# THE NIGERIAN OIL AND GAS LOCAL CONTENT REGIME AND ITS (NON-)COMPLIANCE WITH THE TRIMS AGREEMENT

**Uchenna Jerome Orji** *

## ABSTRACT

One major milestone for the Nigerian oil and gas industry was the enactment of the Nigerian Oil and Gas Industry Content Development Act in 2010. The Act establishes a comprehensive local content regime that enshrines legal measures which promote the patronage of Nigerian products and services by operators in the Nigerian oil and gas industry. This article examines the provisions of the Act and Nigeria's obligations under the WTO's Trade Related Investment Measures (TRIMS) Agreement with a view to determining whether the provisions of the Act are in violation of Nigeria's obligations under the TRIMS Agreement. It also examines whether any exemptions can justify the derogation of Nigeria's obligations under the TRIMS Agreement. The article finds that requirements under the Act constitute trade-related "investment measures" within the meaning of the TRIMS Agreement because such requirements are explicitly meant to apply to "all operations or transactions" connected with the oil and gas industry. This article also finds that some provisions of the Act are not in compliance with Nigeria's obligations under the TRIMS Agreement. In particular, sections 10 (1), 11(1), and 12 of the Act which favour the use of local products and materials for projects in the oil and gas industry contravene Nigeria's obligations under the TRIMS Agreement. The article further identifies exemptions which can justify Nigeria's application of oil and gas industry local content measures that derogate obligations under the TRIMS Agreement. In this regard, the article suggests that the exemptions under Article 4 of the TRIMS Agreement, which permit a WTO member whose economy is in the early stages of development and can only support low standards of living to temporarily apply local content measures, can be applied by Nigeria to justify the oil and gas industry local content measures under the Act for the purpose of promoting economic development and improving living standards in the country.

---

* LL.B (Hons.), (University of Nigeria); LL.M (University of Ibadan); PhD (Nnamdi Azikiwe University Nigeria) Barrister and Solicitor of the Supreme Court of Nigeria.

**Keywords:** GATT, Local Content Requirements, Nigeria, TRIMS, WTO Obligations

**DOI:** https://dx.doi.org/10.4314/jsdlp.v9i2.9

## 1. INTRODUCTION

The Nigerian Government commenced efforts to establish policies and legal measures to promote the development of local content in the oil and gas industry around the late 1950s before the country's independence in 1960.[1] Thus, between 1959 and 1999, the government established several policies and legal measures to promote local content in the industry. To a large extent, such measures were not considered comprehensive and also failed to achieve the desired objectives of indigenizing the industry and facilitating the diversification of Nigeria's economy.[2] However, in 1999, the Nigerian Government commenced new initiatives to establish a comprehensive policy regime for promoting the development of local content in the industry. This led to the establishment of several government committees to explore means of increasing local content levels in the industry with a view to increasing the contribution of the industry to Nigeria's gross domestic product (GDP).[3] The reports of those committees all identified that Nigerian content development initiatives required "an exhaustive systemic approach that would assess local content levels, identify constraints, develop clear policies and processes to stimulate growth and clearly define the roles and responsibilities of stakeholders".[4] This subsequently

1 For a discussion on the history of the development of legal and policy regimes to promote local content in the Nigerian oil and gas industry, *see* Uchenna Jerome Orji, "Towards Sustainable Local Content Development in the Nigerian Oil and Gas Industry: An Appraisal of the Legal Framework and Challenges – Pt I" (2014) 32(1) *International Energy Law Review,* 30-35.

2 Ibid.

3 *See* Kabir A. Mohammed, "Nigerian Content Development: The Petroleum Technology Development Fund Initiatives" (July 2009) 2 *Petroleum Technology Development Journal*, 2.

4 *See Enhancement of Local Content in the Upstream Oil & Gas Industry in Nigeria*, SNF Report (2003) *cited* in Kabir A. Mohammed, "Nigerian Content Development: The Petroleum Technology Development Fund Initiatives", ibid at 2.

led to the development of the Nigerian Oil and Gas Local Content Policy. Later on, the National Assembly enacted the objectives of the policy in the Nigerian Oil and Gas Industry Content Development Act of March 2010 (Local Content Act).[5]

The Local Content Act applies to all matters relating to the development of local content in "all operations or transactions carried out in or connected with the Nigerian oil industry".[6] A major objective of the Local Content Act is to domestically trap oil and gas industry expenditures within the Nigerian economy, to reduce the massive capital flight that usually results from heavy reliance on foreign products and services within the industry. Accordingly, the Act establishes legal obligations that will encourage the patronage of Nigerian products and services in the industry with a view to promoting local participation and the transfer of technologies, while also diversifying the sources of investment in the industry, so as to harness the industry for a rapid and sustainable national economic growth. Thus, the Act aims to promote value-addition to the Nigerian economy through the use of local raw materials, products and services while also stimulating the growth of indigenous capacity in the industry.[7] Also, the Act provides for the establishment of fiscal incentives to promote the development of domestic capacity for manufacturing goods and providing services being imported into the industry.[8] The Act also establishes an institutional framework known as the Nigerian Content Development and Monitoring Board (NCDMB) to coordinate and monitor the implementation of the provisions of the Act.[9]

However, provisions of the Local Content Act appear to be in violation of Nigeria's obligations under the World Trade Organization's (WTO) Trade Related Investment Measures (TRIMS) Agreement.[10] Nigeria became a member of the WTO on 1 January 1995[11] and,

5 *See* the Nigerian Oil and Gas Industry Content Development Act (March, 2010). [Hereafter Local Content Act].
6 *See* Sections 1 & 6 Local Content Act.
7 *See* George Ogunyomi, *et al*, "Overview of the Nigerian Content Development Act 2010", (May 2010) *Aina Blankson LP Newsletter*, 2.
8 *See* Section 48 Local Content Act.
9 *See* Section 4 ibid.
10 *See* The Trade Related Investment Measures (TRIMS) Agreement, available at <https://www.wto.org/english/docs_e/legal_e/18-trims.pdf> accessed 4 December 2018.
11 *See* WTO, "Nigeria and the WTO", available at <http://www.wto.org/english/thewto_e/ countries_e/nigeria_e.htm> accessed 4 December 2018.

therefore, has obligations to comply with principles of the TRIMS Agreement. This article seeks to examine the provisions of the Local Content Act and Nigeria's obligations under the TRIMS Agreement with a view to determining whether the provisions of the Act violate Nigeria's obligations under the TRIMS Agreement. It also examines whether there are any exemptions under which Nigeria can derogate from its obligations under the TRIMS Agreement.

The article finds that the local content requirements under the Act constitute trade-related "investment measures" within the meaning of the TRIMS Agreement because such requirements are explicitly meant to apply to "all operations or transactions" connected with the Nigerian oil and gas industry.[12] The article also finds that some provisions of the Act are not in compliance with Nigeria's obligations under the TRIMS Agreement. In particular, the article finds that sections 10 (1), 11(1), and 12 of the Act which favour the use of local products and materials for projects in the oil and gas industry contravene Nigeria's obligations under the TRIMS Agreement. However, the article also identifies exemptions that can justify Nigeria's application of oil and gas industry local content measures that derogate obligations under the TRIMS Agreement. In this regard, the article identifies that Nigeria is classified as having one of the highest rates of poverty[13] as well as one of the lowest human development indices in the world,[14] which implies that the country's economy can only support "low standards of living". Therefore, the article suggests that the exemptions under Article 4 of the TRIMS Agreement, which permits a WTO member whose economy is in the early stages of development and can only support low standards of living to temporarily apply local content measures, can be applied by Nigeria to justify local content measures under the Act for the purpose of promoting economic development and improving living standards in the country.

This article has six sections. This first section includes this introduction and also provides a brief discussion on the concept of

12 *See* Section 1 Local Content Act.

13 The United Nations Development Programme (UNDP) Human Development Report (2015) classifies Nigeria as one of the five countries with the largest population of people in multidimensional poverty. The report indicates that 88.4 million Nigerians are in multidimensional poverty representing about 50.9 per cent of the entire population of Nigeria. *See* UNDP, *Human Development Report 2015* (UNDP: New York, USA, 2015) 61.

14 *See* UNDP, ibid, at 49 & 210.

local content measures. Section 2 undertakes a review of local content measures under the relevant provisions of the Local Content Act. Section 3 examines the TRIMS Agreement including the obligations of WTO Member States under the Agreement and the exemptions that States can apply to derogate those obligations. Section 4 provides an overview of WTO disputes relating to local content measures that violate the TRIMS Agreement. Section 5 undertakes a compatibility analysis of provisions of the Local Content Act and the TRIMS Agreement. It also examines whether the measures under the Local Content Act are covered by any of the exemptions under the TRIMS Agreement. This is followed by the conclusion in section 6.

## 1.1 The Concept of Local Content Measures

"Local content measures" commonly refer to domestic trade measures that are established by States with the aim of compelling firms that operate within their territory to make use of products or services that have a local origin. Under the Local Content Act, the concept is classified as "Nigerian content" and is defined as the:

> Quantum of composite value added to or created in the Nigerian economy by a systematic development of capacity and capabilities through the deliberate utilization of Nigerian human and material resources and services in the Nigerian petroleum industry.[15]

Local content requirements are usually imposed by States on firms in order to facilitate the achievement of national economic objectives including: the promotion of economic diversification; the reduction of import dependency; the promotion of indigenous participation in strategic economic sectors; the promotion of exports; the facilitation of technology transfers as well as skills acquisition and job creation; and the advancement of social and environmental objectives[16] to promote sustainable trade investments in host communities.

15 *See* Section 106 Local Content Act.

16 *See* Uchenna Jerome Orji, "Promoting Technology Transfers in Nigeria's Extractive Industries: A Review of the Legal Regime, the Challenges and Proposals for Responses", *Journal of World Trade and Investment* (2018) Vol. 19 No. 2, 248-292.

However, local content measures generally have the effect of a double-edged sword depending on how they are applied in any given State. For example, there is a great probability that the application of local content measures can produce positive and sustainable economic results where they are applied with a view to improving the competitiveness of local industries and not as a mechanism for shielding such industries from market competition. On the other hand, the application of local content measures may not produce desirable and sustainable economic outcomes where such measures are not accompanied by efforts to boost the competitiveness of local firms. As such, there is a probability that the application of local content measures without a requisite enhancement of the competitiveness of local firms who are benefiting from such measures may only provide temporary and artificial protection of local firms as they may likely become uncompetitive in the long term. Accordingly, a report of the UNCTAD has observed that:

> where [local content requirements are] used carefully with offsetting measures to ensure that suppliers face competitive pressures and have access to the technology and skills they need to improve their capabilities, they can foster efficient suppliers. Where used in a protective setting with few pressures to invest in building competitive capabilities, they can result in inefficient suppliers that saddle the economy with high costs, outdated technologies or redundant skills.[178]

Therefore, it is imperative that a State's imposition of local content measures in a given industry is purposefully and effectively applied in a manner that enhances the long-term competitiveness of local firms.

## 2 OBLIGATIONS UNDER NIGERIA'S LOCAL CONTENT ACT

The Local Content Act establishes explicit obligations on all regulatory actors and operators in the oil and gas industry to consider "Nigerian content" (local content) in the execution of any operations or projects

17 *See* United Nations Conference on Trade and Development (UNCTAD), *Elimination of TRIMS: The Experience of Selected Developing Countries* (United Nations: New York and Geneva, 2007) 9-10.

in the industry.[18] The Act requires that domestic products and services should be given priority in commercial activities and project execution within the industry.[19] Under section 3(2) of the Act, indigenous Nigerian companies are meant to be given exclusive consideration for the execution of oil and gas contracts and services where such companies demonstrate evidence of basic qualifications such as the ownership of equipment, the availability of Nigerian personnel and the possession of capacity to execute projects on land and swampy areas.[20]

Also, any operator that is bidding for any license, permit or interest in the Nigerian oil and gas industry is required to submit a "Nigerian content plan" (local content plan) to the NCDMB demonstrating compliance with requirements under the Local Content Act.[21] Section 10 (1) of the Act further provides that every local content plan is required to contain provisions which would ensure that "*first consideration* shall be given to services provided from within Nigeria and *to goods manufactured in Nigeria*…".[22] An operator is also required to submit such a plan to the NCDMB before carrying out any project in the oil and gas industry.[23] Under section 12 of the Act, every local content plan that is submitted by an operator is required to contain a detailed plan setting out how the operator and their contractors will give first consideration to Nigerian goods and services to the satisfaction of the NCDMB. Generally, the minimum level of local content in any commercial activity or project to be executed in the oil and gas industry is required to be consistent with the levels that are established in the Schedule to the Local Content Act.[245] Where the NCDMB is satisfied that a local content plan is in compliance with the Act, it will issue a "certificate of authorization" authorizing the operator to execute a specific project or transaction in the oil and gas industry.[25] The Local

18 *See* Section 2 Local Content Act.
19 *See* Section 3(1) Local Content Act.
20 *See* Section 3(2) ibid.
21 *See* Section 7 ibid.
22 *See* Section 10 (1) ibid, emphasis added. Regarding the application of local content obligations to services in the oil and gas industry, and the compliance of the Local Content Act with Nigeria's GATS commitments, *see* Uchenna Jerome Orji, "Assessing the Comformity of Nigeria's L*ocal Content Act with GATS Obligations", *International Trade Law and Regulation* (2017) Vol. 23 Issue 1, pp. 12-24.
23 *See* Section 7 ibid.
24 *See* Section 11(1) ibid.
25 *See* Section 7 ibid.

Content Act also prohibits the importation of welded products into Nigeria where such products are to be used for projects in the oil and gas industry. However, the Act requires all operators and contractors in the industry to carry out all their fabrication and welding activities in the country.[26]

Section 68 of the Act establishes penalties for non-compliance with local content requirements. In this regard, an operator or contractor that fails to comply with local content obligations concerning a particular project in the oil and gas industry will be liable on conviction to a fine of 5 per cent of the value of that project or to a cancellation of such project.[27] In addition, the Act seeks to create a fiscal regime and tax incentives to encourage both foreign and indigenous companies to develop local capacity through measures such as the establishment of facilities for the local production of goods and services which are being imported into Nigeria. In this respect, section 48 of the Act provides that the Minister of Petroleum Resources "shall consult with the relevant arms of Government on appropriate fiscal framework and tax incentives for foreign and indigenous companies which establish facilities, factories, production units or other operations in Nigeria for purposes of carrying out production, manufacturing or for providing services and goods otherwise imported into Nigeria".[28]

## 3. THE TRIMS AGREEMENT

This section examines the history of the TRIMS Agreement and the obligations under the Agreement, as well as the exemptions that apply to the Agreement.

### 3.1 History of the TRIMS Agreement

The TRIMS came into effect on 1 January 1995 as part of the Uruguay Round of Trade Negotiations.[29] However, the need for the establishment of the TRIMS Agreement appears to have arisen during the 1970s when

26 *See* Section 53.
27 *See* Section 68.
28 *See* Section 48 ibid.
29 *See* The Agreement Establishing the World Trade Organization, 1994 (WTO Agreement) (Marrakesh, 15 April, 1994; TS 57(1996) Cm 3277; 33 ILM (1994); OJ L 336/1, 23 December 1994.

governments in both developed and developing countries resorted to performance requirements as a means of counteracting the trade-distorting practices of transnational corporations and promoting economic growth.[30] Foreign investors however objected to the application of performance requirements as an unwelcome interference with their investments. To resolve this state of affairs, the United States subsequently brought the issue of performance requirements on the agenda of the General Agreement on Tariffs and Trade (GATT) Ministerial Meeting in 1982. However, Member States of the GATT were divided on the issue. Thus, while other developed countries that were also home to corporations with significant overseas investments, including Canada, the European Community and Japan, supported the United States' proposals to bring the TRIMS within the agenda of the GATT, developing countries and least developed countries strongly opposed the inclusion of TRIMS within the GATT's Agenda.[31] The opposition of developing and least developed countries was based on the fact that performance requirements were considered as:

> One of the few bargaining tools they could use to extract concessions and benefits from foreign investors. Moreover, they feared that any new GATT rules which encroached on their investment policy autonomy would ultimately undermine national economic and political sovereignty.[32]

The TRIMS was eventually included in the Uruguay Round of Multilateral Trade Negotiations which lasted between 1986 and 1994 resulting in the establishment of the TRIMS Agreement.[33s] However, the immense opposition that was received from developing and least developed countries hindered the achievement of productive results and led observers to describe the TRIMS as the "most frustrating and

30 *See* United Nations Conference on Trade and Development (UNCTAD), *Elimination of TRIMS: The Experience of Selected Developing Countries* (United Nations: New York and Geneva, 2007) 1.

31 *See* UNCTAD.

32 *See* UNCTAD, ibid.

33 *See* Final Acts Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Marrakesh, 15 April 1994). *See also,* WTO*, Understanding the World Trade Organization* (WTO Information and External Relations Division: Geneva, Switzerland, 2011) 23-53.

least productive of the Uruguay Round, because developing countries resented negotiation on the matter while developed countries had little leverage to force progress in the area".[34]

### 3.2 The Scope of the TRIMS Agreement

Being a part of the Uruguay Round of Trade Negotiations, the TRIMS Agreement forms an integral part of the WTO's multilateral trade regime.[35] The TRIMS Agreement aims to address trade-related investment measures and investment measures that can cause trade restrictive and distorting effects.[36] The Agreement explicitly applies "to investment measures related to trade in goods only".[37] Consequently, the scope of the TRIMS Agreement is restricted to "trade in goods" and does not extend to "trade in services"[38] or the supply of services. Thus, the TRIMS Agreement is only concerned with the trade effects of investment measures and is therefore not actually intended to directly deal with the regulation of investments in WTO Member States. Article 2.1 of the TRIMS Agreement requires WTO Members to refrain applying any TRIM (trade-related investment measure) that is inconsistent with the provisions of Article III or Article XI of GATT Treaty (1994).[39]

However, the TRIMS Agreement does not define what constitutes "trade-related investment measures" (TRIMS), rather it establishes an

---

34 *See* United Nations Conference on Trade and Development (UNCTAD), *Elimination of TRIMS: The Experience of Selected Developing Countries* (United Nations: New York and Geneva, 2007) 1. *See* John Croome, *Reshaping the World Trading System: A Historical Account of the Uruguay Round* (WTO: Geneva, 1995)138.

35 *See* The Agreement on Trade Related Investment Measures (TRIMS) *reprinted* in the Results of the Uruguay Round,139-143. [Hereafter, TRIMS Agreement].

36 *See* Preamble to the TRIMS Agreement.

37 *See* Article 1 TRIMS Agreement.

37 Under the WTO's General Agreement on Trade in Services (GATS) "trade in services" is defined as the supply of a service: (a) from the territory of one member into the territory of any other members; (b) in the territory of one member to the service consumer of any other member; (c) by a service supplier of one member through commercial presence in the territory of any other member; (d) by a service supplier of one member, through presence of natural persons of a member in the territory of any other member. *See* Article I. 2 General Agreement on Trade in Services (GATS), TS 58(1996) Cm 3276; 33ILM 44 (1994).

39 *See* The General Agreement on Tariffs and Trade (GATT), TS 56 (1996) Cm 3282; 33 ILM 28 (1994).

Annex with an illustrative list setting out investment measures that are considered to affect trade such as local content measures for the balancing of imports and exports which WTO Member States are required not to apply.[40] Hence, "TRIMS" are regarded as "a broad class of investment incentives and disincentives with no common definition".[41] However, despite the absence of a definition, the TRIMS Agreement is specifically directed to local content requirements, foreign exchange balancing requirements and import and export restrictions, since such trade measures are considered to cause "trade restrictive and distorting effects".

The TRIMS Agreement seeks to abolish the application of "trade-related investment measures" that are inconsistent with the national treatment obligation under Article III: 4 of GATT and the obligations to eliminate quantitative trade restrictions under Article XI: 1 of GATT.[42] The national treatment obligation under Article III: 4 of GATT requires WTO members not to apply national trade measures such as internal taxes/charges, or laws, regulations or requirements that will discriminate against imported products in order to protect domestic production. The obligation specifically requires that products from any WTO member, which have been imported into the territory of another WTO member "shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting that internal sale, offering for sale, purchase, transportation, distribution or use".[43] This obligation implies that every WTO member shall subject products that have a domestic origin and imported products from other WTO Member States to the same treatment. As such, products that are imported from other WTO Member States are not to be discriminated against to provide an advantage to products with a local origin.

On the other hand, the obligations to eliminate quantitative restrictions under Article XI: 1 of the GATT require WTO members not to impose trade measures such as import or export licenses or quotas

40 *See* Article 2 TRIMS Agreement. *See also* Kavaijit Singh, *Multilateral Investment Agreement in the WTO: Issues and Illusions* (Asia-Pacific Research Network, 2003) 23.

41 *See* Kerry A. Chase, "From Protectionism to Regionalism: Multinational Firms and Trade-Related Investment Measures" (2004) 6 (2) *Business and Politics*, 5.

42 *See* Article 2. 1 & 2, Annex to the TRIMS Agreement.

43 *See* Article III: 4 GATT (1994).

for the purpose of prohibiting or restricting the importation of any product from any WTO member, or the exportation of any product from the territory of any WTO member. However, a WTO member is permitted to impose duties, taxes or other charges on such products.[44] Nevertheless, it is implied in the light of Article III: 4 of GATT that such fiscal measures (duties, taxes, or other charges) should not be applied to protect similar products with a local origin.

### 3.3 Prohibited Local Content Measures and Quantitative Restrictions under the TRIMS Agreement

Paragraph 1 of the Illustrative List that is established in the Annex of the TRIMS Agreement provides that the TRIMS that are inconsistent with the national treatment obligation under Article III: 4 of GATT include: measures which are "*mandatory or enforceable under domestic law or under administrative rulings*",[45] or which compliance with is necessary to obtain an advantage, and which require:

(a) [The] purchase or use by an enterprise of products of domestic origin, or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production, or;
(b) Domestic measures that require an enterprise's purchase or use of imported products be limited to an amount related to the volume or value of local products that it exports.[46]

The above provision prohibits WTO members from establishing domestic trade measures (TRIMS) that seek to compel firms operating within their territory to make use of products that have a local origin. Such measures are commonly classified as "local content" requirements and they are usually imposed by States on firms in order to achieve economic objectives such as the promotion of economic diversification, the reduction of import dependency, the promotion of indigenous participation in strategic economic sectors, or the promotion of exports.

Concerning measures relating to quantitative trade restrictions,

44 *See* Article XI: 1 GATT (1994).
45 Emphasis added.
46 *See* Para. 1, Illustrative List, Annex to the TRIMS Agreement.

paragraph 2 of the Illustrative List under the Annex to TRIMS Agreement classifies such measures as TRIMS that are inconsistent with the obligation of WTO members to ensure the general elimination of quantitative restrictions as provided under of Article XI: 1 of GATT. Such measures include "mandatory or enforceable" domestic measures which require any of the following actions:

(a) the restriction of a firm from the importation of products used in relation to its local production, or the restriction of a firm to import an amount of such products in relation to the value of local products that it exports; or,
(b) the restriction of a firm from the importation of products used in relation to its local production by restricting its access to foreign exchange to the amount of foreign exchange inflows attributable to the firm; or,
(c) the restriction of a firm from the exportation of products regardless of whether such restriction is specified in terms of particular products, or in terms of the proportion of volume or value of the firm's local production.[47]

The above TRIMS cover import and export restrictions as well as foreign exchange restrictions that seek to promote trade balance objectives. States usually impose such restrictions on firms within their territory to compel them to increase exports with a view to reducing import dependency. Such restrictions may also be applied by a State for the purpose of compelling firms to reduce the exportation of products with a view to achieving economic objectives which may include (i) promoting domestic consumption; or (ii) preventing the exportation of products that are considered to be scarce in the domestic market; or (iii) ensuring the security of the supply of a particular product to local industries through export quota measures (such as the domestic supply obligation mechanism); or (iv) achieving objectives such as the reduction of prices in the domestic market.

The prohibition of "local content" measures and quantitative import or export restrictions under the TRIMS Agreement generally cover situations where such measures are imposed either on domestic firms or on foreign firms. As such, the prohibition under the TRIMS Agreement generally applies regardless of whether such measures are meant to be

47 *See* Para. 2, Illustrative List, Annex to the TRIMS Agreement.

applied in a non-discriminatory manner to both domestic and foreign firms within a WTO Member State. For example, a local content requirement that is imposed in a non-discriminatory and uniform manner on both domestic and foreign firms will be considered inconsistent with the TRIMS Agreement because it involves discriminatory treatment against the use of imported products in favour of products with a local origin.[48]

### 3.4 Exemptions to Obligations under the TRIMS Agreement

The TRIMS Agreement requires "developed country" members of the WTO to eliminate the domestic application of all TRIMS within two years after the entry into force of the WTO Agreement of 1994.[49] On the other hand, "developing country" members are required to eliminate the application of TRIMS within five years after the entry into force of the WTO Agreement, while "least-developed country" members are required to eliminate the application of TRIMS within seven years after the WTO Agreement has entered into force.[50] The TRIMS Agreement also permitted WTO members to request for an extension of the transition period where prevailing domestic economic circumstances did not allow for a smooth elimination of existing TRIMS within the timeframes stipulated under the Agreement.[51]

For most developing country members of the WTO, the transition period expired in 2000 (although some requested extensions); therefore, any TRIMS that exist after the expiration of the transition period would be subject to the provisions of the TRIMS Agreement. However, the TRIMS Agreement also creates exemptions which WTO members may apply to derogate from fulfilling their obligations to eliminate prohibited TRIMS. In this respect, Article 3 of the TRIMS Agreement provides that "all exceptions under GATT 1994 shall apply as appropriate to the provisions of [the TRIMS] Agreement".[52] The

48 *See* United Nations Conference on Trade and Development (UNCTAD), *Elimination of TRIMS: The Experience of Selected Developing Countries* (United Nations: New York and Geneva, 2007) 3.
49 *See* Article 5.2 TRIMS Agreement.
50 *See* Article 5.2 TRIMS Agreement.
51 *See* Article 5.3 TRIMS Agreement.
52 *See* Article 5.3 TRIMS Agreement.

exemptions that exist under the GATT include the "general exceptions",[53] the "security exception",[54] and those relating to restrictions to safeguard domestic industries from "serious injury" as a result of importation. [55]

### 3.4.1 *General Exceptions*

Article XX of the GATT establishes broad "general exceptions" that are applicable to the TRIMS Agreement. In this respect, a WTO member may derogate from fulfilling its obligations to eliminate TRIMS where such measures are necessary for the protection of public morals or the protection of human life or health, or the lives or health of animals or plants;[56] or where such measures relate to the importation or exportation of gold or silver;[57] or where such measures are "necessary to secure compliance with laws or regulations" which are not inconsistent with the provisions of the GATT.[58] WTO members are also exempted from eliminating other forms of TRIMS, including: (a) TRIMS that relate to products of prison labour;[59] (b) TRIMS imposed for protection of national treasures of artistic, historic or archaeological value;[60] (c) TRIMS that are imposed for the purpose of conserving exhaustible natural resources (where such measures are made effective in conjunction with restrictions on domestic production or consumption);[61] (d) TRIMS undertaken in fulfilment of obligations under any intergovernmental community in accordance with the provisions of the GATT;[62] (e) TRIMS involving the restriction of the export of domestic materials in order to ensure the availability of essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan in accordance

53 *See* Article XX GATT (1994).
54 *See* Article XXI GATT (1994).
55 *See* Article XIX GATT (1994).
56 *See* Article XX (a) & (b) GATT (1994).
57 *See* Article XX (c) GATT (1994).
58 *See* Article XX (d) GATT (1994).
59 *See* Article XX (e) GATT (1994).
60 *See* Article XX (f) GATT (1994).
61 *See* Article XX (g) GATT (1994).
62 *See* Article XX (h) GATT (1994).

with the provision of the GATT;[63] and, (f) TRIMS that are essential to the acquisition or distribution of products in short supply, provided that WTO members are entitled to an equitable share of the international supply of such products.[64]

### 3.4.2 *Security Exceptions*

Article XXI of the GATT establishes broad exemptions that allow every WTO member to derogate from the obligation to eliminate TRIMS where the fulfilment of such obligation is not in the member's security interests.[65] In this respect, a WTO member that does not eliminate TRIMS would not be required to furnish any information on the measure where such member considers that the disclosure of such information would affect its "essential security interests".[66] A WTO member is also exempted from complying with the obligation to eliminate TRIMS in a time of war or in a period of emergency or crisis in international relations;[67] or where the member considers that such a measure is necessary for the purpose of protecting its essential security interests relating to: fissionable materials; traffic in arms/ammunition or for the purpose of supplying a military establishment.[68] A WTO member may also refrain from fulfilling its obligation to eliminate TRIMS where such action is in pursuance of its obligations to maintain international peace and security under the United Nations Charter.[69] For example, a WTO member may impose discriminatory TRIMS such as quantitative trade restrictions, including foreign exchange restrictions, against another WTO member in compliance with a United Nations economic sanction against such member.

63 *See* Article XX (i) GATT (1994). In the above context the GATT also provides that such restrictions on the export of domestic materials shall not operate to increase the exports of such domestic industry, or the protection afforded to such industry and that those restrictions shall not be discriminatory. *See* Article XX (h) GATT (1994).
64 *See* Article XX (j) GATT (1994).
65 *See* Article XXI GATT (1994).
66 *See* Article XXI (a) GATT (1994).
67 *See* Article XXI (b) (iii) GATT (1994).
68 *See* Article XXI (b) (i)-(ii) GATT (1994).
69 *See* Article XXI (c) GATT (1994).

### 3.4.3 *Exceptions Concerning Import Restrictions*

Article XIX:1 (a) of GATT establishes exemptions for the application of Emergency Action on the importation of particular products. In this respect, a WTO member is permitted to derogate from the obligation to eliminate TRIMS where "unforeseen developments" and the effect of such obligations has resulted in the importation of any product in such "increased quantities" and in a manner that would cause or threaten "serious injury" to domestic producers of a similar competing product in the territory of that Member State.[70] The decision in the early GATT matter of *US – Fur Felt Hats*,[71] classified "unforeseen developments" as "developments … which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated".[72] In the matter of *Argentina – Footwear (EC)*, the WTO's Appellate Body interpreted the phrase "as a result of unforeseen developments" under Article XIX:1(a) of the GATT to mean that "the developments, which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been 'unexpected'".[73]

Similarly, in the matter of *Korea-Dairy*, the WTO Appellate Body held that the phrase "as a result of unforeseen developments" under Article XIX:1(a) of the GATT requires that the developments that led to a product being imported in such quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been "unexpected".[74] According to the Appellate Body

70 *See* Article XIX: 1(a) GATT (1994).

71 *See* Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade (October, 1951) at para. 9. *See also* WTO, *WTO Analytical Index Guide to WTO Law and Practice – GATT 1994*, XXI. Article XIX , para. B at 816, available at <https://www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm> accessed 4 December 2018.

72 Ibid.

73 *See* Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, AB-1999-7, WT/DS121/AB/R (14 December 1999) at para. 91. For a brief summary of the matter, *see* WTO Legal Affairs Division, *WTO Dispute Settlement One Page Case Summaries 1995-2011* (WTO: Geneva, 2012) 48.

74 *See* Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, (14 December 1999) at para. 84. For a brief summary of the matter, *see* WTO Legal Affairs Division, *WTO Dispute Settlement One Page Case Summaries 1995-2011* (WTO: Geneva, 2012) 39.

"unforeseen developments" are those not foreseen or expected when Members incurred that obligation. Thus, "[s]uch 'emergency actions' [safeguard measures] are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, an importing Member finds itself confronted with developments it had not 'foreseen' or 'expected' when it incurred that obligation". [75]

The GATT does not provide a definition of the phrase "increased quantities". However, under Article 2.1 of the WTO Agreement on Safeguards[76] the phrase classifies a situation whereby a product is being imported into a WTO member's territory "in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products".[77] The GATT does not also define the meaning of "serious injury", however, under Article 4.1 (a) of the Agreement on Safeguards, "serious injury" is defined as "a significant overall impairment in the position of a domestic industry".[78] While the "threat of serious injury" is defined to mean "serious injury that is clearly imminent".[79] Article 4.1 (b) of the Agreement on Safeguards also requires that the determination of the existence of a threat of serious injury "shall be based on facts and not merely on allegation, conjecture or remote possibility".[80]

However, a WTO member State that is invoking the exemption of "unforeseen developments" under Article XIX:1(a) of GATT is required to provide a "reasoned and adequate explanation" to support the application of those exemptions.[81] In particular, such WTO member is

75 *See* Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, at para. 86.

76 *See* Article 2.1 of the Agreement on Safeguards (1994), available at <https://www.wto.org/english/ docs_e/legal_e/25-safeg_e.htm> accessed 4 December 2018.

77 *See* Article 2.1 Agreement on Safeguards (1994).

78 *See* Article 4.1 (a) Agreement on Safeguards (1994). Under Article 4(1) (c) of the Agreement on Safeguards, a "domestic industry" is defined to mean "the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products".

79 *See* Article 4.1 (b) Agreement on Safeguards (1994).

80 *See* Article 4.1 (b) Agreement on Safeguards (1994).

81 *See* Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R,WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/

required to demonstrate that the unforeseen developments identified have resulted in the increased importation of specific products subject to the exemption.[82] Also, the factual demonstration of unforeseen developments must also relate to the specific product(s) covered by the specific measure(s) at issue. Thus, "the demonstration of 'unforeseen developments' must be performed for *each product*[83] [that is] subject to a safeguard measure".[84]

Also, a Member State that is relying on the exemption under Article XIX:1 (a) is entitled to do so to the extent and period that is necessary to prevent or remedy the injury to its domestic producers.[85] The exercise of the exemption by a member State is also subject to conditions such as the notification of other WTO members and providing an opportunity for consultations with WTO members who are the exporters of the product in issue.[86] Nevertheless, a Member State may apply for exemption without prior consultation where a delay would cause damage that would be difficult to repair on the condition that consultations will be undertaken thereafter.[87]

### 3.4.4 Exceptions for Developing Countries under Article 4 of the TRIMS Agreement

Article 4 of the TRIMS Agreement provides that:

> A developing country Member shall be free to deviate temporarily from the provisions of Article 2 to the extent and in such a manner as Article XVIII of GATT 1994, the Understanding on the Balance-of-Payment Provisions of GATT 1994, and the Declaration on Trade

DS258/AB/R, WT/DS259/AB/R, (10 November, 2003) at paras. 276, 279, 296, 376, 383, 399, 452, 461,472, 473, 474, 482, 487, 513(a) and (b). For a brief summary of the matter, *see* WTO Legal Affairs Division, *WTO Dispute Settlement One Page Case Summaries 1995-2011* (WTO: Geneva, 2012) 100.

82 *See* Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, at paras. 316 and 319. *See also* WTO Panel Report, *Argentina – Definitive Safeguard Measure on Imports of Preserved Peaches*, WT/DS238/R, (14 February 2003) adopted on 15 April 2003, DSR 2003:III, 1037.

83 Emphasis added.

84 *See* Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, at paras 319 and 322.

85 *See* Article XIX: 1(a) GATT (1994).

86 *See* Article XIX: 2 GATT (1994).

87 *See* Article XIX: 2 GATT (1994).

> Measures Taken for Balance-of-Payments Purpose adopted on 28 November 1979 (BISD 265/205-209) permit the Member to deviate from the provisions of Articles III and XI of GATT 1994.[88]

The above provision permits "developing country" members of the WTO to "deviate temporarily" from fulfilling their obligations to eliminate TRIMS that are inconsistent with the national treatment obligation and the obligation to ensure the general elimination of quantitative restrictions under Articles III and XI of GATT. However, such temporary deviation is subject to the extent to which WTO members are permitted to deviate from fulfilling the provisions of Articles III and XI of GATT under Article XVIII of GATT and also under other multilateral instruments, including the Understanding on the Balance-of-Payment Provisions of GATT and the Declaration on Trade Measures Taken for Balance-of-Payments Purposes of 28 November 1979.

Article XVIII: 1 of GATT provides for "Governmental Assistance to Economic Development" and declares the recognition of WTO members that "the attainment of the objectives of [the GATT 1994] will be facilitated by the progressive development of their economies", and more especially for members whose economies are still in the early stages of development and "can only support low standards of living".[89] Article XVIII: 2 of GATT also recognizes that it may be necessary for such members "to take proactive or other measures affecting imports" for the purpose of implementing economic development policies that are designed to raise the general standard of living of their people, and "that such measures are justified in so far as they facilitate the attainment of the objectives of [the GATT]".[90] Thus, WTO members whose economies are still in the early stages of development, and can only support low standards of living are allowed to enjoy additional facilities that would enable them "to maintain sufficient flexibility in their tariff structure" so as to provide the requisite tariff protection for the establishment of a particular industry and also to apply quantitative restrictions for balance of payment purposes.[91]

88 *See* Article 4 TRIMS Agreement.
89 *See* Article XVIII: 1 GATT (1994).
90 *See* Article XVIII: 2 GATT (1994).
91 *See* Article XVIII: 2 GATT (1994).

## 4. AN OVERVIEW OF WTO TRIMS DISPUTES RELATING TO LOCAL CONTENT MEASURES

In the matter of *Indonesia – Certain Measures Affecting the Automobile Industry*,[92] a WTO Panel addressed issues relating to the application of local content requirements in Indonesia's automobile industry within the framework of the TRIMS Agreement. The WTO Panel was constituted in June 1997, at the request of the European Community, Japan and the United States to determine: (i) whether Indonesia's 1993 car programme which provided import duty reductions and exemptions on imports of automotives based on the local content per cent and; (ii) whether the 1996 national car programme that provided for various benefits such as luxury tax exemptions and import duty exemptions to cars and Indonesian car companies based on the implementation of qualifying local content measures were in violation of Article 2 of the TRIMS Agreement and Articles I and III of the GATT.[93] The WTO Panel considered whether the measures in Indonesia's 1993 and 1996 automobile programmes were "investment measures" within the meaning of the TRIMS Agreement. Thus, the Panel considered the wording of various laws, regulations and administrative directives relating to the said automobile programmes and concluded that the "measures [were] aimed at encouraging the development of a local manufacturing capability for finished motor vehicles and components in Indonesia".[94] The Panel found Indonesia's 1993 car programme to be in violation of Article 2.1 of the TRIMS Agreement because the measure was a trade-related investment measure, and the measure as a local content requirement fell within paragraph 1 of the list of TRIMS in the Annex to the TRIMS Agreement which set out trade-related investment measures that are inconsistent with the national treatment obligation under Article III: 4 of GATT.[95]

92 *See Indonesia – Certain Measures Affecting the Automobile Industry,* WT/DS54/R, WT/DS5/R, DS59/R, WT/DS64/R and corr. 1 and 2 adopted 23 July 1998, and corr. 3 and 4, DSR 1998: VI, 2201. For a brief summary of the matter, *see* WTO Legal Affairs Division, *WTO Dispute Settlement One Page Case Summaries 1995-2011* (WTO: Geneva, 2012) 25.

93 *See* WTO Legal Affairs Division, *WTO Dispute Settlement One Page Case Summaries 1995-2011* (WTO: Geneva, 2012) 25.

94 *See Indonesia – Certain Measures Affecting the Automobile Industry*, at para. 14.80.

95 *See* WTO Legal Affairs Division, *WTO Dispute Settlement One Page Case Summaries 1995-2011* (WTO: Geneva, 2012) 25.

In the matter of Canada – Renewable Energy Dispute,[96] Japan and the European Union brought complaints before the WTO concerning certain measures relating to local content requirements in the "Feed-in-Tariff Programme" (FIT Programme) established by the Canadian province of Ontario.[97] The FIT required renewable energy generation facilities to use domestically produced equipment for energy generation if such facilities wished to receive guaranteed prices under the FIT Programme. The complaints alleged *inter alia* that the local content requirements under the FIT programme violated the national treatment obligation under Article III: 4 of GATT and Article 2.1 of TRIMS, because benefiting from the programme was dependent on the use of domestic products over imported products. The WTO Panel found that the local content requirements under the FIT programme violated national treatment obligations under Article III: 4 of GATT and Article 2.1 of TRIMS since the programme accorded a less favourable treatment to imported equipment, but however, favoured the use of domestically produced equipment in renewable generation facilities.[98]

In the matter of *India – Certain Measures Relating to Solar Cells and Solar Modules*,[99] the United States requested WTO consultations with India on 6 February 2013, regarding certain domestic content requirements that were imposed by India in the initial phases of the Jawaharlal Nehru National Solar Mission (NSM) programme.[100] The NSM programme required solar power developers selling electricity to the government to use solar cells and modules manufactured in India to qualify for benefits in the form of long-term tariff rates for electricity. However, the United States complained that the measures under the

96 *See* WTO Panel Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS426/R (19 December, 2012). *See also* Appellate Body Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS412/AB/R; *Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS426/AB/R (6 May, 2013).

97 Japan filed complaints against Canada on the 13 September, 2010, while the European Union filed a similar complaint on 11 August, 2011.

98 *See Panel Report Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS412/R (19 December, 2012) at para. 7.167.

99 *See* WTO Panel Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/R/Add.1 (24 February, 2016).

100 *See* Request for Consultations by the United States, India - Certain Measures Relating to Solar Cells and Solar Modules WT/DS45 6/1, G/L/1023 G/TRIMS/D/35, G/SCM/D96/1 (11 February, 2013).

NSM were local content measures inconsistent with national treatment obligations under Article III: 4 of GATT and Article 2.1 of the TRIMS Agreement,[101] and those measures appeared to impair the benefits accruing to the United States directly or indirectly under the above agreements.

India argued that the local content measures under the NSM were justified under the general exception in Article XX (j) of GATT, on the grounds that its lack of domestic manufacturing capacity in solar cells and modules, and/or the risk of a disruption in imports, made those "products in general or local short supply" within the meaning of Article XX (j) of GATT. The WTO Panel found the local content measures under the NSM programme to be trade-related investment measures covered by paragraph 1(a) of the Illustrative List in the Annex to the TRIMS Agreement and therefore inconsistent with Article III: 4 of the GATT and Article 2.1 of the TRIMs Agreement. The Panel also found that the NSM's local content measures were not covered by the government procurement derogation under Article III: 8(a) of GATT.[102]

## 5. COMPATIBILITY OF THE NIGERIAN LOCAL CONTENT ACT WITH THE TRIMS AGREEMENT

The extension period of five years which the TRIMS Agreement granted to developing countries as a "transition period" is no longer available to Nigeria, having expired in 2000. Therefore, the TRIMS Agreement would apply to any regimes that seek to establish local content measures or quantitative import or export restrictions in Nigeria, including the Local Content Act. Hence, as a member of the WTO Nigeria has obligations to ensure that the provisions of the Local Content Act comply with the principles of the free trade regime under the TRIMS Agreement. In this respect, the degree or extent to which the Local Content Act complies with or diverts from the core principles of the TRIMS Agreement is dependent on the extent to which the Act "alters

101 *See* WTO – Committee on Trade-Related Investment Measures, Minutes of the Meeting held on 30 April, 2013, G/TRIMS/M34 (19 June, 2013)12 at para. 87.

102 *See* WTO, Dispute Settlement: Dispute DS456, *India – Certain Measures Relating to Solar Cells and Solar Modules*, (29 June, 2016) available at <https:// www.wto.org/english/tratop_e/dispu_e/cases _e/ds456_e.htm> accessed 4 December 2018.

the balance of competition between foreign and domestic products through its provisions".[103]

Within the above context, the major questions are:

(i) Whether the Local Content Act is in violation of the national treatment obligation under Article III: 4 of GATT and the obligation to eliminate quantitative restrictions under Article XI of GATT? and;
(ii) Whether such violation is covered within the scope of the exemptions under the GATT and the TRIMS Agreement?

To determine whether the measures under the Local Content Act are in violation of principles under the TRIMS Agreement, it will be necessary to show that:

(a) The measures qualify as "investment measures" which are trade-related;
(b) The measures require the use of domestic products over similar imported products; and,
(c) That compliance with the measures is mandatory or enforceable, or that they are necessary in order to obtain a governmental advantage.

The Local Content Act does not explicitly provide that the measures established in the Act shall apply to "investments" in Nigeria's oil and gas industry. This is because the Act does make use of the term "investment". However, section 1 of the Act provides that the Act "… shall apply to all matters pertaining to Nigerian content in respect of all *operations or transactions*[104] carried out in or connected with the Nigerian oil and gas industry".[105] The phrase "operations or transactions" apparently grants the Act a very broad scope of application, which would cover any form of business activity in the oil and gas industry, including investment-related activities, as well as trade in goods and services.[106]

---

103 *See* Dominic Ayine, *Consolidated Report on Proposed Petroleum Bills and Local Content Policy for the Petroleum Sector* (A report submitted to the Ghana Research and Advocacy Programme (G-RAP), Accra, Ghana (September, 2012) 45.

104 Emphasis added.

105 *See* Section 1 Local Content Act.

106 The Blacks' Law Dictionary defines "transaction" as "the act or an instance of conducting business or other dealings". *See The Blacks' Law Dictionary* (8th Edition), 1535.

In the matter of *Indonesia – Certain Measures Affecting the Automobile Industry*,[107] the WTO Panel, while considering whether the local content measures in Indonesia's national car programmes (1993 and 1996) constituted "investment measures" within the meaning of the TRIMS Agreement, noted that the "characterization of measures as *investment measures*[108] is based on an examination of the manner in which the measures at issue in [a particular] case relate to investment".[109] The Panel also noted that "there is nothing in the text of the TRIMS Agreement to suggest that a measure is not an investment measure simply on the grounds that a [WTO] member does not characterize the measure as such, or on the grounds that the measure is not explicitly adopted as an investment regulation".[110] Hence, the fact that measures under the Local Content Act are not explicitly classified as "investment measures" or as a form of investment regulation does not imply that the Act does not have the effect of an investment measure in practice. Thus, a measure will qualify as an "investment measure" within the meaning of the TRIMS Agreement where such a measure is established to encourage investment whether foreign or local.[111] Consequently, the measures that are established in the Local Content Act constitute "investment measures" within the meaning of the TRIMS Agreement, since such measures are explicitly meant to apply to "all operations or transactions" connected with the oil and gas industry.

The decision of the WTO Panel in the *Indonesian Automobile Industry Dispute*[112] also establishes a simple test for determining whether an "investment measure" that is in the form of a local content requirement

107 *See Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS5/R. DS59/R, WT/DS64/R and corr. 1 and 2 adopted 23 July, 1998, and corr. 3 and 4, DSR 1998: V1, 2201. For a brief summary of the matter, *see* WTO Legal Affairs Division, *WTO Dispute Settlement One Page Case Summaries 1995-2011* (WTO: Geneva, 2012) 25.

108 Emphasis added.

109 *See Indonesia – Certain Measures Affecting the Automobile Industry*, n.108 at para. 14.80.

110 Ibid at para. 14.81.

111 *See* Dominic Ayine, *Consolidated Report on Proposed Petroleum Bills and Local Content Policy for the Petroleum Sector* (A report submitted to the Ghana Research and Advocacy Programme (G-RAP), Accra, Ghana, (Septembers, 2012) 49.

112 *See Indonesia – Certain Measures Affecting the Automobile Industry* (23 July, 1998).

is "trade related". According to the Panel, if investment measures are local content requirements "they would necessarily be *trade-related*[113] because such requirements, by definition, always favour the use of domestic products over imported products and therefore affect trade".[114] As seen in the overview in Section 2 (above), the *first consideration principle* which is enshrined in sections of 10 (1) and 12 of the Local Content Act explicitly favours the use of domestically manufactured products in the Nigerian oil and gas industry. In addition, section 11(1) of the Act establishes a Schedule which prescribes the minimum level of local content that is required with respect to the procurement and utilization of some specified products in the execution of projects in the oil and gas industry (*see* Table 1). Thus, the above requirements of the Act have the effect of favouring the use of domestic products over imported products in the oil and gas industry. This implies that the Act's local content requirements are "trade related" in accordance with the position of the WTO Panel in the *Indonesian Automobile Industry Dispute*, and also shows that the Act discriminates against the use of imported products while favouring the use of local products.

The overview in Section 2 (above) also shows that non-compliance with the requirements under the Local Content Act constitute an offence, which can be sanctioned by a fine or the cancellation of the project where the local content requirements were not complied with.[115] This clearly implies the local content requirements under the Act are "mandatory" and "enforceable" in the Nigerian legal system. Consequently, the local content measures under the Act can be classified as being inconsistent with the TRIMS Agreement. However, despite the mandatory nature of the local content requirements under the Act, the Act does not stipulate that compliance with those requirements are necessary to obtain government benefits such as fiscal incentives or other forms of subsidies. In this regard, it should also be noted that section 48 of the Act provides for the establishment of "appropriate fiscal framework and tax incentives for foreign and indigenous companies" that establish facilities, factories, production units, or other operations in Nigeria for purposes of carrying out the production or manufacturing of goods being imported into Nigeria.[116] However, the

113 Emphasis added.
114 At para. 14.82.
115 *See* Section 68 Local Content Act.
116 *See* Section 48 Local Content Act.

fiscal and tax incentives that exist under section 48 are limited in scope as they are not available to operators who merely comply with local content requirements under the Act.[117]

### 5.1 The National Treatment Obligation under Article III: 4 of the GATT

To determine whether requirements under the Local Content Act are in violation of the national treatment obligation under Article III: 4 of the GATT, it will be necessary to show that the Act favours the use of local goods/products or materials over similar items of a foreign origin. Section 106 of the Act defines "local content" (Nigerian content) as the "quantum of composite value added to or created in the Nigerian economy by a systematic development of capacity and capabilities through the deliberate utilization of Nigerian … *material resources*[118] … in the Nigerian oil and gas industry". The above definition provides a basis for inferring that the Act applies to the use of Nigerian goods since the term "material resources" broadly includes raw materials and unfinished products, which can be used in processing goods or products within the oil and gas industry. Section 3(1) Act also provides another broad basis for the application of the Act to goods/products. It declares that "Nigerian independent contractors shall be given first consideration … in *all projects for which contracts*[119] [are] to be awarded in the Nigerian oil and gas industry…".[120] Within the above context, the Act does not impose any explicit obligations for the utilization of Nigerian goods or materials; however, it is imperative to note that projects for which contracts can be awarded in the oil and gas industry broadly include projects for the provision of goods/products or materials for activities in the industry.

The *first consideration principle* under section 10 (1) of the Local Content Act clearly favours the use of locally manufactured goods for projects in the oil and gas industry by providing that an operator's local content plan "shall contain provisions intended to ensure that

117 *See* Uchenna Jerome Orji, "The WTO Agreement on Subsidies and the Fiscal Incentive Regime under the Nigerian Local Content Act: a Compatibility Assessment" (2017) 35 (5) *International Energy Law Review*, 143-147.
118 Emphasis added.
119 Emphasis added.
120 *See* Section 3(1) Local Content Act.

*first consideration* shall be given to … goods manufactured in Nigeria".[121] Section 11(1) of Act also favours the use of Nigerian goods for projects in the industry. It provides that the "minimum" level of local content in any project to be executed in the Nigerian oil and gas industry "shall be consistent with the level set in the Schedule to [the] Act".[122] In this respect, the Schedule to the Act prescribes the levels in Table 1 as the minimum local content requirements concerning the procurement and utilization of Nigerian products in the execution of projects in the oil and gas industry.

Table 1. Level of Local Content Requirement(s) in the Utilization of Nigerian Products/Materials for Projects in the Oil and Gas Industry

| S/N | Description of Materials/Products | Minimum Level of Local Content Requirement |
|---|---|---|
| 1 | Steel plates, flat sheets, sections | 100 per cent tonnage |
| 2 | Steel pipes | 100 per cent tonnage |
| 3 | Low voltage cables | 90 per cent length |
| 4 | High voltage Cables | 45 per cent length |
| 5 | Valves | 60 per cent number |
| 6 | Drilling mud-Baryte, Bentonite | 60 per cent tonnage |
| 7 | Cement (Portland) | 80 per cent tonnage |
| 8 | Cement (Hydraulic) | 60 per cent tonnage |
| 9 | Heat exchangers | 50 per cent number |
| 10 | Steel ropes | 60 per cent tonnage |
| 11 | Protective paints | 60 per cent tonnage |
| 12 | Glass Reinforced Epoxy (GRE) pipes | 60 per cent tonnage |

The local content requirements that are prescribed in the Schedule to the Act as shown in Table 1 clearly indicate that the Act favours the use of Nigerian products for the execution of projects in the oil and gas industry. Compliance with the above requirements is "mandatory" for all operators in the oil and gas industry, while non-compliance will trigger sanctions under section 68 of the Act. Therefore, the provisions

121 *See* Section 10 (1) (a).
122 *See* Section 11 (1) (a) ibid.

of the Act have an implied effect of discriminating against the use of imported products for the execution of projects in the oil and gas industry while favouring similar products that have a local origin. However, such favourable treatment apparently violates the national treatment obligation under Article III: 4 of the GATT which requires the equal treatment of both domestic and foreign products by WTO members.

As noted earlier, the TRIMS Agreement provides for the application of exemptions that exist under the GATT.[123] In this respect, it is imperative to note that the GATT's national treatment obligation does not apply to materials or products that are procured by a government for non-commercial purposes,[124] and neither does it apply to government subsidies granted to domestic producers or to the purchase of domestic products by government agencies.[125] However, these exemptions cannot be applied to justify the favourable treatment of Nigerian products under the Local Content Act. This is because the Act was meant to apply to commercial activities within the oil and gas industry, and also the Act was not established to regulate the government's procurement of products for non-commercial purposes in the industry, or for the purpose of granting subsidies to domestic producers in the industry within the meaning of Article III: 8 (a) of GATT. Consequently, the favourable treatment of Nigerian products as required by the provisions of the Act is clearly inconsistent with Article 2 of the TRIMS Agreement.

### 5.2 The Obligation to Ensure the General Elimination of Quantitative Restrictions

In order to determine whether the Local Content Act violates Article 2 of the TRIMS Agreement which requires WTO members to ensure elimination of quantitative restrictions as provided under Article XI: 1 of the GATT, it will be necessary to show whether the Act establishes any provisions that constitute a quantitative restriction on the importation or exportation of a product; and whether the application of such restriction is exempted under the GATT. As noted earlier (in Section 3.3 above), the obligation to ensure the general elimination of quantitative restrictions requires WTO members not to impose export

123 *See* Article 3 TRIMS Agreement.
124 *See* Article III: 8 (a) GATT (1994).
125 *See* Article III: 8 (b) GATT (1994).

or import licenses or quotas that prohibit or restrict the exportation or importation of any product to or from any other WTO Member State. It is also implied from the national treatment obligation under Article III: 4 of GATT that quantitative restrictions are not to be used by States as a mechanism to create an advantage for domestic products.

Section 53 of the Local Content Act imposes a requirement which apparently constitutes a quantitative restriction that prohibits the importation of fabricated welded metal products into the Nigerian oil and gas industry. It provides that "as from the commencement of this Act, all operators, project promoters, contractors and any other entity engaged in Nigerian oil and gas industry shall carry out all fabrication and welding activities in the country".[126] Under Article XI:2 of the GATT, the obligation to ensure the general elimination of quantitative restrictions does not apply to: (a) export prohibitions or restrictions temporarily applied to prevent critical shortages of food stuff; (b) import and export restrictions necessary for the application of regulations for the classification or marketing of commodities in international trade; and (c) import restrictions on any agricultural and fisheries products necessary for the enforcement of certain governmental measures. However, these exemptions cannot be applied to justify the import restriction measure under section 53 of the Local Content Act; hence the section is inconsistent with Article 2.1 of the TRIMS Agreement which requires WTO members not to apply domestic measures that are inconsistent with the general obligation to eliminate quantitative restrictions under Article XI: 1 of the GATT.

### 5.3 The Special Exceptions for Developing Countries under Article 4 of the TRIMS Agreement

As noted earlier (in Section 3.4.4 above), Article 4 of the TRIMS Agreement permits developing country members of the WTO to "deviate temporarily" from fulfilling their obligations to eliminate TRIMS that are inconsistent with the national treatment obligation under Article III of GATT and their obligation to ensure the general elimination of quantitative restrictions under Article XI of the GATT. However, these exemptions are subject to Article XVIII of the GATT and the Understanding on the Balance-of-Payments Purpose (1979).[127] Thus,

126 *See* Section 53 Local Content Act.
127 *See* Article 4 TRIMS Agreement.

Article XVIII of the GATT permits a WTO member whose economy is in the early stages of development and can only support low standards of living to temporarily apply TRIMS to implement economic development programmes aimed at raising the standard of living of its people.[128]

Apparently, the exemptions under Articles 4 of the TRIMS Agreement and Article XVIII of the GATT can be applied to justify the measures established in the Local Content Act. In this respect, it is imperative to note that Nigeria qualifies to be classified as a country whose economy is in the "early stages of development". Under the GATT this concept is used to refer to WTO members who "have just started their economic development" and members whose economies "are undergoing a process of industrialization to correct an excessive dependence on primary production".[129] Although Nigeria is usually classified as a "developing country",[130] its economy is however not diversified but reliant on the oil and gas sector, which provides for the major source of government revenue. Recent statistics from the World Bank indicate that the oil and gas sector accounts for 75 per cent of the government's consolidated budgetary revenue and 90 per cent of foreign exchange earnings.[131] The Local Content Act seeks to address the above state of affairs by promoting the patronage of local products and services in the oil and gas industry to effectively integrate the industry into the mainstream of the Nigerian economy and also enhance the industry's GDP contribution. Hence, the Act aims to harness the industry to facilitate Nigeria's economic development and diversification.[132]

In addition, it is imperative to note that Nigeria is classified as having one of the highest rates of poverty[133] as well as one of the lowest

128 *See* Articles XVIII: 1, XVIII: 2 & XVIII: 4 (a) GATT (1994).

129 *See* Annex I, Ad Article XVIII: 2 GATT (1994).

130 *See* The United Nations, "Country Classification", (2012) available at <http://www.un.org/en/development/desa/policy/wesp/wesp_current/2012country_class.pdf> accessed 4 December 2018.

131 *See* The World Bank, "Nigeria-Overview" (2016) available at <http://www.worldbank.org/en/country/nigeria/overview> accessed 4 December 2018.

132 *See* Uchenna Jerome Orji, "Towards Sustainable Local Content Development in the Nigerian Oil and Gas Industry: An Appraisal of the Legal Framework and Challenges – Pt I", (2014) 32 (1) *International Energy Law Review*, 30, 31 & 35.

133 • The United Nations Development Programme (UNDP) Human Development Report (2015) classifies Nigeria as one of the five countries with the largest population of people in multidimensional poverty. The report indicates that 88.4 million Nigerians are in multidimensional poverty representing about

human development index levels in the world.[134] This implies that the country's economy can only support "low standards of living". Apparently, this situation justifies the application of local content measures in oil and gas industry, because the primary objective for applying those measures is to promote Nigeria's economic development so as to improve the standard of living in the country. Consequently, Nigeria can rely on the exemption under Article 4 of the TRIMS Agreement to justify the application of local content measures in the oil and gas industry.

### 5.4 Local Content Measures and the "General Exceptions" under Article XX of GATT

As seen from the overview in Section 3.4.1, the TRIMS Agreement permits a WTO member to derogate from complying with obligations under the TRIMS Agreement under specific instances that are covered by the "general exceptions" under Article XX of the GATT. Thus, a WTO member may establish measures that derogate the national treatment obligation and the obligation to ensure the general elimination of quantitative restrictions where such measures are necessary to achieve objectives, which include the protection of public morals; the protection of human life or health and the lives of animals or plants; or for the purpose of ensuring compliance with laws or regulations which are not inconsistent with the GATT. Other conditions under which a WTO member can derogate from fulfilling the GATT are where such measures relate to the importation or exportation of gold or silver; or where such measures relate to products of prison labour; or where such measures are imposed for the protection of national treasures of artistic, historic or archaeological value; or where such measures are imposed for the purpose of conserving exhaustible natural resources (where such measures are made effective in conjunction with restrictions on domestic production or consumption). Further conditions include where such measures are undertaken in fulfilment of obligations under any intergovernmental community in accordance with the provisions of the GATT; or where such measures are imposed to restrict the export of

50.9 per cent of the entire population of Nigeria. *See* UNDP, *Human Development Report 2015* (UNDP: New York, USA, 2015) 61.

134 *See* UNDP, ibid at 49 & 210.

domestic materials in order to ensure the availability of essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan in accordance will the provisions of the GATT; or where such measures are essential to the acquisition or distribution of products in short supply.[135] However, none of the above "general exceptions" under Article XX of the GATT can be validly applied to justify any of the Local Content Act's measures that are inconsistent with the TRIMS Agreement.

### 5.5 Local Content Measures and "Security Exceptions" under Article XXI of GATT

As seen in Section 3.4.2, the TRIMS Agreement allows a WTO member to apply domestic measures that are inconsistent with the TRIMS Agreement where the application of such measures are covered by the "security exceptions" under Article XXI of GATT. In this respect, a WTO member can rely on the security exceptions to apply local content measures that derogate from the national treatment obligation and the obligation to eliminate quantitative restrictions. Such member can also rely on the security exceptions to decline the provision of information on its local content measures where it considers that the non-disclosure of such information is vital to the protection of its essential security interests relating to fissionable materials, traffic in arms and ammunition or in a time of war.[136] Also, a member in the exercise of its obligations to maintain international peace and security under the United Nations Charter can apply local content measures that derogate from the national treatment obligation and the obligation to eliminate quantitative restrictions.[137] This is covered within the scope of the "security exceptions" under Article XXI of GATT. However, the above security exceptions cannot be applied to justify any of the measures under the Local Content Act that are inconsistent with the TRIMS Agreement because the objectives of the Act does not include the implementation of any of the security exceptions under Article XXI of GATT.

135 *See* Article XX GATT (1994).
136 *See* Article XXI GATT (1994).
137 *See* Article XXI (c) GATT (1994).

### 5.6 Exceptions Concerning Import Restrictions for the Protection of Domestic Industries from "Serious Injury" under Article XIX of GATT

As seen in Section 3.4.3, the TRIMS Agreement allows a WTO member to rely on Article XIX: 1(a) of GATT to apply domestic measures that are inconsistent with the TRIMS Agreement such as local content measures which restrict the importation of particular products in order to safeguard domestic producers of similar products from "serious injury" that may arise from the increased importation of such products. This exemption can be applied to justify some of the Local Content Act's measures that are inconsistent with the TRIMS Agreement, such as the prohibition of the importation of fabricated and welded metal products for oil and gas projects under section 53 of the Act.[138] However, Nigeria's reliance on this exemption will be subject to conditions including the notification and consultation of other WTO members on the application of such import restrictions.[139] In addition, Nigeria will have to factually demonstrate that developments it had not "foreseen" or "expected" when it became a party to the GATT and TRIMS Agreement ("unforeseen developments") and the effect of the obligations under those WTO instruments has resulted in the increased importation of fabricated/welded metal products into the oil and gas industry in a manner that would cause or threaten "serious injury" to domestic producers of such products,[140] by showing the existence of a significant overall impairment to the position of domestic producers in the industry or a clearly imminent threat of such impairment.[141]

## 6. CONCLUSION

WTO members whose free trade benefits under the GATT have been nullified or impaired as a result of the Local Content Act's requirement that is inconsistent with the TRIMS Agreement may challenge the Act through the WTO's dispute resolution procedure.[142] Questions have already arisen on the compatibility of the Local Content Act with Nigeria's obligations under the TRIMS Agreement. In April 2013, one of the items

138 *See* Section 53 Local Content Act.
139 *See* Article XIX. 2 GATT (1994).
140 *See* Article XIX: 1(a) GATT (1994).
141 *See* Article 4.1 (b) of the Agreement on Safeguards (1994).
142 *See* Article 8 TRIMS Agreement.

on the agenda of the meeting of the WTO Committee on Trade-Related Investment Measures was the compatibility of the Local Content Act with WTO Agreements such as the TRIMS Agreement. This item was brought before the Committee at the request of the European Union (EU) and the United States.[143] Specific local content measures that were in issue included the requirement to grant "first consideration" to goods manufactured in Nigeria; the minimum local content requirements for specific goods such as steel plates and pipes, cables, valves, and cement, and; the mandatory use of locally welded and fabricated products.[144] Similar concerns were also expressed by several countries (including the United States, the EU, Australia, Norway, Canada and Japan) at the WTO's Committee on Trade-Related Investment Measures in April 2015.[145]

At the time of writing, Nigeria was yet to formally respond to those concerns. However, given that Nigeria's economy can only support "low standards of living" due to high poverty rates[146] and low human development index levels,[147] the application of local content measures in the oil and gas industry can be justified under Article 4 of the TRIMS Agreement on the basis that such measures are meant to promote economic development and improve living standards in the country. Nevertheless, while the application of local content measures in Nigeria's oil and gas industry will not provide a magic bullet that will address all the country's economic problems, the purposeful and effective application of such measures to enhance the long-term competitiveness of local firms will go a long way towards promoting economic development and improving living standards in the country.

143 *See* "Nigeria – Certain Measures Taken in the "Act to Provide for the Development of Nigerian Content in the Nigeria Oil and Gas Industry" of April 2010", Minutes of Meeting of the WTO Committee on Trade-Related Investment Measures held on 30 April, 2013 (G/TRIMS/M/34) (19 June, 2013), at paras. 36-62.

144 Ibid, at para. 59.

145 *See* "Nigeria – Certain Measures Taken in the "Act to Provide for the Development of Nigerian Content in the Nigeria Oil and Gas Industry" of April 2010, Minutes of Meeting of the WTO Committee on Trade-Related Investment Measures held on 16 April, 2015 (G/TRIMS/M/38) (27 July, 2015), at paras. 111-117.

146 The United Nations Development Programme (UNDP) Human Development Report (2015) classifies Nigeria as one of the five countries with the largest population of people in multidimensional poverty. The report indicates that 88.4 million Nigerians are in multidimensional poverty representing about 50.9 per cent of the entire population of Nigeria. *See* UNDP, *Human Development Report 2015* (UNDP: New York, USA, 2015) 61.

147 *See* UNDP, ibid, 49 & 210.