim; it is not suggested that the different national laws be conformed to any other single standard. On the contrary, the suggested framework is intended to inject greater convergence in investment regulation among ECOWAS Member States, drawing upon the experience of a number of regulatory regimes elsewhere. In other words it is an amalgam of regulatory experiences elsewhere, plus a few novel prescriptions.

Experience with international harmonization, particularly harmonization of international commercial law, shows three principal methods of harmonization. These are the 'treaty' method, the 'model law' method, and the 'commercial customs and practice' method.[293] The treaty method involves the introduction of normative regulations devised and elaborated within the framework of international treaties and agreements concluded between two or more states that could subsequently ratify and implement same, and may also be open to accession by other members of the international community.[294] This method of harmonization involves a zero harmonization margin as all the states involved subscribe to the same rules elaborated in the treaty or agreement.[295] A similar degree of harmonization can be attained by assigning responsibility for policy formulation to a centralized lawmaking authority whose promulgations have direct effect in national legal systems. Such supranational legislation can be found in advanced integration groupings like the European Union where both the Council and the Commission can legislate

[293] UNCITRAL Yearbook, Vol.1 1968-1970 (New York, U.N 1971) at 39.
[294] O.A. Ovrawah, "Harmonization of Laws within the Economic Community of West African States (ECOWAS) (1994) 6 R.A.D.I.C, at 83.
[295] This is of course subject to any reservations that may be made by member states.

directly to bind Community Member States and citizens alike.[296] The European integration effort has however proceeded to a lot more advanced stage than West Africa and therefore has the institutional capacity for implementation of the measures, as well as the commonality of objectives necessary to make such a high degree of harmonization work. In view of the stage of ECOWAS integration, harmonization may have to be more gradual than the treaty or direct effects model, with a greater harmonization margin.

The model laws method of harmonization involves the formulation of a non-binding model or uniform law which can be used by states as guides for local adaptation or incorporation into domestic legislation. This method has the advantage of inducing substantial regulatory similarity without requiring exact equivalency like a treaty. On the downside however, there is the risk that in the process of national adaptation, the similarity that was secured at the elaboration stage may be lost.[297] A recent useful non-binding instrument of this type is the World Bank "Guidelines on the Treatment of Foreign Direct Investment" which was finalized and brought to the attention of Member States by the World Bank's Development Committee in 1992.[298] However, the guidelines address only the treatment of foreign investors by host governments. They make no provision for the conduct of international investors. As such, their adoption can only provide partial harmonization; in order to realize the level of efficiency and equity that this thesis has advocated for investor/host state relations, they may have to be

---

[296] Agyemang, supra note 77, at 76.

[297] M. Ndulo, "Harmonization of Trade Laws in the African Economic Community" (1993) 42 I. C. L.Q, at 110.

[298] The Guidelines are reproduced in *International Investment Instruments: A Compendium,* Vol. 1 (New York and Geneva: U.N 1996) at 246. See also Shihata, *Legal Treatment of FDI, supra* note 118.

supplemented by soft law rules formulated in other international fora. The most comprehensive, albeit abortive attempt, to formulate a code of conduct for multinational enterprises was made by the United Nations Center on Transnational Corporations.[299] Under the auspices of UNCTNC, the parties successfully negotiated most of the issues relating to corporate conduct, like non-interference in internal affairs, contribution to national and regional development efforts, abstention from corrupt practices and abusive transfer pricing, as well as appropriate technology transfer and environmental policies and practices.[300] They could however not agree on significant issues governing treatment of foreign investors.[301] Since legal treatment of investors is the focus of the World Bank Guidelines, it is suggested that the two instruments can provide a useful synergistic framework for investor/state relations.

At the regional level, the OECD has also formulated a Declaration on International Investment and Multinational Enterprises (1976), which was revised in 1991.[302] The Declaration lays down extensive rules governing the conduct of corporate investors and the 1991 revision in particular, introduced important provisions on environmental protection. These instruments provide important principles which could be used as guides by West African countries to develop a regional investment law.

The commercial customs method of harmonization involves the formulation of commercial customs and practices based on the usages of the international community

[299] Fatouros, "Looking for an International Legal Framework for TNCs", *supra* note 221 at 528.
[300] The Draft Code is reprinted in *International Investment Instruments: A Compendium* (1996) Vol. 1, at 161.
[301] Asante, "Concept of the Good Corporate Citizen", *supra* note 159 at 183.
[302] The 1991 revised version is reproduced in *International Investment Instruments: A Compendium*, Vol. II 1996, at 183.

usually under the auspices of an international agency.[303] With respect to international investment law, such usages may be found in the bilateral treaty practice of states, or the regional or multinational norms to which the members of the regional grouping had previously acceded. These sources, when put together, may provide a reflection of the *opinio juris* of the states with respect to international investment law. ECOWAS could mandate a study to collect and collate principles from these sources, which could be used as an additional basis on which to formulate regional norms on investment regulation. The ECOWAS Secretariat could provide the administrative and coordination functions to facilitate the study.

Harmonization work undertaken in other integration groupings and international fora like UNIDROIT and UNCITRAL, show that these three methods are strictly speaking not alternatives to each other. In most cases they were all found to be essential to the harmonization effort and that they complement each other.[304] Even in the European Union, Community rules formulated by the Commission or Council are assimilated into the Member States' legal systems through four methods;[305]

1. the 'substitution' method is the situation where Community treaties and regulations supersede inconsistent national legislation
2. the 'harmonization' method involves the amendment of national laws to meet Community requirements
3. the 'coordination' method where Community law orders the effect of national legislation, so as to achieve some degree of uniformity in particular issues

[303] UNCITRAL Yearbook, *supra* note 293.
[304] UNCITRAL Yearbook, *supra* note 293 at 39. **See also** Ndulo, *supra* note 297 at 110.
[305] Ovrawah, *supra* note 294 at 86-87.

4. the 'co-existence' method where Community laws and national laws exist side by side in governing the same area of activity but in different ways and with different objectives

It is submitted that harmonization of investment law in West Africa, must involve all the three principal harmonization methods discussed above, so as to reflect the essential economic and regulatory differences between the countries, but also to facilitate sensitivity to the disparity in levels of development. I suggest a progressive or paced harmonization, that allows some latitude to the least developed members of the Community, to measure up over a period of time to the desired standards. In my view, this will be a more realistic and pragmatic approach, than formulating a single instrument which Member States, due to economic and developmental realities, find themselves unable to implement. This is particularly important in view of the fact that the countries currently operate very diverse national legal systems from a variety of legal traditions, - - common law, civil law, Islamic law, and customary law; all these will need to be closely studied so as to minimize regulatory inconsistency and facilitate the smooth operation of the investment regime. The task ahead is indeed Herculean and ought to be approached with tact and commitment. The fact that the European Council of Ministers had to pass at least twelve directives for the harmonization of European company law alone, is illustrative of the seriousness of the effort that lies ahead.[306]

On the specific issue of harmonizing investment incentives, two alternative approaches could be utilized by Member States. The first is for ECOWAS to commence a round of discussions on investment law harmonization which will include a challenge

[306] F. Wooldridge, *Company Law in the United Kingdom and the European Community: Its Harmonization and Unification* (London: The Athlone Press, 1991).

round for members to make undertakings to harmonize their investment incentives at a certain level. Such an approach will, in any case, require broad understanding among Member States that they are losing more by the grant of incentives, than by refraining from granting them. Moreover, the approach will allow a degree of flexibility that will enable states to make undertakings that reflect their economic conditions and fiscal needs.

- The second alternative is for the Member States to formulate a regional scheme for the harmonization of incentives that sets ceilings on the amount and duration of incentives that can be granted to investors. This is the approach adopted by Member States of CARICOM.[307] Furthermore, ECOWAS could, in the framework of a regional investment policy, set disciplines on the Member States grant of incentives by either granting a right to ask for consultations where a Member State's grant of incentives distorts the flow of investment capital by adversely affecting flows to another Member State, or for dispute settlement under the auspices of the ECOWAS Court where such consultations fail.[308]

I suggest progressive harmonization to reflect the imbalances in the level of development of ECOWAS Member States. Due to these imbalances, the ECOWAS harmonization effort may initially have a harmonization margin that would not have been necessary had all the countries been at comparable levels of development. However, it must be emphasized that in order to attain the desired level of policy convergence, ECOWAS must ultimately aim for harmonization with zero margin, i.e. the adoption of a

[307] See the CARICOM "Agreement on the Harmonization of Fiscal Incentives to Industry" (1973), in *International Investment Instruments: A Compendium*, Vol.II 1996 at 161.

[308] The 1984 OECD Decision on "International Investment Incentives and Disincentives" provides a right to ask for consultations, where a Member country considers that its inward FDI flows are adversely affected by another party's grant of incentives. The decision is reproduced in *International Investment Instruments: A Compendium*, Vol. II 1996 at 200.

uniform regional investment agreement. It is noteworthy that Member States are cognizant of this need and the revised ECOWAS Treaty stipulates as one of the aims and objectives of the Community "the harmonisation of national investment codes leading to the adoption of a single Community investment code".[309]

(B) THE SEARCH FOR EFFICIENCY AND EQUITY

The objective of a uniform investment code must be two-pronged; firstly, it must be attractive enough to enhance the flow of investment capital to the region and provide a safe and secure legal structure for investors. Secondly, it must be sensitive to the socio-economic needs of Member States. In my view, it is this mutuality of gains that ought to be the crux of any attempt to formulate a regional investment law for West Africa. When a hypothetical bargain model of the investment law is taken as a framework for analysis, it follows that the parties, (here the foreign investor and the host state), will only agree on rules that each of them concludes, leaves their lot better or at least not worse off, than their pre-contract positions. In other words, in a free and competitive market for goods or services, persons are deemed to enter only contracts that in their view, are to their advantage. Recall that in terms of economic efficiency criteria, this is the "Pareto Superior" standard.[310] It describes the consequences of a transaction that effects a transformation in which, at least one party is made better of, and no one is made worse off.[311] In the words of Coleman,

---

[309] Article 3 (2) (I)
[310] The name comes from the Italian economist Vilfredo Pareto (1848-1923).
[311] J.L. Coleman "Efficiency, Utility, and Wealth Maximization" (1980) 8 Hofstra. L. Rev. 509, at 512-513.

> Exchanges among knowledgeable, rational persons in a free market are generally Pareto superior; rational individuals do not strike bargains with one another unless each perceives it to be in his or her own interest to do so. A successful exchange between such parties is, therefore, one in which the value to each of what he or she relinquishes is perceived as less than the value of what each receives in return. Such exchanges make no individual worse off; often they improve the lot of all concerned. Pareto superiority is connected in this way to the ideal of a free-exchange market.[312]

However, because contractual effects are usually not limited to only the parties to the contract, efficiency criteria also considers the effect of contracts on third parties i.e. externalities. Where such externalities are benign and thus considered desirable by the third party, they are called 'external goods' and therefore do not render a contract or transaction inefficient. Where, on the other hand, the spillover is negative in the sense of adversely affecting non-consensual third parties, one speaks of 'external costs', and efficiency standards dictate that such contracts be upheld only so far as the net gains to the contractors do not exceed all third party external costs. This is the "Kaldor-Hicks" standard of efficiency.[313] It refers to transformations arising out of a contract or transaction in which gains to winners exceed losses to losers. It involves a cost/benefit analysis of legal transactions. On this standard, contracts could be upheld as economically efficient even though they are not Pareto superior, provided a Pareto superior outcome could be achieved if the winners chose to compensate the losers. The Kaldor-Hicks criterion of efficiency it must be pointed out, does not require *actual* compensation; it reflects a potential on the part of the winners to compensate the losers. As such it is sometimes referred to as "potential Pareto superiority".[314]

[312] Ibid. at 516-517.
[313] Ibid. **See also** Buckley *et al*, *supra* note 2, at 13-15.
[314] Coleman, *supra* note 311, at 513.

Under this model, a regional investment regime for West Africa it is suggested, should be so crafted that it is economically efficient in the sense that investors and host countries are either better off or at least not worse off than before the law - a Pareto superior outcome. It is for this reason that this thesis has argued that the national regimes that presently hold sway, are inefficient and ought to be revised. They are inefficient both from the host country and investor point of view. On the host country side, the laws have resulted in extensive fiscal sacrifice which have proved ineffective in attracting the desired amount of investment capital. Secondly, due to the unhealthy competitive legislation, and the fear of losing investment to regional neighbors, the laws fail to make prescriptions to govern investor conduct with respect to key issues like the environment and other aspects of corporate social responsibility. It is my view that these issues ought to be addressed in a future regional agreement on investment, in order to balance the need for investor protection with the development and social needs of the host countries.

A regional framework will also increase the bargaining power of the countries, as the similarity of regional policies will mean that investors can no longer play ECOWAS countries against each other in making their location decisions. Inefficiency from the investor's point of view arises from the fact that in making their location decisions, potential investors have to make a decision among a multitude of investment regimes which consequently means larger transaction costs. Moreover, even after establishment, investors must adjust to a host of regulatory differences whenever they wish to expand into another state in the region. A regional investment law will save on these costs, as well as inject greater certainty and predictability in regional investment regulation.

The conclusion that national liberalization efforts are one-sided and therefore neither comprehensive, nor economically efficient, leads to the search for a more comprehensive and efficient regulatory regime. How then can this be attained and what should be the content of such a framework? On the means for attaining this objective, I suggest a single regulatory regime for West Africa. The contents of this regime must of course include the liberalization *desiderata* previously discussed, but tailored to the development needs of the ECOWAS Member States. In other words, I advocate a regime of 'developmental liberalization'. On the other hand, an efficient and equitable regime must address issues of investor conduct without which the desired levels of economic efficiency cannot be attained; or, putting a different dimension on the same thing, the costs to host countries of improper corporate activity in, for example environmental degradation or abusive transfer pricing, might exceed the benefits accruing from the investment activity.

In this connection, it is gratifying to note that there is increasing international consensus on issues of investor conduct. Norms relating to non-interference in internal affairs of host states, a commitment to participate in national and regional development efforts, as well as abstention from illicit practices, unfair competition, and abusive transfer pricing, now enjoy a large degree of international acceptance.[315] The fact that the negotiating parties on the United Nations Draft Code of Conduct on TNCs were able to agree on most of these issues, illustrates this international consensus.[316] Labor and social

[315] See Asante "Concept of a Good Corporate Citizen", *supra* note 159. See also Fatouros "Looking for an International Legal Framework for TNCs", *supra* note 221.

[316] Similar prescriptions could be found in the OECD Declaration on International Investment and MNEs. The OECD is also in the process of negotiating a Multilateral Agreement on Investment which is expected

issues relating to international investment are dealt with under the ILO Tripartite Declaration of Principles Concerning MNEs and Social Policy (1977).[317]

However, one of the most significant new issues that have recently emerged, relates to the environmental impacts of international corporate investment. As already pointed out, the revised OECD Declaration on International Investment and MNEs introduced important new principles in this area in 1991. Among other things, the Declaration requires both domestic and foreign investment enterprises to take environmental concerns into account in their decision making, avoid creating environmentally related health problems, and provide information on the potential environmental impacts of their activities.[318] Another significant development was the NAFTA provisions on investment which provide *inter alia* that:

> ...it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion, or retention in its territory of an investment of an investor.[319]

The Parties to the APEC Non-Binding Investment Principles (1994) also undertake not to relax health, safety, and environmental regulations as an incentive to encourage investment.[320]

The environment issue is of particular importance due to the inter-generational consequences of inappropriate environmental practice. It is for this reason that there is

---

to break new ground with respect making prescriptions for corporate conduct. This is important especially if the MAI will be open to accession by non-members of the OECD.

[317] Reprinted in *International Investment Instruments: A Compendium*, Vol. I (1996), at 89.

[318] OECD "Declaration on International Investment and MNEs", 1991 revision.

[319] North American Free Trade Agreement (NAFTA), Article 1114 (2).

[320] Reprinted in *International Investment Instruments: A Compendium* Vol. II(1996), at 535.

increasing advocacy that both international trade and international investment must be environmentally sensitive, and be guided by principles of sustainable development. In the context of international trade, significant progress has been made under the GATT which accepts that contracting parties could impose measures "...necessary to protect human, animal or plant life or health" or "relating to the conservation of exhaustive natural resources..."[321] It is submitted that these developments ought to be replicated in the context of international investment law. Protection of the environment has acquired such significance that no country or region can afford to ignore it in the formulation of rules relating to economic activity. A future agreement on investment in West Africa must therefore contain prescriptions with respect to both investors and host states for the protection of the environment. On the part of investors, it may be necessary to stipulate a requirement for a corporate environmental policy or action plan, as well as a commitment to environmentally sound production methods (PPMs),[322] and technology. A commitment to restore the environment where damage occurs as the result of an investment activity, may also be important. Rules for host countries must prohibit them from lowering their health, safety or environmental standards so as to encourage investment. This is important to prevent the kind of 'race to the bottom' that was feared by several

[321] General Agreement on Tariffs and Trade 1994, Article XX. This provision is subject to the requirements that the measures must not arbitrarily discriminate between countries where the same conditions prevail or operate as disguised restrictions on international trade. The 1994 WTO Agreement also contains an explicit reference to the objective of sustainable development and the need to protect and preserve the environment. On institutional matters the WTO in 1994, established a Committee on Trade and Environment with a mandate to identify the relationships between trade and environmental measures and to make recommendations for modifications of the provisions of the multilateral trading system where necessary.

[322] Under GATT jurisprudence trade measures could not be imposed as a result of another party's PPMs. This is the effect of the GATT Panel decisions in the TUNA/DOLPHIN cases. It is suggested however that international investment law, ought to discipline environmentally damaging PPMs.

environmental groups in Canada and the United States when the NAFTA was being negotiated between those countries and Mexico.

Having argued that a West African investment law ought to contain both investor protection and investor conduct rules, the question next arises how such an instrument should be formulated. On the one hand, there is no question that provisions on treatment of investors ought be binding legal commitments on the part of host states for, otherwise, the intended security of title and other guarantees will be ineffective. On the other hand, up till now, all the rules on investor conduct that have been formulated have taken the form of non-binding soft-law rules elaborated in codes of conduct. Ongoing negotiations for a Multilateral Agreement on Investment in the OECD, are exploring the possibility of binding international prescriptions for corporate investors.[323] The question for West Africa then becomes whether to work on a single investment instrument that contains *binding* rules for both investors and home states, or to have a 'zebra' code which contains both binding principles of legal treatment of foreign investors, and non-binding prescriptions to guide corporate conduct.[324] A third alternative may be the formulation of two separate instruments; one containing binding principles of legal treatment, and a second containing the non-binding rules for investor conduct.

In making a choice between these options, West African countries ought to bear two principal issues in mind; the first is that international law still recognizes corporations as juristic persons of particular nationality. As such, they are still not

[323] *Towards Multilateral Investment Rules*, OECD Docs. (Paris: OECD 1996).
[324] C.D. Wallace, *Legal Control of the MNE*, *supra* note 219 at 300.

subjects of international law.[325] Secondly, due to globalization, the choice ought to be informed partially by what is going on in other regions of the world, for, undue stridency in regulating corporate conduct, may operate as a disincentive to investors and therefore defeat the whole purpose of improving the regulatory framework. The task therefore ought to be guided by the search for a legal framework that promises a mutuality of gains; a regime that adequately protects investors and their investments, but at the same time, reflects the special development needs of West Africa as a region. Anything short of this, will in my view, be an inefficient and inequitable outcome, that may sooner, rather than later, bring the parties round the bargaining table to re-negotiate for better and more efficient rules.

[325] But note the arguments made in chapter 3 that the time has come for binding legal obligations to be formulated to regulate international corporate conduct.

CHAPTER SIX: CONCLUSION

The most significant lesson to emerge from the experience of the participation of TNCs in integration among developing countries is that if such integration is not accompanied by the harmonization of other economic policies and, in particular by the harmonization of trade-related investment incentives, the outcome of TNC participation is unlikely to be an optimal rationalization and production integration within the bloc. Instead the benefits of integration to the developing region may be expected to be dissipated partly in higher costs because of a failure to exploit scale economies to an extent that the size of the market would warrant, and partly in a less favorable share of the rewards than might otherwise have been obtained.[326]

The twin concepts of regional economic integration and integrated international production by foreign multinational corporations share a common motivation. They are both driven by the need to capture synergistic gains arising from unified control of productive activities in different countries in the case of MNEs, and the gains from policy coordination, harmonization or full integration in the case of member states of an integration bloc.[327] The realization of these objectives will require a suitably crafted framework that promises equity and balance as between the member states of the integration bloc in terms of development objectives and priority, but also ushers in a regime for the regulation of international corporate activity, that guarantees investor and investment protection in an equitably liberalized manner, paying due regard to the special development needs of host states. It is with this end result in mind that I argued that the negative integration measures adopted by ECOWAS (in the form of tariff reductions and the removal of other barriers to trade), are inadequate to attain the desired level of balance in regional development. I suggested in this respect the adoption of positive integration measures that will plan the industrial development of the region with sensitivity to the

[326] Robson, *TNCs and Regional Economic Integration, supra* note 259 at 464.
[327] Ibid.

disparity in levels of economic development among member states. As a follow-up, it is also suggested that the adoption of a single community investment instrument containing both investor protection/guarantee clauses and investor conduct prescriptions, will be the ideal optimal framework for an efficient and equitable investor/host state relationship. In other words, my recommendation is a framework that promises a mutuality of gains for both investors and host states, and indeed the larger society in which the investment activity takes place. The reverse, i.e. where one side gains at the expense of another, or where costs to one side exceed the gains from the transaction, will be inefficient, inequitable and undesirable. The heart of the argument is that the strategy of 'developmental regionalism', ought to be complemented by a regime of 'developmental liberalization' of transborder investment, so that, at the end of the day, both investors on the one hand, and host states and their people on the other, will be satisfied that integration and investment have left them either better off or, at least not worse off. than their positions before these arrangements were adopted- a Pareto superior outcome.

Having said that, it must be emphasized that the regulatory regime does not operate in a vacuum. Its impact, and indeed the reaction of outsiders to it, are linked to non-legal variables that characterize each society in terms of economic development levels, growth potential and political risk perceptions. These are policy issues which need to be addressed in tandem with a review of the regulatory regime, to realize the desired levels of optimality.

In addition, globalization of the world economy implies among other things, that economic realities in one part of the globe, may have an effect on other parts separated by time and space. The world has become an interdependent unit. It is for this reason that the wider world ought not to ignore developments in Sub-Saharan Africa. With respect to Africa's image as a location for international investment, an important contribution that can be made by the outside world, especially the developed world, is to revisit the African debt situation. This situation has a direct impact on the investment climate because it prolongs the balance-of-payments difficulties which have forced several African countries to place restrictions on foreign currency remittances. As a liberal regime for foreign exchange accessibility and transfer is an indispensable element of a favorable investment climate, new arrangements like debt-forgiveness will ease the pressure on the public sector in Africa, caused by extensively burdensome debt-service obligations, inject a level of macroeconomic stability, and thus boost trade and investment.

In the end, even though African countries must take the lead and embark on serious structural and regulatory adjustments, both at the national and regional levels, the international community has an important complementary role to play. Without these two efforts, I submit, the prospect of export-oriented economic development in Africa spurred by inflows of significant foreign capital and technology, will remain a distant dream.

BIBLIOGRAPHY

(A) Primary Sources

(i) National Legislation

1.Law No. 84-1230 1984 Investment Code, -Ivory Coast, in ICSID *Investment Laws of the World* Release 87-1, May 1987.

2.Decree No. 1231 1984 Implementing the Investment Code,- Ivory Coast, in ICSID *Investment Laws of the World* Release 87-1, May 1987.

3.Ordinance No. 89.013/CSMN Investment Code,- Mauritania, in ICSID *Investment Laws of the World* Release 93-1, June 1993.

4.Act # 478 1994, Investment Promotion Center Act, -Ghana, in ICSID *Investment Laws of the World* Release 93-5, January 1995.

5.Nigerian Enterprises Promotion Decree 1989, Federal Republic of Nigeria, Decree No.54 of 1989, Supplement to Official Gazette Extraordinary, No 76, 30 Dec. 1989.

(ii) Regional Agreements and Publications

ECOWAS Documents

1. Treaty of the Economic Community of West African States (ECOWAS), May 1975.
2. Revised Treaty of the Economic Community of West African States (ECOWAS), July 1993.
3. Protocol Relating to Free Movement of Persons, Residence and Establishment, May 1979.
4. Regime for the Liberalization of Trade, September 1983.
5. Protocol Relating to Community Enterprises, 1981.
6. Protocol on the Fund for Cooperation, Compensation and Development, 1979.

OECD Documents

1.Declaration on International Investment and Multinational Enterprises 1976 (Revised in 1991).

2.Decision on International Investment Incentives and Disincentives 1984.

3.*Towards Multilateral Investment Rules* (Paris: 1996).

4.*Foreign Direct Investment: OECD and Dynamic Economies of Asia and Latin America* (Paris: 1995).

5.*Investment Incentives and Disincentives: Effects on International Direct Investment* (Paris: 1989).

6.*Regionalism and its Place in the Multilateral Trading System* (Paris: 1996).

CARICOM

1.Agreement for the Harmonization of Fiscal Incentives to Industry, 1973.

APEC

1. Non-Binding Investment Principles, 1994.

ANDEAN PACT

1.Decision 24 of the Andean Pact, 1971-Foreign Investment Code.

2.Decision 291 of the Andean Pact, 1991- Revised Foreign Investment Code.

NAFTA

1. North American Free Trade Agreement 1994.

(iii)Multilateral Instruments and Documents.

United Nations.

1. Charter of the United Nations Organization, 1945.
2. Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960
3. Resolution on Permanent Sovereignty over Natural Resources, 1962.
4. Resolution on a New International Economic Order, 1974.
5. Charter on the Economic Rights and Duties of States, 1974.
6. Draft Code of Conduct on Transnational Corporations 1983

World Trade Organization

1.Agreement Establishing the World Trade Organization, 1994.

2.General Agreement on Tariffs and Trade, 1994.

3.General Agreement on Trade in Services, 1994.

4.Agreement on Trade Related Investment Measures, 1994.

5.Agreement on Subsidies and Countervailing Measures, 1994.

World Bank

1. Guidelines on the Treatment of Foreign Investment, 1992.
2. *Sub-Saharan Africa: From Crisis to Sustainable Growth,* (Washington, 1989).

UNCTAD Documents.

1.*World Investment Report 1992: Transnational Corporations as Engines of Growth.*

2.*World Investment Report 1993: Transnational Corporations and Integrated International Production*

3.*World Investment Report 1994: Transnational Corporations, Employment and the Workplace.*

4.*World Investment Report 1995: Transnational Corporations and Competitiveness.*

5.*World Investment Report 1996: Investment, Trade and International Policy Arrangements.*

6. *Foreign Direct Investment in Africa* UNCTAD/DTC1/19, (Geneva: 1995).

7. *Handbook of Economic Integration and Cooperation Groupings of Developing Countries,* Vol.1, *Regional and Sub-Regional Integration Groupings* (Geneva: 1996).

8.*Incentives and Foreign Direct Investment* UNCTAD/DTC1/28, (Geneva: 1996).

9.*International Investment Instruments: A Compendium* Vol.I-III, (Geneva: 1996).

(B) Secondary Sources

1. Agyemang A.A, "Trade Liberalization Under the Treaty of the Economic Community of West African States (ECOWAS): Some Preliminary Highlights of Legal and Economic Problems (1990) 24 J.W.T, 57.
2. Asante S.K.B, "International Law and Foreign Investment: A Reappraisal" (1988) 37 I.C.L.Q 588.
3. Asante S.K.B, "The Concept of a Good Corporate Citizen in International Business" (1989) ICSID Rev, 1.
4. Asante S.K.B, *The Political Economy of Regionalism in Africa- A Decade of the Economic Community of West African States* (New York: Praeger, 1985).
5. Atik J, "Fairness and Managed Foreign Direct Investment" (1994) 32 Cloum. J. of Transnat'l. L.1
6. Barlow E.R, & Wender I.T, *Foreign Investment and Taxation* (Englewood Cliffs: Prentice Hall, 1955).
7. Berle A.A, & Means G.C, *The Modern Corporation and Private Property* (1932).
8. Beveridge F, "Taking Control of Foreign Investment: A Case Study of Indigenisation in Nigeria" (1990) 40 I.C.L.Q, 302.

9. Biersteker T.J, *Multinationals, the State, and Control of the Nigerian Economy,* (Princeton: Princeton Univ. Press, 1987).

10.Buckley F.H, Gillen M, & Yalden R., *Corporations: Principles and Policies,* (Toronto: Emond Montgomery 3rd ed, 1995).

11.Burfisher M.E, & Missiaen M.B, "Intraregional Trade in West Africa" in J.E.Okolo & S. Wright eds., *West African Regional Cooperation and Development* (Boulder: Westview Press 1990).

12.Cary W.L, "Federalism and Corporate Law: Reflections Upon Delaware" (1974) 88 Yale.L.J.663.

13.Chudnovsky "Latin American Integration and Multinational Enterprises: Issues in the Industrial Integration of Argentina with Brazil" in P. Robson ed., *Transnational Corporations and Regional Economic Integration,* Vol. 9, UNLTNC (London: Routledge, 1993).

14.Coase R., " The Problem of Social Cost" (1960) 3 J. L.& Econ, 1.

15.Coleman J.L, "Efficiency, Utility, and Wealth Maximization" (1980) 8 Hofstra.L.Rev.509.

16.Dunning J.H ed., *The Theory of Transnational Corporations,* Vol.1 UNLTNC (London: Routledge,1993).

17.ECA "Report of the ECA Mission on the Evaluation of UDEAC and the Feasibility of Enlarging Economic Cooperation in Central Africa -1981" in P. Robson ed., *Transnational Corporations and Regional Economic Integration* (London: Routledge, 1993).

18.Emole C.E, "Nigeria's LNG Venture: Fiscal Incentives, Investment-Protection Schemes and ICSID Arbitration" (1996) 8 Afr.J.Int'l.& Comp.L, 169.

19.Enuenwosu C.E, "Trade Liberalization and Finance- The ECOWAS Experience" in A.A. Owosekun ed., *Towards an African Economic Community (Lessons of Experience from ECOWAS),* (Nigerian. Inst. of Soc. & Econ. Research 1986).

20.Ezenwe U, *ECOWAS and the Economic Integration of West Africa,* (New York: St. Martins, 1983).

21.Fatouros A.A, "Towards an International Agreement on Foreign Investment", in *Towards Multilateral Investment Rules* (Paris: OECD, 1996).

22.Fatouros A.A, "Transnational Corporations: Looking for an International Legal Framework for Transnational Corporations", in *Transnational Corporations and World Development,* (New York: Routledge, 1996).

23.Foroutan F, "Regional Integration in Sub-Saharan Africa: Past Experience and Future Prospects" in J De Melo and A Panagariya eds., *New Dimensions in Regional Integration* (Cambridge: Cambridge Univ. Press, 1993).

24.Gray C.W, and Jarosz W.W, "Law and the Regulation of Foreign Investment: the Experience of Central and Eastern Europe" (1995) 33 Colum. J. of Transnt'l. L.1

25.Grosse R, "The Andean Foreign Investment Code's Impact on Multinational Enterprises" in P. Robson ed., *Transnational Corporations and Regional Economic Integration* Vol. 9 UNLTNC (London & New York: Routledge, 1993).

26.Gusinger and Associates, *Investment Incentives and Performance Requirements* (New York: Praeger, 1985).

27.Katz W.G, "Responsibility and the Modern Corporation" (1960) 3 J.L & Econ.75.

28.Kindleberger C.P, "European Integration and the International Corporation" in P. Robson ed., *Transnational Corporations and Regional Economic Integration* Vol. 9 UNLTNC (London & New York: Routledge, 1993).

29.Kindred H.M *et al, International Law Chiefly as Interpreted and Applied in Canada* 5th ed. (Toronto: Emond Montgomery 1993).

30.Knowles O.S, "ECOWAS: Problems and Potential" in J.E. Okolo & S. Wright eds., *West African Regional Cooperation and Development*, (Boulder: Westview Press: 1990).

31.Kofele-Kale N, "Host-Nation Regulation and Incentives for Foreign Private Investment: Analysis and Commentary" (1990) 15 N.C.J.Int'l & Com. Reg, 361.

32.Kofele-Kale N, "Investment Codes as Instruments of Economic Policy: A Cameroon Case Study" (1991) 25 Int'l Lawyer #4, 821.

33.Kofele-Kale N, "The Political Economy of Foreign Direct Investment: A Framework for Analyzing Investment Laws and Regulations in Developing Countries" (1992) 23 L & P in Int'l Bus. 619.

34.Lee R, "Multilateral Rules to Promote the Liberalization of Investment Regimes" in *Towards Multilateral Investment Rules* (Paris: OECD, 1996).

35.Leebron D.W, "Lying Down with Procustes: An Analysis of Harmonization Claims" in *Harmonization and Change*, 25th Annual Workshop on Commercial and Consumer Law (Toronto: Fac. Of Law, Univ.of Toronto 1995).

36.Lim D, "Fiscal Incentives and Direct Foreign Investment in Less Developed Countries (1983) 19 J.of Dev. Studies, 207.

37.Lipsey R.G, "The Theory of Customs Union: A General Survey" (1960) 70 Econ. Jrnl. 496.

38.Mytelka L.K, "The Salience of Gains in Third World Integrative Systems" (1973) 25 World Politics, 236.

39.Ndulo M, "Harmonization of Trade Laws in the African Economic Community" (1993) 42 I.C.L.Q, 101.

40.Ogowewo T.I, "The Shift to the Classical Theory of Foreign Investment: Opening up the Nigerian Market" (1995) 44 Int'l & Comp. L.Q, 915.

41.Okolo S.E, & Wright S, *West African Regional Cooperation and Development* (Boulder: Westview Press, 1990).

42.Omorogbe Y, "The Legal Framework for Economic Integration in the ECOWAS Region: An Analysis of the Trade Liberalisation Scheme" (1993) 5 Afr. J. Int'l & Comp. L, 355.

43.Ovrawah O.A, "Harmonization of Laws within the Economic Community of West African States (ECOWAS)", (1994) 6 Afr. J. Int'l. & Comp.L, 76.

44.Plessez N.G, *Problems and Prospects of Economic Integration in West Africa,* (Montreal: Mcgill Univ. Press 1968).

45.Robinson H.J, *The Motivation and Flow of Private Foreign Investment* (Palo Alto, CA: Stanford Research Institute, 1961).

46.Robson P, "Transnational Corporations and Regional Economic Integration" in *Transnational Corporations and World Development* (London & New York: Routledge, 1996).

47.Robson P, *Integration, Development and Equity: Economic Integration in West Africa* (London: George Allen & Unwin, 1983).

48.Shihata I.F.I, "Promotion of Foreign Investment-A General Account with Particular Reference to the Role of the World Bank Group" (1991) 6 ICSID Rev, 484.

49.Shihata I.F.I, *Legal Treatment of Foreign Direct Investment: "The World Bank Guidelines",* (Boston: Martinus Nijhoff, 1993).

50.Shihata I.F.I, *MIGA and Foreign Investment,* (Boston: Martinus Nijhoff, 1988).

51.Sloan J.W, "The Strategy for Developmental Regionalism: Benefits, Distribution, Obstacles and Capabilities (1971) 10 J. of Common Mkt Stud.,138.

52.Sornarajah M, *The International Law on Foreign Investment* 1st ed. (Cambridge:Grotious Pubs., Cambridge Univ. Press 1994).

53.Trebilcock M.J, & Howse R., *The Regulation of International Trade,* (London & New York: Routledge, 1995).

54. Ubezonu C, "Some Recent Amendments to Laws Affecting Foreign Investment in Nigeria" (1993) 8 ICSID Rev, 123.

55. UNCTAD "The Role of Transnational Enterprise in Latin American Economic Integration" in P. Robson ed., *Transnational Corporations and Regional Economic Integration*, Vol. 9, UNLTNC (London & New York: Routledge, 1993).

56. UNCTAD Div. On TNCs and Investment, *Transnational Corporations and World Development*, (New York: Routledge, 1996).

57. UNTCMD "The Effects of Integration on the Activities of Transnational Corporations in the European Community: Theory and Empirical Tests", in P. Robson ed., *Transnational Corporations and Regional Economic Integration* Vol. 9, UNLTNC (London: Routledge, 1993).

58. Vaitsos C, "The Role of Transnational Enterprises in Latin American Economic Integration Efforts: Who Integrates and with Whom?" (UNCTAD, 1982).

59. Vasciannie S.C, "The Namibian Foreign Investments Act: Balancing Interests in the New Concessionary Era" (1992) 7 ICSID Rev. 114.

60. Viner J, *The Customs Union Issue*, (New York: Carnegie Endowment for Intl Peace, 1950).

61. Wallace C.D, *Legal Control of the Multinational Enterprise* (The Hague: Martinus Nijhoff, 1982).

62. Welch C.L, "The Military Factor in West Africa: Leadership and Regional Development" in S.E. Okolo & S. Wright eds., *West African Regional Cooperation and Development* (Boulder: Westview Press, 1990).

63. Winter R.K, "State Law, Shareholder Protection and the Theory of the Corporation" (1977) 6 J. of Legal Studies 251.

64. Wooldridge F, *Company Law in the United Kingdom and the European Community: Its Harmonization and Unification* (London: Athlone Press, 1991).