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Economic and Development Policy-Making in Nigeria

Elimma C Ezeani*

Abstract

The difficulties in effective engagement with the global trade environment, especially given the rules-based system of world trade applicable to member states of the World Trade Organisation, are a constant subject for academic and political discourse, particularly when developing countries are involved. One consideration is however often overlooked: the internal constraints which must be faced in these countries along with their added obligations to comply with modern liberalization processes. This article studies these constraints by identifying the challenges facing one of sub-Saharan Africa's largest economies in constructing a stable legal framework for trade and development, which meets domestic needs and complies with the demands of the global market environment.

INTRODUCTION

Long ruled under successive military governments,[1] Nigeria's comparatively low level of socio-economic advancement has determined its long status as a "developing country", notwithstanding its vast mineral resources, arable land and human capital. A member of the old General Agreement on Tariffs and Trade (GATT), ten years into its membership of the World Trade Organisation (WTO) Nigeria's manufacturing and other production processes were still beset by "infrastructural inadequacies, high cost of finance, adverse effect of an upsurge of imports and consequently low capital utilisation".[2]

Agriculture still employs the highest percentage of labour (mostly unskilled) in Nigeria, largely located in rural areas. The largest contribution to Nigeria's economy is from natural resources. As at 2006, crude oil specifically remained

* PhD (Kings College, London), LLM (Robert Gordon University, Aberdeen), BL (Nigeria), LLB (Ife). Lecturer in law, Robert Gordon University, Aberdeen. Email: e.ezeani@rgu.ac.uk. The author remains indebted to the anonymous reviewers of this article for their invaluable comments.

1 After gaining independence from the British colonial government in 1960, Nigeria saw a brief period of civilian rule from 1960 until 1966 when the military first intervened in Nigerian politics. Still under military rule, the bloody Nigeria-Biafra civil war took place from 1967 to 1970. There were military interventions, mostly by means of coups d'état, on 15 July 1966, 29 July 1966, 29 July 1975 and 13 February 1976. The military eventually handed power to a civilian led government in 1979. In 1983, the military returned again and remained in power until 1999, under successive military coups.

2 See WTO "Trade policy review: Report by Nigeria": WT/TPR/G/147, 13 April 2005 at 6.

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Nigeria's largest export commodity, contributing about 45 per cent to the country's GDP, 95 per cent of her export earnings and 70 per cent of total government revenue. However the sector employed only about 5 per cent of the country's labour force.[3] Gas is fast becoming another mining sub-sector contributor. The creation of Nigeria Liquefied Natural Gas Limited in May 1989 was a step forward in efforts to diversify the mining sector.[4]

This article offers a background to economic and development policy-making in Nigeria. It evaluates aspects of Nigerian legislation in comparison with WTO rules and considers regulations affecting investment and private sector participation. It highlights in particular the problems with the 2009 central bank interventionist reforms, as well as considering the capacity for local firms to engage in trade in services. The article also considers domestic efforts at improved market access within the African region. The conclusion is that there needs to be a limit on continuous (and inconsistent) executive attempts at policy-making without a determined focus as to what polices are required and how those policies can be made effective.

INTERNAL CONSTRAINTS AND EXTERNAL RULES

The development plans after the country's independence from British colonial rule in 1960 drew a relationship between the country's activities in international trade and domestic socio-economic advancement; the early nationalists saw the successes of both areas of development in improved industrialization and self sufficiency. It was however to prove more difficult to adopt a steady pace towards development:

> "Emphasis was placed on accelerated development of the economy through expansion in the nation's industrial base. The idea was for the country to be able to at least produce some of her consumables locally and in effect reduce dependence on external sources for the supply of such items. To be able to finance the imports necessary for the prosecution of the industrialisation programme, exports of cash crops which were then the main source of foreign exchange had to be enhanced. Thus, farmers were encouraged to expand

3 See WTO "Trade policy review Nigeria: Report by the secretariat": WT/TPR/S/147, 13 April 2005 at ix. The most recent WTO trade policy review of Nigeria reiterated these statistics noting that, while they employ few people, oil and gas make up over 90% of exports and 80% of government revenue. The review also found that "although the petroleum sector dominates the economy, agriculture is more important to most Nigerians as it represents over half of employment". See WT/TPR/S/247/Rev.1, 1 August 2011 at paras 1 and 9.

4 The company's shareholders include the national petroleum company and foreign multinationals also engaged in the crude oil sub-sector: Nigeria National Petroleum Corporation, 49%; Shell Gas BV, 25.6%; Total LNG Nigeria, 15%; and ENI International (NA) NV, 10.4%. Other gas projects by Chevron Nigeria Ltd and Exxon Mobil are expected to increase the contribution of the gas sub-sector in the future.

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> their production of cash crops with guaranteed external markets by the Marketing Boards. The export basket consisted of cocoa, palm produce, rubber, groundnut, ginger, and some solid minerals, coal and tin.
>
> The insatiable urge to quicken the pace of development gave rise to heightened demand for imports, which in turn exerted pressures on the balance of payments. Consequently, the trade policies had to be restrictive in order to moderate the demand pressures. Exchange control measures were then introduced to adjust the demand for foreign exchange to the available supply so as to maximise the use of reserves by ensuring that essential imports were accorded priority over other imports in the use of foreign exchange resources.
>
> Also, in order to give effect to the import substitution industrialisation policy, trade barriers in the form of imports licensing was [sic] put in place to complement imports tariffs in the control of import [sic], as well as protect domestic industries that were set up to produce import substitutes.
>
> The customs tariff structure was deliberately discriminatory, biased in favour of capital goods and raw materials. Items considered as luxury goods were either put on [sic] import prohibition list or had very high import tariffs placed on them. In terms of directional flow of trade, Nigeria's imports and exports were concentrated in the Western Hemisphere, although not as a deliberate policy, but due to historical inheritance."[5]

The outbreak of the civil war, the subsequent reliance on the oil sector as a quick foreign earner after the war, and the unstable political environment with another return to military rule in the 1980s meant that these and other development policies did not benefit from continuity.[6] The frequent interruptions to Nigeria's political structure, and military governance, meant that the country's trade policies and development-related regulations were subjected to sporadic changes. Between 1960 and 1977, the country had gone through four development plans.[7] The fourth national development plan (in 1977), which was the foundation for subsequent economic programmes, was regulated by the Nigerian Enterprises Promotion Act 1977, an amendment of an earlier 1972 decree. This regulation was subsequently amended again in 1989.[8] Referred to as the Indigenization Decree, the act restricted foreign participation in the Nigerian economy. It was not essentially

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5 See FCO Analogbei "Trade reforms and productivity in Nigeria" (Central Bank of Nigeria paper, 31 Dec 2000) at 160–61, available at: <http://www.cenbank.org/OUT/PUBLICATIONS/OCCASIONALPAPERS/RD/2000/ABE-00-9.PDF> (last accessed 7 December 2011).

6 See id at 161. By the mid 1970s, increases in international crude oil earnings to the country brought euphoria, but with damning consequences. The previous trade restrictions, geared towards improving local industries, boosting the agricultural sector and encouraging the growth of infant industries, were relaxed.

7 See generally Analogbei "Trade reforms and productivity in Nigeria", above at note 5.

8 The Nigerian Enterprises Promotion Act is no longer in force. However its essential provisions have remained, but with an allowance for more foreign direct investment, under

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intended to promote the creation of industries or to liberalize the Nigerian market. The intent of the act was effectively to protect Nigeria's economy from foreign acquisition by reserving certain enterprises for Nigerian citizens.[9] Remarkably, this restrictive regulation did not help in improving the productive base of the country and did not enhance the industrialization process as it was undoubtedly intended to:

> "The indigenisation scheme did not achieve the desired objective, at least not in the area of industrialisation. Most of the enterprises taken over by Nigerians were mainly trading outfits whose major occupation was the importation and marketing of foreign goods and services. Those of the enterprises that lay claim to being industrial enterprises depended almost exclusively on imported inputs. The Nigerians who purchased those trading outfits were contented with the status quo and did little or nothing by way of establishing new industries. The government was perhaps a greater culprit in this regards [sic] as most government owned enterprises or those in which government had a substantial stake came under this category."[10]

As such, whereas there was commercial activity in the form of the buying and selling of goods, mostly imports,[11] there was no major establishment of industries or production facilities for non-oil exports with a view to integration with the global market.

THE OIL BOOM

Ironically, in the post-1970s period, much of the blame for the lack of continuity in development policy is placed on the hitherto unforeseen increases in international crude oil prices which brought significant financial results to the Nigerian economy. According to the Central Bank of Nigeria (CBN):

> "The sudden and unexpected increase in the prices of crude petroleum in 1973 coupled with the country's low absorptive capacity, and the existence of various productive bottlenecks in the economy had by 1974 led to a situation whereby the country was faced with [sic] surfeit of funds for which it had no

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contd
the current Nigerian Investment Promotion Decree No 16 and Foreign Exchange (Monitoring and Miscellaneous Provisions) Decree No 17, both of 1995.

9 See the act in vol XVIII cap 303 Laws of the Federation of Nigeria (LFN) 1990. The areas reserved exclusively for Nigerians included bread and cake making, hairdressing, garment manufacture, travel agencies, departmental stores and supermarkets.

10 See AS Pepple "The new business investments regulations: Implication and the dilemmas of compliance" in IA Ayua (ed) *Structural Adjustment and Nigerian Development; A Third World Angle; Nigerian Current Legal Problems* vols 4 and 5, 1996–98 (2000, NIALS) 159 at 165–66.

11 Highlighting the observations by Dr Okigbo noted below at note 15.

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> immediate investment outlet internally … In the circumstance, it was thought that the exchange control regulations needed further liberalisation."[12]

The reliance on the huge wealth generated by the oil sector particularly in the 1970s and early 1980s proved to be the Achilles heel in the country's economic progress. Trade in crude oil was deemed sufficient to maintain the country's balance of payments to the neglect of the previous emphasis on indigenous manufacturing and production. Foreign multinationals were engaged in exploration and drilling of natural resources and successive governments were intent on preserving the concessionary contracts with foreign multinationals and the earnings, to the detriment of industrial advances in other areas. Despite numerous government-led initiatives, the Delta region area, where the oil exploration activities are concentrated, still scarcely exhibits any real evidence of the profits.[13]

A descriptive account of Nigeria's trade and economic activities in the "oil-boom era" portrays the internal challenges and the adverse impact on the socio-economic structures of the oil dependent economy:

> "In 1971, the share of agriculture to GDP stood at 48.23 per cent. By 1977, it had declined to almost 21 per cent. Agricultural exports, as a percentage of total exports, which was 20.7 per cent in 1971, reduced to 5.71 per cent in 1977. The discovery of oil in commercial quantity in the mid-1950s, coupled with the oil-boom resulting from the Arab oil embargo on the USA in 1973, affected the agricultural sector adversely. The economy became heavily dependent on oil. While the boom afforded the government much needed revenue, it also created serious structural problems in the economy.
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> The agricultural sector was most hit. Rural urban migration increased, as people attempted to reap or benefit from the windfall from oil. Production of agricultural commodities for export declined. Food production became a problem. Starting from 1974, the economy became a net importer of basic foods. Huge foreign exchange earnings were utilised in importing food. Nonetheless, prices of foodstuff remained high. Policies like the government's Operation Feed the Nation (OFN) programme could not reverse the deteriorating food situation. Government was involved in direct food production, provided subsidies to peasant farmers and created more commodity boards for various agricultural and food products.
>
> Policy makers advised the government not only to embark on ownership and control of the commanding heights of the economy like the petroleum

12 CBN *Twenty Years of Banking in Nigeria* (1979, CBN), quoted in Analogbei "Trade reforms and productivity in Nigeria", above at note 5 at 162.

13 Compare with K Ebeku "Niger Delta oil, development of the Niger Delta and the new development initiative: Some reflections from a socio-legal perspective" (2008) 43/4 *Journal of Asian and African Studies* 399. The problems of governance and the conflicts in the region are examined in NS Akpan "Governance and communal conflicts in a post-democratic Nigeria: A case of the oil-producing Niger Delta region" (2010) 2/3 *Journal of African Studies and Development* 65.

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> and mining sectors, but also to be directly involved in banking, insurance, clearing and forwarding, among others. With the promulgation of the Nigerian Enterprises Promotion Decree in 1972, Government became directly involved in virtually all aspects of the economy, especially as foreign exchange was thought to be no longer a constraint to development.
>
> This era had its problems. Primitive accumulation intensified. Corruption, theft, real estate speculation, outright looting of government treasury and other fraudulent practices prevailed. The State, on its own, intensified the creation of a business class that depended solely on government contracts rather than on production. The gap between the rich and the poor widened considerably. Ad-hoc and ill-conceived government policies exacerbated the problem. For example, the 100 per cent salary increase of 1975, tagged the Udoji Salary Award, was disastrous for the economy as prices increased by more than 100 per cent. The payment of a year's arrears of the increase in salary, further worsened the situation.
>
> The exchange rate regime encouraged imports. The economy was heavily dependent on imports; almost everything was imported, from toothpicks to toothpaste dispensers. There was no serious attempt to invest the windfall from oil in viable projects. Except for the huge expenditures on education and construction of dual carriage highways in some parts of the country, Nigeria would have had nothing to show from the oil boom era."[14]

Revisiting the causes of Nigeria's inability to make significant use of her reserves, leading to chronic balance of payment difficulties by the early 1980s, one of Nigeria's foremost economists Dr Pius Okigbo reasoned that the problem was due to the over-valuation of the naira, particularly during the oil boom period. He observed that:

> "The naira was obviously over-valued; it had been for twenty years, a managed currency whose value in relation to the dollar was maintained by fiat … Because the over valuation made Nigerian made goods relatively more expensive than equivalent imports, commercial policy was addressed to closing the Nigerian market officially to some of those imports through bans, prohibitions, high tariffs, etc … Because our local manufacturers procured their equipment and spares and intermediate inputs relatively cheaply from abroad in consequence of the external exchange rate of the naira, they could not be persuaded either by their long term interests or by the prodding of the government to turn to local sources for their raw materials and intermediate goods. Our engineers and nascent engineering industries saw no future in the local fabrication of equipment and machinery. These tendencies fastened on our

14 "Oil boom era (1971–77)" *OnlineNigeria*, available at: <http://www.onlinenigeria.com/economics/?blurb=490> (last accessed 30 November 2011). The period referred to is 1971–81.

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economy further dependence on imports and therefore, a growing deficit in the balance of payments."[15]

With the slump in oil prices in the mid 1980s, dependence on oil was clearly not in the country's long term interests. Accepting the tight lending conditions of the International Monetary Fund (IMF), the military government embarked in 1986 on a stringent programme of market reform: the Structural Adjustment Programme.

THE STRUCTURAL ADJUSTMENT PROGRAMME – AN OVERVIEW

Largely blamed for the downward spiral of the country's economy and the creation of the harsh living standards which sustained largely into the new millennium, the Structural Adjustment Programme (SAP) was promoted with the intention to:

- restructure and diversify the productive base of the economy in order to reduce dependence on the oil sector and on imports;
- achieve fiscal and balance of payments viability;
- lay the basis for sustainable non-inflationary or minimal inflationary growth and;
- lessen the dominance of unproductive investments in the public sector, improve the sector's efficiency and intensify the growth potential of the private sector.[16]

The programme was to achieve these objectives by:

- the adoption of a realistic exchange rate policy coupled with the liberalization of the external trade and payments system;
- monetary and credit restraint;
- the adoption of appropriate pricing policies in all sectors, with greater reliance on market forces and a reduction in complex administrative controls;
- further rationalization and restructuring of public expenditure and customs tariffs;
- privatization and commercialization of public sector enterprises; and
- debt rescheduling and debt conversion.[17]

SAP altered the indigenization attempts with its policies of a liberalized market, a focus on export promotion, and currency devaluation. While the programme, embarked upon in 1986, suggested that the country could integrate into the global economy by adopting the stated policies, the effect on the overall development dimension either was not considered relevant

15 See P Okigbo "SAP and financial intermediaries (1)" (31 August 1987) *The Guardian* (Nigeria) at 7.

16 B Ogunleye "Why SAP was adopted, by Sanusi" (5 September 2001) *The Guardian* (Nigeria) at 27.

17 Ibid.

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or was deliberately ignored.[18] Whereas government regulation and direct participation in economic activities had been the norm, the introduction of a badly structured (or simply unstructured) market-regulated economy meant that government regulation, fundamental to the orderly implementation of market based reforms and development programmes, became an arbitrary exercise under the frantic efforts to liberalize the Nigerian market. Moreover, it meant that the lack of capacity to produce competitive finished goods for the global market, as opposed to offering very basic raw materials characteristic of most developing economies, was not addressed. A writer notes that: "the efficacy of SAP to address Nigeria's development problems are restricted by factors which are external to the state, and are common to all Third World states. These issues include the peripheral nature of the state to the international economy."[19] This "peripheral nature" nature of the Nigerian state to the international economy is described in the following manner:

> "The core issue in this relationship pertains to the peripheral status of Nigeria as an underdeveloped state vis à vis the developed capitalist states which are the owners of the capital, technology, etc which are needed for Nigeria's development … [I]f it is accepted that the capitalist system of development requires raw material input which must be supplied for the system to continue, then it also has to be acknowledged that some states must provide these materials."[20]

Elsewhere, the author comments: "the underdeveloped states provide the raw / primary materials for producing finished goods which are subsequently exported to the developing state".[21]

The free trade principles of the WTO were nevertheless of importance to the country's external relations, particularly with her trading partners. In order to ensure that the country fulfilled her obligations within the domestic environment, certain domestic rules and policies had to be put in place. However, there was still the beneficial constraint of free-flowing oil wealth.

SAP in all its various stages of implementation was severely criticized in the national press.[22] Apart from indications that the data which formed the basis of government and IMF support for the programme were not largely

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18 SAP was ostensibly terminated in 1993 but its hardships endured beyond the exit of its initiating government, the regime of the former military leader, President Ibrahim Babangida.

19 See OA Odiase Alegimenlen "Structural adjustment and Nigerian development; A third world angle" in Ayua (ed) *Structural Adjustment and Nigerian Development*, above at note 10, 28 at 45.

20 Id at 38–9.

21 Id at 36.

22 See for example N Achime "A case against SAP" (15 March 1989) *National Concord* (Nigeria) at 3; G Sogolo "The blessings of SAP" (1 May 1989) *The Guardian* (Nigeria) at 9; B Ogundele "Whatever happened to SAP?" (25 October 1991) *The Guardian* (Nigeria) at 13.

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consistent with the facts on the ground,[23] the causal factor to the lack of economic and developmental progress under SAP had been established early on:

> "The basic philosophy behind SAP is that the economy was over regulated and that the road to salvation lies in relaxing the hold of the public authorities on the economy … There is no doubt that the administration of import licences, the process of export promotion, the management of the money supply left much to be desired … Under the SAP regime, these are made more responsive to the forces of the market place.
>
> However, the market is not as convex as the protagonists would have us believe, nor are the results as smooth and trouble-free as we would expect from a perfectly competitive market system. Where we are is in the limbo where the elimination of export licences does not do away with foreign exchange scarcity, where money supply is constrained both by the constriction of the monetary bases and by a deliberate squeeze of liquidity, and where promotion of exports of non-oil commodities is constrained by structural inelasticity, administrative bottle necks and lack of domestic credit."[24]

SAP did not have a significant impact in lowering inflation, improving the debt situation, improving living standards or in establishing viable local industries.[25] The domestic environment had to contend with these factors which appeared more urgent than global market integration. However, GATT had evolved into a rules-based system at the WTO with a single undertaking requirement for all of its members.

NIGERIA AND THE WTO

Nigeria ratified the Marrakesh Agreement Establishing the WTO (WTO Agreement) in December 1994, becoming a founding member of the organization when it came into operation in January 1995.[26] WTO membership required a different obligation from that which had subsisted in the relationship between previous governments and the adopted market reforms. The practice has been that:

> "The Nigerian government and the donor agencies have largely played a cat-and-mouse game, with the government signing on to the reforms while

23 See P Mosley "Policy-making without facts: A note on the assessment of structural adjustment policies in Nigeria 1985–1990" (1992) 91 *Journal of African Affairs* 227.

24 Okigbo "SAP and financial intermediaries (1)", above at note 15.

25 By 1995 Nigeria owed US$ 35.6m; as at 1985 it had been US$ 18.9m. See Nigeria Debt Management Office reports at: <http://www.dmo.gov.ng/oci/edebtstock/docs/External%20Debt%20Outstanding%20(1983-2004).pdf> (last accessed 30 November 2011).

26 See "Nigeria: June 1998" (WTO press release, 16 June 1998), available at: <http://www.wto.org/english/tratop_e/tpr_e/tp75_e.htm> (last accessed 30 November 2011). The WTO Agreement was signed on 15 April 1994.

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> failing to implement the agreed policies. In some cases, one could discern the actual policies by examining the implementation record. For example, while the tariff regime is (on paper) more liberal than before, the frequency of the reversals (sometimes reversed a few times in one year) render [sic] the published tariffs inoperative. Even with the liberalised foreign exchange market, the market still operates a dual regime thus providing significant rents for those with access to the foreign exchange at the official rate."[27]

WTO membership however required visible participation: the ability to make available goods which could be traded in the global market. It also demanded compliance with trade liberalization principles: the removal of trade barriers and an open trading system. The WTO undertaking had little room for flexibility or arbitrariness in the implementation of the organization's many agreements. In 2004, realization of this demand for Nigeria's membership would prompt the new civilian government to set up a committee to review the WTO agreements. It was expected that: "the Committee will look into the WTO Agreement with a view of reviewing and ensuring that Nigerian industries are protected, and that the national economy is encouraged to grow and expand and that everything will be done within the approved regulations to ensure that the dumping of goods into the Nigerian economy is prohibited".[28]

This comment offers an insight into the general perceptions of the implications for the obligations Nigeria has incurred as a member of the WTO. Three provisions of the WTO Agreement effectively dissuade the possibility of an accession country "reviewing" the WTO Agreement as suggested.

First, article XII of the WTO Agreement presumes capacity to enter into the WTO Agreement: "[a]ny State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO." Nigeria may rebut this presumption of capacity to accede on the basis that the country's accession to the WTO was a politically motivated act by the unpopular military government at the time. This does not however detract from the fact that the country entered into an agreement with other countries under the WTO.

Secondly, a suggestion that the WTO Agreement may be "reviewed" is not a proper interpretation of the WTO obligations. Article II(2) of the WTO Agreement provides that: "[t]he agreements and associated legal instruments

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27 See NI Ikpeze, CC Soludo and NN Elekwa "Nigeria: The political economy of the policy process, policy choice and implementation" in C Soludo, O Ogbu and H-J Chang (eds) *The Politics of Trade and Industrial Policy in Africa: Forced Consensus?* (2004, Africa World Press / IDRC), available at: <http://web.idrc.ca/en/ev-71263-201-1-DO_TOPIC.html> (last accessed 7 December 2011).

28 See "Reviewing the WTO treaty" (editorial) (28 October 2004) *This Day* (Nigeria) at 11, quoting the then information minister, Prof Jerry Gana.

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included in Annexes 1, 2 and 3 (hereinafter referred to as 'Multilateral Trade Agreements') are integral parts of this Agreement, binding on all Members." By these provisions, the WTO operates a "single undertaking" requirement. This means that a member state has undertaken the binding nature of obligations arising under the various multilateral agreements, negating any attempt at a unilateral review under the rules.

Thirdly, the WTO Agreement expects a practical implementation of the agreements in the legal realm of member states. Accordingly it provides: "[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."[29]

Furthermore, article XIV(2) states: "[a] Member which accepts this Agreement after its entry into force shall implement those concessions and obligations in the Multilateral Trade Agreements that are to be implemented over a period of time starting with the entry into force of this Agreement as if it had accepted this Agreement on the date of its entry into force."

The above notwithstanding, there were still suspicions as to the effect of the WTO Agreements:

> "It is the view of many in the developing world that the WTO Agreement operates effectively to prise open markets for the benefits of trans-national corporations at the expense of national economics, considering that WTO rules insist that international corporations be treated equally with local companies … [s]tudents of globalisation are beginning to point to newly emerging features which make prompt action necessary at this time, if developing nations are to stem their further marginalisation occasioned by the globalisation phenomenon."[30]

The view that Nigeria and the developing world are being "marginalized" is however not generally upheld, as the statement above may suggest. The observation above can be contrasted with this comment by a Nigerian economist:

> "If reports on the debate in the House of Representatives as to whether Nigeria should continue her membership or not is [sic] to be reckoned with, it clearly shows that the debaters have little understanding of the functions of the multilateral trading system … if most members … are of the view that WTO is the cause of poor industrial performance in the country, then the real issue is not being addressed. No one should be left in doubt that the bane of industrial performance in the country is the accumulation of bad domestic policies which made the cost of doing business in the country perhaps the highest

29 WTO Agreement, art XVI(4).

30 See C Nwuche (deputy speaker, Nigeria House of Representatives) "Nigeria and the World Trade Organisation" (speech) (6 March 2002) *The Guardian* (Nigeria) at 70.

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> in the world thereby reducing the country's competitiveness in the world market."[31]

Nigerian laws and WTO agreements

It is true that the WTO rules are not directly applicable in Nigeria since they have not been formally enacted into Nigerian law by Nigeria's National Assembly, pursuant to section 12 of the 1999 Constitution of the Federal Republic of Nigeria.[32] However, a review of relevant Nigerian legislation shows the awareness of international obligations in the context of multilateral trade, particularly in the areas of trade liberalization and decreased government participation (deregulation). It must be pointed out that there is no reference in these provisions that they were made pursuant to the WTO Agreement provision that member states should bring their laws, regulations and administrative procedures into line with their WTO commitments.[33] The relevant Nigerian legislation covers:

Protection of intellectual property

Intellectual property (IP) is protected in Nigeria under the Copyright Act, as amended in 1992 and 1999,[34] the Trade Marks Act[35] and the Patents and Designs Act.[36] The Copyright Act 1999, including a new section 4f, extends IP protection to WTO members, as envisioned under the national treatment provisions of article 1(3) of the WTO Trade Related Aspects of Intellectual Property Agreement (TRIPS):[37]

> "Members shall accord the treatment provided for in this Agreement to the nationals of other Members.[38] In respect of the relevant intellectual property right, the nationals of other Members shall be understood as those natural

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31 See A Adeyemo "Should Nigeria pull out of WTO?" (8 October 2005) *Nigerian Tribune* at 12.

32 See the decision of the Nigerian Supreme Court in *Abacha v Fawehinmi* (2000) 6 NWLR pt 660 at 288 confirming that "an international treaty entered into by the government of Nigeria does not become binding until enacted into law by the National Assembly".

33 WTO Agreement, art XVI(4). See generally P Usoro's commentary on the paper titled "The legal status of WTO and the new maritime legal regime" (delivered at the maritime seminar for judges organized by the Nigerian Shippers' Council / National Judicial Commission, Abuja, Nigeria, June 2008), available at: <http://www.paulusoro.com /publications/ Commentary%20on % 20 The%20 Legal%20 Status%20 of%20WTO%20etc% 20by%20Dr%20Omo-Eboh(%20v1).doc> (last accessed 30 November 2011).

34 Vol V cap 68 LFN 1990; Decree No 48 1992; Decree No 42 1999.

35 Cap 436 LFN 1990.

36 Vol XIX, cap 344 LFN 1990.

37 TRIPS is annex 1C of the WTO Agreement.

38 Note the note to art 1(3) of TRIPS: "When 'nationals' are referred to in this Agreement, they shall be deemed, in the case of a separate customs territory Member of the WTO, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory."

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> or legal persons that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits, were all Members of the WTO members of those conventions…"

Section 4(A)(1) of the Copyright Act extends copyright protection in Nigeria to every work at least one of the authors of which is a citizen or body corporate of a country which is a party to any international agreement to which Nigeria is a party. Under section 4(A)(1)(b), protection is also extended to any work first published in any country which is also a party to any international agreement to which Nigeria is a party. By extension, the most favoured nation (MFN) provisions of article 4 of TRIPS are also protected with this extension of rights to cover IP of non-Nigerian origin.

Protection of cultural rights which developing countries fear may be exploited arises under section 29(A) of the Copyright Act 1999. This section provides for criminal liability for the infringement of any "expression of folklore". There is no further indication of the scope this provision is to cover; perhaps the term "expression of folklore" is expected to cover music, film, dance and literature.

Collectively, Nigerian laws on IP rights do not provide for protection of indigenous innovation in areas of health and medicine, foods and agricultural processes, or any other research and development processes. This differs from the TRIPS provisions, which extend to copyrights, patents, industrial design, computer and computer data, wine and spirits, lay-out designs of integrated circuits, and the control of anti-competitive practices in contractual licences. For example, under section 4(b) of the Nigerian Patents and Designs Act, patents cannot be obtained for "plant or animal varieties, or essentially biological processes for the production of plants or animals other than microbiological processes and their products". Section 5 of the act also states that: "[p]rinciples and discoveries of a scientific nature are not inventions for the purposes of this Act."

These provisions contrast with section 27.3(b) of TRIPS, which provides: "[m]embers shall provide for the protection of plant varieties either by patents or by an effective *sui generis* [unique] system or by any combination thereof." In effect, research and scientific discovery into plant varieties in Nigeria do not have first protection under Nigerian IP laws. This makes it possible for foreign research bodies, which have the requisite advanced technologies and can undertake scientific experiments, to claim first protection over a plant variety.[39]

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39 In the India-US basmati rice dispute, India challenged the US government grant of a patent to a US company (RiceTec Inc) which allowed the company to label its cross-breed product of basmati and American long grain rice "basmati", a name hitherto used to refer to a variety of the rice plant grown in India and Pakistan. The US Patent Office

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The principal conflict between domestic laws and TRIPS lies in the fact that the latter seeks for MFN principles to be applied in Nigeria which, in its current state of under development, lacks the extensive range of IP property that TRIPS covers. Furthermore, easy acquisition of foreign technological processes which aid industrial development is hindered by the range of rights granted.[40] There is also the fact of compulsory jurisdiction under the WTO's dispute settlement body (DSB) for the protection of IP rights, which further limits the powers of domestic laws over IP protection.

Dumping and subsidies

The Nigerian Customs Duties (Dumped and Subsidised Goods) Act[41] is established to "authorise the imposition of customs duties where goods have been dumped or subsidised, and to make provision for matters connected therewith".[42] Section 3 of the act treats dumping and adverse subsidization on imported goods together. The president is conferred "in the national interest" with the power to "impose and vary duties of customs in such manner as he thinks necessary to meet the dumping or the giving of the subsidy".[43] The power to impose duties is subject to the provisions of GATT 1947[44] and is provided for under section 4 of the act.

Section 2(a) of the act defines imported goods as dumped if the export price of the goods from an originating or export country is less than the "fair market price" of the goods in that (originating or export) country. Section 3 defines a subsidy as the giving "directly or indirectly" of any "bounty or subsidy" whether by grant, loan, tax relief or in any way including special subsidies on transport of a particular product. Subsidies also refer to any favourable treatment which assists a reduction in the prices for exports of a product.

With respect to anti-dumping, the WTO Anti-dumping Agreement[45] interpretation of what constitutes dumping is more detailed. Article 2 of this agreement determines a situation of dumping as: "[a] product is to be considered as being dumped, ie introduced into the commerce of another country at *less than its normal value*, if the export price of the product exported

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eventually upheld India's assertions that the "basmati" rice had been in the public domain as it has always been cultivated in India. See the application history of patent No. 5663484, available at: <http://www.google.com/patents?id=eiMnAAAAEBAJ&printsec=abstract&zoom=4&source=gbs_overview_r&cad=0#v=onepage&q&f=false> (last accessed 7 December 2011).

40 The National Office for Technology Acquisition and Promotion oversees the registration and transfer of foreign technology in Nigeria, including responsibility for ensuring that foreign technology imported into the country is not overpriced or obsolete. See generally the National Office of Industrial Property Act, vol XVII cap 268 LFN 1990.

41 Vol Vc cap 87 LFN 1990.

42 Id, preamble.

43 Id, sec 3.

44 The act has not been amended to reflect Nigeria's membership of the new WTO.

45 The WTO Anti-dumping Agreement is under annex 1A of the WTO Agreement.

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from one country to another is *less than the comparable price*, in the ordinary course of trade, *for the like product when destined for consumption in the exporting country*." (Emphasis added)

Under the WTO rules, the goods must be introduced at less that their "normal" value, not less than the "fair market price" as provided for in the Nigerian act; furthermore the goods must be compared to "like products".[46] Where there are no like products, the margin of dumping is determined by: "comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits".[47]

In the case of subsidies, the relevant WTO agreement is again detailed as to what constitutes a subsidy. The WTO Subsidies and Countervailing Measures Agreement (SCM Agreement)[48] provides that a subsidy exists when a benefit is conferred where: government practice involves a direct transfer of funds including grants, loans, equity infusion and loan guarantees; government revenue is foregone or not collected including tax credits; a government provides goods or services other than general infrastructure or purchases goods; or a government entrusts another body to do any of these things.[49]

Article 3(1) of the SCM Agreement limits the prohibition of subsidies (excluding the provisions in the WTO Agreement on Agriculture[50] to those contingent on "export performance" or those contingent "upon the use of domestic over imported goods". This is in contrast to the Nigerian provision which includes the prohibition of subsidies on the "production or export of goods".[51]

With respect to both dumping and subsidies, the real test is in the rigorous determination of the two measures under the WTO rules.[52] There is the expectation that "investigating authorities" will carry out any allegations of dumping which are raised by the manufacturers of domestic "like products" who

46 Sec 9 of the Nigerian act refers to the price at which the goods are sold in the ordinary course of trade, subject to necessary adjustments including conditions and terms of sale, taxation etc. In the view of the author, there is a difference between the two provisions: the "value" of goods may not necessarily be reflected in the price of the goods. For example, goods may be valued at £50, but sold at a cheaper price, say, "£50 for two" in the course of a promotion. A very common example is this: a bottle of US marketed washing liquid which usually contains 1 litre of the detergent is normally sold at $2; during a promotion a bottle has an extra litre but is to be sold at the price of one litre, a fact clearly stated on the bottle. Invariably, the goods are offered for sale in Nigeria at their "value" which is interpreted as the market equivalent of more than $4 per bottle.

47 WTO Anti-dumping Agreement, art 2(2).

48 The SCM Agreement is under annex 1A of the WTO Agreement.

49 See SCM Agreement, art 1(2).

50 The Agreement on Agriculture is under annex 1A of the WTO Agreement.

51 See Customs Duties (Dumped and Subsidised Goods) Act, sec 3.

52 See WTO Anti-dumping Agreement, arts 5, 6, 9, 11, annexes I and II; and SCM Agreement, arts 11–17 and 19.

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feel the imports are threatening.[53] Such an investigating authority has not been provided for under Nigerian law.

Articles 23 and 13 of the WTO SCM and Anti-dumping Agreements respectively, provide that member states whose national legislation contains provisions on countervailing duty measures "shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review of administrative actions relating to final determinations and reviews". The Nigerian law has not been amended to reflect this provision.

Preferential Treatment

The special and differential treatment provisions in the different WTO agreements apply to Nigeria as well, in her WTO status as a developing country.

Under the Trade (EEC Preferences Under the Lomé Convention) Act,[54] Nigerian legislation incorporates the WTO notified trade co-operation between the African-Caribbean-Pacific and the European Union. By virtue of section 1 of this act, the Nigerian director of the Department of Customs and Excise is empowered as the certifying authority for goods exported from Nigeria under the agreement.

There is also the Trade (Generalised System of Preferences) Act[55] which is established in line with the WTO preferential treatment provisions under the generalised system of preferences (GSP) scheme. The certifying authority for goods exported under the GSP scheme is the Nigerian Department of Customs and Excise.[56]

Pre-shipment inspection

Nigerian legislation provides for two forms of pre-shipment inspection (PSI), in the Pre-shipment of Exports Decree No 10 and the Pre-Shipment of Imports Decree No 11, both of 1996.

Under the "exports" legislation, no goods except those listed[57] shall be exported from Nigeria unless an inspecting agent, appointed by the head of state under section 12 of the decree, has issued a clean certificate of inspection to the oversees buyer of the goods.[58] The Central Bank of Nigeria is responsible for the general administration of the provisions of the decree.[59]

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53 See WTO Anti-dumping Agreement, art 5(1).

54 Vol XXIII cap 434 LFN 1990.

55 Vol XXIII cap 435 LFN 1990.

56 Id, sec 1.

57 Exempt are objects of art, explosives and pyrotechnic products, arms, ammunition, weapons, implements of war, animals, household and non-commercial products. See the Nigerian export prohibitions list in the Customs, Excise Tariff etc (Consolidation) Decree No 4 of 1995. The government however also periodically lists prohibited export or import items; these lists are available at: <http://www.customs.gov.ng/ProhibitionList/import.php> for imports and <http://www.customs.gov.ng/ProhibitionList/export.php> for exports (each last accessed 7 December 2011).

58 See Pre-shipment of Exports Decree, sec 1.

59 See id, sec 13.

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The "imports" legislation contains similar provisions[60] but does not mandate PSI for "explosives and pyrotechnic products, arms and ammunition, weapons and implements of war; supplies to diplomatic missions and international organisations for their own needs, *such other goods as may be prescribed by the Federal Government of Nigeria from time to time*."[61] (Emphasis added)

Although the legislation (section 7 on imports and section 18 on exports) on PSI each provides that failure to comply with the national pre-shipment laws will amount to an offence, there is no provision for an appeals procedure on pre-shipment grievances as directed by article 2.21 of the WTO Pre-Shipment Agreement (WTO PSI Agreement).[62] This may be the case if it is understood that the Nigerian laws govern Nigerian citizens alone. However, this interpretation may not suffice. Both Nigerian PSI decrees refer to "oversees" buyers and sellers: buyers and sellers may be governments. It is therefore not clear whether the Nigerian situation perceives a PSI "offence" as covered by the Nigerian provisions alone. Furthermore, the independent review procedures provided for under article 4 of the WTO PSI Agreement are not reflected in both decrees. Neither is there any reference to dispute settlement under the DSB pursuant to article 8 of the WTO PSI Agreement.

It is not legislation alone however that is relevant to considerations of trade and development policy-making in Nigeria. Given the importance and impact of investment in facilitating trade, the extent and capacity for private sector involvement in this area merits some consideration. This article therefore addresses regulations on investment and private sector participation next.

OPEN TRADE, INVESTMENT AND PRIVATE SECTOR PARTICIPATION

One of the fundamental characteristics of international trade as envisaged by the WTO is the liberalization of markets for cross-border access, including for investment purposes and for trade in services, both of which involve the private sector.

Open trade and regulations on investment

The WTO Trade Related Investment Measures Agreement (TRIMS)[63] emphasizes this aspect of liberal trade. The Nigerian Investment Promotion Commission Decree No 16 (NIPC Decree) and the Foreign Exchange (Monitoring and Miscellaneous) Provisions Decree No 17 (FEMMP Decree), both of 1995, make provisions for greater foreign investment participation

60 Sec 1 provides for pre-shipment inspection of imports; sec 4 vests the appointment of investigating agency powers in the head of state; and sec 5 provides for general administration by the CBN.

61 See Pre-Shipment of Imports Decree, sec 1(5). The list of excluded goods is obviously open.

62 The WTO PSI Agreement is under annex 1A of the WTO Agreement.

63 TRIMS is under annex 1A of the WTO Agreement.

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in the country's economy.[64] Section 1 of the NIPC Decree established the Nigerian Investment Promotion Commission. Under section 4, the commission has the duty to "encourage, promote and co-ordinate" investment in the Nigerian economy. There is no restriction on participation in a Nigerian enterprise by a foreign investor who may establish an enterprise[65] or purchase, through the Nigerian Stock Exchange, the shares of any Nigerian enterprise in any convertible currency.[66]

An amendment under Decree No 32 of 1998 provides that, for an enterprise in which foreign participation is permitted, a foreign investor complies with national laws upon incorporation or registration under the Nigerian Companies and Allied Matters Decree (Act LFN 1990). In the view of the author, incorporation and not, alternatively, mere registration would have served the same purpose and ensured a preferable level of compliance with other applicable laws in the country.

The foreign investment initiative is aided by the FEMMP Decree which establishes an autonomous foreign exchange market for transactions in foreign exchange,[67] monitored by the CBN.[68] Any person may invest in any enterprise or security with foreign currency or capital in Nigeria imported by an authorized dealer,[69] which may be a bank or any non-banking body with sufficient resources to operate.[70] Section 15(4) guarantees unconditional transferability of funds to foreign currency invested in any enterprise.

While the motives behind the establishment of these laws in Nigeria will undoubtedly lie in pursuance of global economic integration, in the author's view, the corresponding need to improve on the development progress of the country is not satisfied by these laws alone:

> "Favourable legal framework for foreign investments does not necessarily guarantee that foreign investments will come. There are other factors, not least the profit motive, which drive foreign investments. These include the degree of political stability, the place of the Rule of Law, in the Legal System, the availability of critical skills as well as clear evidence that local investors invest locally. Where most of the financial capital is invested or lodged outside, it will prove difficult to convince foreign investors except perhaps in the extractive industries such as oil, that their investments are worth it."[71]

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64 The provisions of the NIPC Decree have been extended to cover petroleum resources under an amendment (Decree No 32 1998).

65 NIPC Decree, secs 17, 19 and 20.

66 Id, sec 21.

67 FEMMP Decree, secs 2 and 7.

68 Id, sec 8.

69 Id, sec 15.

70 Id, sec 5.

71 See OC Eze *Nigeria and the World Trade Organisation* (2004, Nigerian Institute of International Affairs) at 49.

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The protagonists of open liberalized trade believe in the reduction of government control over a nation's economic activities. The Nigerian Public Enterprises (Privatisation and Commercialisation) Decree No 28 of 1999 (Privatisation and Commercialisation Decree) was, as the name suggests, enacted in line with this view: to reduce government involvement in market activities and encourage the participation of individuals and corporate bodies (including foreigners) into a less restrictive market.

The National Council on Privatisation established under part II of the decree is concerned primarily with determining the public enterprises to be privatized or commercialized and approving the legal framework for these purposes.[72] There is reference to the view that the decision to deregulate the Nigerian market should contribute to the nation's socio-economic development. Sub-section 11(a)(i) provides that the functions and powers of the council include to "determine the political, economic and social objectives of privatisation and commercialisation of public enterprises", and to "review, from time to time, the socio-economic effects of the programme of privatisation and commercialisation and decide on appropriate remedies".

There is however no further suggestion as to how the council is to achieve these targets. What the decree provides is for an implementation body, the Bureau of Public Enterprise (BPE),[73] with the main function of preparing public enterprises approved by the council for privatization or commercialization, including advising the council on further enterprises to be privatized or commercialized, and carrying out all activities for the successful implementation of the privatization and commercialization programme.[74]

The schedules to the decree list the enterprises affected. Some are to be partially commercialized while others are for full commercialization, including the Nigerian National Petroleum Corporation, the Nigerian Industrial Development Bank and the Nigerian Bank for Commerce and Industry.[75] Enterprises for full privatization include government owned companies in the following sectors: petroleum; banks; motor vehicle and truck assembly; cement manufacturing; agro-allied industries; and hotels.[76] Partial privatization has also been identified for companies in the following industries: telecommunications; petroleum; fertilisers; steel and aluminium; mining and solid minerals.[77] Also affected are transport and aviation companies (including the national carrier and the federal airports authority), the media, insurance companies, and paper and sugar companies.[78]

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72 See generally Privatisation and Commercialisation Decree, sec 11.
73 See generally id, part III.
74 See generally id, secs 13 (privatization) and 14 (commercialization).
75 See id, second schedule.
76 See id, part II, first schedule.
77 See id, part I.
78 Ibid.

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Private sector participation

This section of the article focuses on two dynamic areas of activity: the Nigerian banking sector; and the potential and capacity for Nigeria's growth in the area of trade in services.

Banking

The move towards greater private sector participation is more visible in Nigeria's banking sector. Under the liberalization policies of the mid 1980s, the country saw reforms in the financial sector mainly in foreign exchange management, from a government-controlled to a market-determined regime.[79] This facilitated the emergence of private banking as a significant industry. As at December 2003, there were 89 banks trading, with 3,282 branches around the country. Under a consolidation exercise initiated by the then CBN Governor Charles Soludo,[80] a more viable banking sector was created, with 24 "well capitalised banks *owned by the Private Sector*"[81] contributing in 2009 a commendable 40 per cent to the country's GDP[82] and about 20 per cent of the work force.[83] The consolidation exercise aided market access for the banks with 37 operating around Africa and nine outside Africa in the same period.[84] There was also an attempt to reduce government ownership[85] and, under the Code of Corporate Governance for Banks in Nigeria post Consolidation, government equity holding in banks was limited to 10 per cent.[86]

Since the Nigerian financial market is not inured to the capital flight that results when foreign investment is pulled out of shaky economies in times of financial speculation, the sector was not unaffected in the global financial crises of 2009. The news of the financial crisis only exacerbated the fears of the possible complete collapse of the Nigerian financial market and renewed speculation about the health of the banks. Although there had been no information by the banks by way of admission that they were under threat of

79 See CC Soludo "50 years of central banking in Nigeria: The journey so far and the road ahead" at 23, available at: <http://www.cenbank.org/cbnat50/papers/wadd.pdf> (last accessed 30 November 2011).

80 Banks were required to have a minimum capital base of 25 billion naira.

81 CC Soludo "50 years of central banking" above at note 79 at 29 (emphasis original).

82 Id at 5.

83 Ibid. See also U Gunu "The impact of the banking industry recapitalisation on employment in Nigerian banks" (2009) 11/3 *European Journal of Social Sciences* 486. Other efforts at development policy initiatives adopted by the banking sector under the supervision of the CBN at the time include: granting licences for the purposes of microfinance; and entrepreneurship development centres for the purpose of assisting private entrepreneurship activities.

84 Id at 29.

85 See T Beck, R Cull and A Jerome "Bank privatization and performance: Empirical evidence from Nigeria", available at: <http://arno.uvt.nl/show.cgi?fid=95647> (last accessed 30 November 2011).

86 Sec 5.1.2 (1 March 2006).

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failure, the CBN, under a new governor, Sanusi L Sanusi, and supported by the executive, embarked on a range of pre-emptive reform strategies.

It may still be too soon to analyse the results, but it is not clear whether the action by the CBN will be to the country's benefit given that the reforms appear to represent a return to the previous practice of government involvement in banks, albeit through the CBN.[87] Investigations into the internal activities (including corporate governance)[88] of several high profile banks by way of reforms under the new CBN governor have already seen the removal from office of eight bank chiefs on criminal charges of fraud.[89] Criticizing these moves, it has been noted that:

> "From the beginning, the reforms were based on wrong assumptions. Some of which were that if the bank chiefs were sacked, bad loans would be recovered quickly, other bank chief executives would be frightened into observing banking regulations and the public's confidence in the banks would increase. Things have worsened since then. The banks have had to sack many of their staff at the instance of new managements CBN installed, lending has ceased, even businesses that legitimately obtained loans from banks have been hounded to repay them, with the Economic and Financial Crimes Commission, EFCC, called in to give bite to the loan recovery drive."[90]

Rather surprisingly, there has also been a call, including to foreign investors, for interest in purchasing these so-called failing banks,[91] in addition to the establishment of an asset management institution, the Asset Management Corporation of Nigeria (AMCON), to buy up the bad loans of the failing banks.[92] It is true that the Nigerian Stock Exchange gained 1.7 per cent on

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87 See CBN Governor SL Sanusi's interviews with *The Financial Times* (London) (21 June 2009), available at: <http://www.ft.com/cms/s/0/406e8650-ea69-11de-a9f5-00144feab49a.html#axzz1fqnq0Fjh> (last accessed 7 December 2011).

88 See generally ENM Okike "Corporate governance in Nigeria: The status quo" (2007) 15/2 *Corporate Governance: An International Review* 173; and C Ogbechie, DN Koufopoulous and M Argyropoulou "Broad characteristics and involvement in strategic decision making: The Nigerian perspective" (2009) 32/2 *Management Research News* 169.

89 See CBN Governor SL Sanusi's remarks in "Why we fired Akingbola, Ibru, Ebong, others – CBN Governor Sanusi Lamido Sanusi" (15 August 2009) *The Nation*, available at: <http://www.nigerianmuse.com/20090814214307zg/sections/spotlight-focus-on-issues/why-we-fired-akingbola-ibru-ebong-others-cbn-governor-sanusi-lamido-sanusi/> (last accessed 30 November 2011).

90 See "One year of Sanusi reforms" (24 August 2010) *The Vanguard* (Nigeria), available at: <http://www.vanguardngr.com/2010/08/one-year-of-sanusi-reforms/> (last accessed 30 November 2011).

91 See the Governor Sanusi's interviews in *The Financial Times*, above at note 87.

92 See the CBN press release on AMCON after it received its third reading at the Senate: "AMCON bill passes third reading in the Senate … Sent for harmonization", available at: <http://webcache.googleusercontent.com/search?hl=en&safe=active&gs_sm=s&gs_upl=3235l3235l0l4063l1l1l0l0l0l0l62l62l1l1l0&q=cache:iGvSSS505nEJ:http://www.cenbank.org/Out/2010/pressrelease/gov/Press%20Release%20-%20Third%20reading%20for%20AM

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the news of the bill establishing AMCON being signed into law.[93] Yet it must be said that the efforts at reform have been "rapid, almost frenetic" and have granted the CBN "a more interventionist role in the Nigerian economy".[94]

Without going beyond the limits of this article, three issues deserve some consideration. First is the legality of CBN intrusion into the internal arrangements of the eight banks affected under the new reforms. The sacking and subsequent imposition of managing directors (MDs) on the banks, followed by the trial of the MDs of five banks (Oceanic International Bank, Intercontinental Bank, Afribank Plc, Finbank Plc and Union Bank Plc) appear contrary to the intent of sub-sections 33 and 35 of the Banks and Other Financial Institutions Act 1991 (as amended) (BOFIA), upon which the CBN governor relied. The drafters' intentions behind the main provision relevant here, section 35, which surely acknowledged the independence of the banks as participants in the liberalization process of the financial sector, do not appear to have been followed. The relevant section 35 states:

> "(1) Where a bank informs the Bank that -
> (a) it is likely to become unable to meet its obligations under this Decree; or
> (b) it is about to suspend payment to any extent; or
> (c) it is insolvent; or
> (d) where, after an examination under section 32 of this Decree or otherwise howsoever, the Bank is satisfied that the bank is in a grave situation as regards the matter referred to in section 32(1) of this Decree,
> the Governor may by order in writing exercise any one or more of the power specified in subsection (2) of this section."

The powers set out in section 35(2) range from prohibiting the bank from extending any further credit facility to removing any officer of the bank and appointing another in their place. The critical question here is however: was section 35(1) fulfilled? From the drafter's use of the term: "[w]here a bank informs the Bank", it is only reasonable to presuppose the implied independence of the bank itself whether in the first instance, admitting its limitations under sub-sections 35(1)(a)–(c), or (and only in the alternative given the wording of the act), by accepting the report of the examination to be undertaken in

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COM%20Bill.pdf+CBN+press+release+on+AMCON+after+ it+ received + its+third+reading+at +the+Senate&ct=clnk> (last accessed 12 December 2011). The AMCON bill was signed into law in July 2010.

93 See K Ighomwenghian "NSE gains 1.7 percent after AMCON bill gets presidential assent" (26 July 2010), available at: <http://allafrica.com/stories/201007261387.html> (last accessed 30 November 2011). See also the Nigerian Stock Exchange report on trading activities for July 2010, available at: <www.nigerianstockexchange.com/news/pdfs /Annual%20Reports.pdf> (last accessed 7 December 2011).

94 See D Alford "Nigerian banking reforms: Recent actions and future prospects" *Social Science Research Network Working Papers* (19 April 2010) at 14 and 20.

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section 32 pursuant to section 31(1)(d). In either case, it is expected that the bank (and by implication its investors including shareholders) ought to be aware of the "bank's failure", the extent of the investigations carried out, and the resulting report.[95] This was not the case.

The second issue relates to private sector participation and the independence of the corporate entity in law. The question dwells on the position of banks in Nigeria: are they companies, or financial entities under the supervision of the government via the CBN? Surely banks have separate legal personality as companies protected under the country's Companies and Allied Matters Act (CAMA).[96] If so, liability for any wrong-doing is borne by the officers who are appointed by the company and act for it.[97] In turn, the officers including directors are accountable neither to the government nor to its official organs, but to the company to which they must act in "utmost good faith".[98] Referring to remuneration, CAMA expressly provides that "a director who receives more money than he is entitled to, shall be guilty of misfeasance and shall be accountable to the company for such money".[99] There is provision for the removal of directors[100] by the shareholders.[101] CAMA, part VIII provides for actions by or against the company, ie minority actions. Where there is a suspicion that "the affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against a member or members" or, whether in addition to the preceding circumstances or alone, "in a manner which is in disregard of the public interest" a petition to the court on the grounds of "unfairly prejudicial and oppressive conduct" can be brought against the alleged offenders.[102] Where public interest is affected, the Corporate Affairs Commission (the Commission) is charged with investigating the claims and petitioning the court.[103]

If followed, the provisions of CAMA suffice to oversee the allegations of embezzlement and internal mismanagement under the new reforms. The CBN's intervention under BOFIA duplicates and, in an overreaching manner, assumes the task of the Commission. It is true that the CBN has an interest in the regulation of banks, but this should only be to the extent that the banking activity complies with the provisions of the licence issued to the particular bank. The Commission, which oversees the administration of companies, should be better equipped to deal with internal problems of companies' administration regardless of the type of company; the same is to be said for

95 BOFIA, secs 31 and 32.
96 Cap 59, LFN 1990.
97 Id, secs 63 and 244–45.
98 Id, secs 279–80.
99 Id, sec 267(6).
100 Id, sec 262.
101 Id, sec 283.
102 Id, sec 311. The petition can be brought by a member, an officer or former officer, creditor, the Corporate Affairs Commission or "any person", at the court's discretion.
103 Id, sec 7(c). The Commission is established under part I of the act, which it administers.

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the courts which ultimately exercise jurisdiction over these matters. The duplication of responsibilities across the sector,[104] and this is not only an issue in the financial sector, creates an unnecessary bureaucratic burden on the legal system and constrains the emergence of effective private sector involvement in enterprise. By their first nature as companies, banks have shareholders who are directly affected by the health status of their investments and who should be given first consideration in revisiting their management (and auditors) unless there is a supervening impossibility, a situation which has clearly not been the case here.[105]

Thirdly, regardless of the successful conviction of one of the deposed MDs,[106] why does BOFIA, which was first enacted as a decree in 1991, still contain these provisions? It would have been preferable and more in line with the efforts at encouraging a market-driven banking sector, not to mention instilling the rule of law and due process in the legal economy, if the allegations of embezzlement and mismanagement arose out of shareholder action against fraudulent management and irregular accounting, and not by a caveat of the CBN after its investigations. Forfeited assets would therefore revert back to the market, ie to the shareholders and the bank, and not to the government or an official organ as is now the case.[107]

Trade in services

Following from the discussions above, it is important to consider more generally the enabling environment for trade in services within the Nigerian services industry.[108] The WTO General Agreement on Trade in Services (GATS)[109] sets out rules for market access to service providers based on four modes of supply: cross-border supply, where services are supplied within the territory of another member state; consumption abroad, where a service is delivered outside the territory of a member state to a service consumer of the member; commercial presence, where a service is delivered within a

104 Note also that the Securities and Exchange Commission has its own Code on Corporate Governance of which banks which are listed as companies on the Nigerian Stock Exchange are expected to take cognizance.

105 Shareholder action is only recent in Nigeria; it is hoped that similar action as shown by the shareholders of Cadbury Nigeria in their suit against the management and auditors of the company, which saw the removal of its managing and finance directors in 2006, will be the practice across the private sector, instead of intervention by an official organ of government.

106 At the Federal High Court, Lagos, FHC/L/297C/2009 (judgment of 8 October 2010) Chief Mrs Cecilia Ibru, MD of the Oceanic Bank, received a suspended jail term of 18 months (to serve six) and was to forfeit 199 assets worth over a 190 m naira.

107 The forfeited assets in the case above were to be handed over to AMCON.

108 See further EC Ezeani "*Carpe diem*! Developing countries and global trade in services" (2007) 2/3 *AE&E Business and Commercial Law Newsletter* available at: <http://www.aeandelegal.com/dynamicdata/flash/AE&E%20Business%20&%20Commercial%20Newsletter%20-3-2007.doc> (last accessed 12 December 2011).

109 GATS is annex 1B of the WTO Agreement.

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member's territory through the commercial presence of the supplier such as a representative or a wholly owned subsidiary or branch; and presence of natural persons, where a service is delivered within a member's territory, for example by persons working for a company of another member state.

There are hardly any indigenous firms providing services outside Nigeria; but here again, banks have made a head start. Given this background, there are few firms that can compete in the global services market, including those who can do so in the context of the country's liberalization programmes. This article will consider the provision of advisory services to the privatization exercise under the trade liberalization policy of privatization. In its *Privatisation Handbook*, the BPE, charged with overseeing the privatization programme, makes provision for what it refers to as "merit based applications" for expressions of interest from those interested in acting as privatization advisers. These merit based applications demand four considerations as bases for prequalification:

- qualification of staff and their individual experience in handling similar assignments in Nigeria and abroad;
- evidence of track record in a similar industry or transaction in Nigeria or elsewhere in the world;
- intended approach to the assignment (work-plan); and
- proof of alliances or partnership with other competent domestic and international advisers who have the requisite qualifications, experience and track record in the industry or transactional type.[110]

Of the four, only the third, which in essence demands nothing more than a skill in drafting schedules and presentations for such assignments, can be readily provided by local firms. The local market for consultancy in this area of privatization and commercialization of government enterprises is limited; the services required are not part of the daily practice of the service industry in Nigeria.[111] It is difficult to see why these provisions were therefore included in the policies for the privatization programme, which was supposed not only to stimulate socio-economic development but also incorporate a greater number of local service providers. Clearly, the services market in Nigeria will require greater incentives for private entrepreneurship and expansion for a start within the West African region. An option is of course for local firms to seek long-term working partnerships with foreign professional service providers. This will ensure that there are local firms with the capacity to engage in such specialized activity as envisaged under the provisions of the *Privatisation Handbook*.

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110 BPE *Privatisation Handbook* (2000, BPE) at 75.

111 Successful expressions of interest for consultancy in the current privatization programme of the successor companies of the national electric company, previously known as the National Electric Power of Nigeria, now Power Holding Company of Nigeria, have been by African Finance Corporation, CPCS Transcorp, Goldman Sachs / Stanbic IBTC, IPA Energy, Lazard / UBA and Standard Chartered Bank.

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IMPROVING MARKET ACCESS

Successive Nigerian governments have imposed various trade restrictions through export and imports prohibition lists,[112] all based on an attempt to bolster fledgling domestic industries. However, at present, the country's trade regime significantly encompasses a wider range of activities than the maintenance of tariff structures and barriers. In order to ensure stronger participation in the WTO, a new enlarged and enhanced National Focal Point has been established under the Federal Ministry of Commerce to co-ordinate the country's activities in international trade (including at the WTO and other trade-related international organizations).[113] This body is expected to assist in Nigeria's negotiations at the international level. The WTO has records of notifications in respect of the various WTO agreements by Nigeria on the WTO member information website.

A new industrial policy was adopted in 2003. This was to be overseen by the Federal Ministry of Industry and was concerned with facilitating Nigeria's development, especially in terms of industrial progress. The policy's objectives included "strengthening the competitiveness of Nigerian manufacturers by facilitating access to technology and best practices" and ensuring that Nigeria's resources are not traded in their primary state.[114] The target year given for all-round improvement in the industrial sector was 2010, which was questionable given the nascent stages of Nigeria's technological advancement and private sector involvement in the market.[115]

Efforts at improving market access are also made under more recent development plans. A new economic strategy for the country, the National Economic Empowerment Development Strategy (NEEDS) based on the UN Millennium Development Goals (MDGs), was established in 2004 with, among others, the target of poverty alleviation by the year 2015, itself a doubtful target. The strategy, which is to be executed across all three tiers of government (federal, state and local), will be overseen by an independent monitoring committee. NEEDS is described as "Nigeria's plan for prosperity".[116] The four

112 See the Export Prohibition Act, vol VIII cap 121 LFN 1990; Import Prohibition Act, vol X cap 171 LFN 1990. The Customs, Excise, Tariff etc (Consolidation) Act, vol VI cap 88 1990 prohibits the exportation of maize (corn) and grain sorghum for the purposes of trade.

113 Inaugurated on 16 August 2001, the body had been previously established in 1994 but was largely inactive.

114 See Federal Government of Nigeria *Industrial Policy of Nigeria: Policies, Incentives, Guidelines and Industrial Framework* (2003, Federal Ministry of Commerce and Industry).

115 See "Nigerian textile factories may close after import ban lifted" (1 December 2010), available at: <http://www.bloomberg.com/news/2010-12-01/nigerian-textile-factories-may-close-after-import-ban-lifted.html> (last accessed 30 November 2011); F Ugwoke and O Chima "Govt lifts ban on textile materials, toothpicks" (29 November 2010) *This Day* (Nigeria), available at: <http://allafrica.com/stories/201011300682.html> (last accessed 30 November 2011).

116 See *Meeting Everyone's Needs* (2004, Nigerian National Planning Commission) (NEEDS document) at viii.

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pillars of the programme are to: reorient values (eschewing corruption);[117] reduce poverty; create wealth; and generate employment.[118] NEEDS is based on four main themes:

- promoting exports and diversifying exports away from oil;
- gradually liberalizing imports, harmonizing tariffs with Economic Community of West African States (ECOWAS) common external tariffs, and using special levies and import prohibitions to protect local industries;
- establishing a market-determined nominal exchange rate regime, and avoiding overvaluation of the real exchange rate; and
- seeking debt reduction to make Nigeria's debt service sustainable.[119]

The author considers NEEDS to be a reference plan for Nigeria's economic and social advancement, indeed a fifth development plan. However, two factors are crucial here. First, the objectives under the programme can only be met with legislative backing and practical implementation. Realistic financial projections and facilities for management in both the country's budgetary and fiscal policies have always hampered Nigeria's economic policies.[120] Secondly, elaborate though NEEDS was, after 2007 it has no longer been the focus of the government after the president at the time, Olusegun Obasanjo, left office.

This reveals the worrying trend of inconsistencies in policy-making and adoption even under the recent civilian political dispensation. A new government has always meant that a new economic policy will be adopted. This has also been the case with NEEDS. In 2009, the late President Umaru Yar'Adua (and his eventual successor, President Goodluck Jonathan) adopted a "seven point agenda" aimed at addressing the objectives of the UN MDGs.[121] In addition, a new economic strategy was established, Vision 20-2020,[122] which aims to put Nigeria among the top 20 countries by 2020. The potential for these policies to succeed where others have not remains to be seen.

Nevertheless, beyond establishing domestic development-related provisions, harmonization of the tariff structures across the ECOWAS region is part of the

117 An effort addressed under the Economic and Financial Crimes Commission.

118 See NEEDS document at ix.

119 Id, part one, chap 3 at 22.

120 It was estimated that this socio-economic programme will cost the country about $4.5bn in 2007 which was expected to come from oversees development assistance and, subsequently, about $1.5bn from foreign direct investment. See id, part four, chap 11 at 116.

121 These include energy emergency, agriculture and food security, wealth creation and poverty alleviation, land reform, security of lives and property, human capital development including compulsory education for children, and transport development including improved mass transit.

122 To see the policy through, "experts have declared that the country will require about N32 trillion worth of investment in the next 10 years, from 2010 to 2020"; see T Ailemen "Vision 20 – 2020: Presidency strategizes for implementation" (19 June 2010) *Daily Champion*, available at: <http://allafrica.com/stories/201006210422.html> (last accessed 30 November 2011).

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market access initiatives currently being pursued by Nigeria. Along with the other ECOWAS member states, Nigeria has agreed final plans for a uniform cross-border policy, the common external tariff (CET). Proposals on the CET had been gradually introduced in Nigeria since July 2005 and the ECOWAS heads of state agreed that the CET will become operational across the West African sub-region by January 2008. The harmonized regime sets the following four band tariff structure of between 0 and 20 per cent on goods imported into the sub-region: (i) 0 per cent on industrial machinery and equipment, necessities and special medicaments such as anti-retroviral drugs; (ii) 5 per cent on raw materials and other capital goods; (iii) 10 per cent on intermediate goods; and (iv) 20 per cent on finished goods.[123]

In adopting the CET's modalities for lowering import prohibition charges, Nigeria has not however eliminated protection for certain industries, goods of which attract a 50 per cent import charge. These include ethanol, olive oil in bottles, textiles, plastics, rice and cigarettes.[124] The proposed harmonization policy was not altogether welcomed as a positive contribution by the country's private sector.[125]

On a broader scale, the New Partnership on African Development (NEPAD) and the African Growth and Opportunity Act (AGOA) are initiatives which Nigeria has embraced as instrumental to both her domestic development goals and her integration in the globalization process. AGOA is set in the context of the US Trade and Development Act 2000 passed by the US Congress in order to provide access for goods from the African continent to the US.[126] The act lists new market access provisions, particularly with respect to textiles and apparel, while it maintains preferential treatment under the GSP for certain imports from Africa.[127] However, the supposed impact of AGOA may be limited in Nigeria, considering that the country's primary export to the United

123 See "ECOWAS common external tariff now effective" (7 October 2005) *Nigeriafirst*, available at: <http://allafrica.com/stories/200510070509.html> (last accessed 9 December 2011).

124 Ibid.

125 See R Okeke "Nigeria: Manufacturer's claim ECOWAS tariff will be damaging" (20 March 2005) *The Guardian* (Nigeria), available at: <http://www.afrika.no/Detailed/8698.html> (last accessed 9 December 2011). Opposition to the immediate implementation of the policy was also expressed by Nigerian manufacturers under the umbrella organization, the Nigerian Association of Chambers of Commerce, Industry, Mines and Agriculture. Their opposition was based on the view that Nigeria's poor social infrastructure and high cost of production puts the other ECOWAS member states at a distinct advantage in producing cheaper and, hence, more exported goods than Nigeria. See "The ECOWAS common tariff" (editorial) (30 July 2006) *This Day* (Nigeria), available at: <http://allafrica.com/stories/200607311026.html> (last accessed 8 December 2011).

126 See title 1, US Trade and Development Act 2000 *Public Law* 106-200.

127 The US Department of Commerce has information on AGOA and eligibility requirements for countries and products available at: <http://www.agoa.gov/index.html> (last accessed 8 December 2011).

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States (for which it is the biggest trading partner in Africa) is not textiles and similar goods, but oil and oil-related products.[128]

The NEPAD strategy, formulated at the 37th Summit of the African Union in July 2001, was the work of Nigeria together with Algeria, Egypt, Senegal and South Africa under the mandate of the African Union. NEPAD's principal aim is for African leaders to find ways of addressing the challenges faced by the African continent, including economic growth, development and employment.[129]

CONCLUSION

Economic and development policy-making in Nigeria has so far been carried out in one of two ways. There is either a rapid fire response to problems on which basis legislation, largely speculative (to cover any eventualities), is made, or arbitrary legislation is set out which may not correspond to the needs and concerns of the Nigerian environment. In terms of practice, what the government considers to be critical areas of action will be clear from the extent of "reforms", especially those involving punitive measures which the government or its relevant agency undertakes. What is clear is that virtually all action (or inaction) emanates from the executive: the government or its official organs.

A number of problems arise with these modes of response: the obvious lack of stable, long term policies; the lack of consideration of well-structured policies which are tailored to the Nigerian environment; the attendant proliferation of official organs, administrative and bureaucratic processes involved in implementing economic policies and in countering corruption arising in their implementation; and the difficulty in formulating legislation that can incorporate the demands of a rules-based global market with the domestic requirements of the country. In the view of the author, these constraints are challenges for the country's legislature, which, as the people's representative, bears the task and has the burden of creating laws that can address trade and development needs.

Furthermore, it cannot be overemphasized that the direct participation of the organized private sector (OPS) and the contribution of trade and industrial professionals is essential. The Manufacturers Association of Nigeria, Nigeria's

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128 See further S Momoh "Why Nigeria is yet to take advantage of AGOA" (30 May 2011) *Business Day*, available at: <http://www.businessdayonline.com/NG/index.php/entrepreneur/entrepreneur-news/22233-why-nigeria-is-yet-to-take-advantage-of-agoa> (last accessed 9 December 2011). For an earlier general assessment of AGOA, see C Van Grasstek "The African Growth and Opportunity Act: A preliminary assessment" (2003, report for UN Conference on Trade and Development): UNCTAD/ITCD/TSB/2003/.1.

129 See generally the NEPAD framework document (October 2001), available at: <http://www.nepad.org/system/files/framework_0.pdf> (last accessed 9 December 2011). Information on NEPAD's activities is available at: <http://www.nepad.org> (last accessed 9 December 2011).

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Association of Chambers of Commerce, Industry, Mines and Agriculture, and the Nigerian Employer's Consultative Association currently constitute the foremost participants in the OPS. However their contributions are still secondary to institutional (government-led) initiatives. The country requires both the independent contributions of the individual constituents of the OPS (and not the institutional responses of government bodies such as the Ministry of Commerce) and the skills of persons learned in international economics and international economic law, trade negotiators and policy makers, who can dialogue and proffer suggestions beneficial to the country's trade and development policies.

With regard to economic and development policy-making in Nigeria, the focus should therefore be on identifying and addressing the country's development needs in the context of a fast changing and rules oriented global market system. In addition, the facts and the data upon which economic projections and policies are based must be consistent with the availability of finances and capacity (both technical and human) for their implementation and achievement. The objective of effective policy-making is not, as has been the case so far, the adoption of a large number of proposed reforms by each subsequent political administration, but the adoption and implementation of crucial objectives that visibly impact the socio-economic environment in the country, even in the short term.

Finally, a troubling and telling absence in the process of economic and development policy must be mentioned: the absence of the interpretative function that is reserved for the courts. While the executive and legislature engage constantly in advocating policies, the courts are barely involved in their judicial review. Whatever issues arise from the manner and procedure of policy implementation including administration, in either the private environment or the public sector, they are rarely the subject of judicial decisions. With little or no judicial review of the practices and procedures undertaken in carrying out policies, there is no visible independent and impartial assessment of their efficacy, legitimacy or legality, because cases are hardly ever brought before the courts on these grounds. This dearth of judicial review not only poses a problem, it is also a setback. This explains the absence of a defined body of jurisprudence on the interpretation of Nigerian government policy. It also demonstrates the limited progress of public law and judicial review of administrative action. Significantly, it reveals the limitations of the practice of the rule of law, since the activities of government with regard to policy making and implementation are hardly ever subject to judicial determination.

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