AN EXAMINATION OF THE TAXATION OF MULTINATIONAL CORPORATIONS AND ITS LEGAL EFFECTS ON FOREIGN INVESTMENTS IN NIGERIA

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BEING A DISSERTATION SUBMITTED TO THE SCHOOL OF POSTGRADUATE STUDIES, AHMADU BELLO UNIVERSITY ZARIA IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF MASTER OF LAWS DEGREE –LL.M

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DECLARATION

I Declare that this Dissertation titled: "AN EXAMINATION OF TAXATION OF MULTI-NATIONAL CORPORATION AND IT'S LEGAL EFFECT ON FOREIGN INVESTMENT IN NIGERIA" was written by me and that it is a record of my own personal research. No part of this research work is to the best of my knowledge, previously presented for the award of any degree in this or any other University. All quotations are indicated with specific acknowledgement and sources of information have been duly referenced by way of footnotes.

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CERTIFICATION

This dissertation entitled: "AN EXAMINATION OF THE TAXATION OF MULTINATIONAL CORPORATIONS AND ITS LEGAL EFFECTS ON FOREIGN INVESTMENTS IN NIGERIA' by Onyemah Okei JOHN, meets the regulations governing the award of Master of Laws Degree -LLM of Ahmadu Bello University, Zaria and it is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This thesis is dedicated to my wife Lady Agatha Onyemah and my Children Kenechukwu, Ginikachukwu and Akachukwu for their immense support and blessings throughout the research work.

ABSTRACT

Taxation is the key to a sustainable development. This is because no government can survive without sufficient revenue to finance its activities. This explains why revenue generation is one of the basic objectives of taxation. This actually prompts the analysis of multinational corporate taxation in Nigeria so as to see the effects of corporate investments contribution to foreign investments in Nigeria. Also, the aim of bilateral tax treaty entered into between the Federal Republic of Nigeria and other foreign countries is to encourage economic growth by mitigating international double taxation and other barriers to cross border trade and investment, and to improve tax administration between the contracting nations. The enabling environment created through generous fiscal policies is expected to increase the level of direct foreign investment in Nigeria beyond its present level. On the contrary what obtains are divestments cum capital flight out of the country, it is therefore in line with the above that this study seeks to examine the effects of Nigeria fiscal policies on foreign investment in Nigeria. Therefore, the objective of the study is to examine the extent to which tax incentives have impacted on direct foreign investment in Nigeria; To evaluate the adequacy or otherwise of the present legal regime on corporate taxation and proffer possible necessary reform to the laws; analyze the relationship between taxation and direct foreign investment in Nigeria; to find out who are these multinational corporations that are subject to corporate taxes that can be granted tax reliefs to attract foreign investments into Nigeria. Thus, this study posit that, by identifying the multinational corporations subject to corporate tax, foreign investment opportunities will be created under the Nigerian corporate laws that will attract foreign investments to Nigeria which will boost the revenue development in Nigeria. The old standard of corporation tax, the manual assessment and enforcement procedures cannot meet up with the fast- changing commercial activities of the companies. This consequently creates administrative ineptitude which to a large extent adversely affects revenue generation in Nigeria. There is therefore the need to probe into how the developments have affected our domestic corporate taxation. The study applies the doctrinal methods of research to achieve this and recommends that, Nigeria and United Kingdom and other countries double taxation treaties on multinational corporations be reviewed in line with International best practices by designing sound tax policy, good corporate governance, good tax incentives to encourage investments and amending Nigerian tax laws to guarantee these objectives.

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LIST OF ABBREVIATIONS

A.P.C	-	.African, Pacific and Caribbean Union
A.U	-	African Union
B.O.J	-	Best of Judgement
C.A.M.A	-	Companies and Allied Matters Act
C.G.T.A	-	Capital Gains Tax Act
C.O.P	-	Commissioner of Police
C.I.R	-	Commissioner for Inland Revenue
C.I.T.A	-	Companies Income Tax Act
C.T.A	-	Capital Transfer Act
E.C.O.W.A.S	-	Economic Community of West African States
E.F.C.C	-	Economic and Financial Crimes Commission
E.T.A	-	Education Tax Act
E.U	-	European Union
F.B.I.R	-	Federal Board of Inland Revenue
F.C.T	-	Federal Capital Territory
F.H.C	-	Federal High Court
F.I.R.S	-	Federal Inland Revenue Service
F.R.C	-	Federal Revenue Court
G.A.T.T	-	General Agreement on Tariff and Trade

I.C.P.C	-	Independent Corrupt Practices Commission
I.M.F	-	International Monetary Fund
I.R.C	-	Inland Revenue Commissioner
I.T.M.A	-	Income Tax Management Act
J.T.B	-	Joint Tax Board
L.F.N	-	Laws of the Federation of Nigeria
M.A.N	-	Manufacturers Association of Nigeria
N.C.S.T	-	National Commission on State Taxation
N.E.C	-	National Economic Council
F.I.R.S	-	Federal Inland Revenue Service
N.S.W	-	New South Wales
O.P.E.C	-	Organization of Petroleum Exporting Countries
P.A.Y.E	-	Pay As You Earn
P.A.Y.S	-	Pay As You Spend
P.I.T.A	-	Personal Income Tax Act
P.P.T.A	-	Petroleum Profits Tax Act
S.D.A	-	Stamps Duties Act
T.C.C	-	Tax Clearance Certificate
U.K	-	United Kingdom
U.N.C.T.A.D	-	United Nations Cooperation on Trade and Development

U.N	-	United Nations
U.S.A	-	United States of America
V.A.T	-	Value Added Tax
W.T.O	-	World Trade Organization

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 BACKGROUND TO THE STUDY

The international multinational corporate taxation vis-à-vis foreign investments, together with issues of double taxation and non-adherence to corporate rules are some factors that have brought companies to ruins. The viability and health of corporations have direct bearing on a country's economic growth and revenue generation.

It is definite to state that taxation is the key to a sustainable development. This is because no government can survive without sufficient revenue to finance its activities. This explains why revenue generation is one of the basic objectives of taxation[1]. As a matter of fact, fiscal considerations are paramount in shaping development policies of a given economy either at micro or macro level. In his remark, Felix Frankfurter[2] states the significance of tax thus:

> Taxation has always been the sensitive nerve of government. The enormous increase in the cost of society and the extent to which wealth is represented by intangibles, are putting public finance to its severest tests. To balance budgets, to pay for the cost of progressively civilized social standards, to safeguard the future and to divide these burdens with substantial fairness to the different interests in the community, strains to the utmost the ingenuity of statesmen.

Nigeria has many taxes through which sufficient revenue can be generated to meet government expenditure[3]. Some of these taxes include companies' income tax and

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1 Other objectives of the taxation include re-distribution of wealth and management of economy.

2 " Justice Branders and Constitution" 45 Harvard Law Review 33 reproduced in Ervin H. Pollack. The Brandies Reader Oceana, Docket series, vol. 7 (1965) p.38 quoted In O. Akanke (ed) *Tax Law & Tax Administration in Nigeria,* Nigeria Institute of Advanced Legal Studies (NIALS), 1991, p.109.

3 The major taxes in Nigeria are: Personal income tax governed by *Personal Income Tax Act* 1993, (Now Cap P8 Laws of Federation of Nigeria (LFN) 2004), Companies' income tax regulated by *Companies Income Tax Act* 1990 (Now Cap C21 LFN 2004), Petroleum profit tax regulated by *Petroleum Profit Tax Act* 1990 (Now Cap C1 LFN 2004), Value added tax regulated by *Value Added Tax Act* 1993,(Now Cap V 1 LFN, 2004), Education tax regulated by *Education Tax Act* 1993 (Now Cap E4

petroleum profit tax among others[4]. These taxes are capable of generating sufficient revenue to finance the government activities if they are effectively administered and enforced. However, there is no gainsaying despite the fact that Nigeria has many companies and other taxable persons from whom revenue can be generated, the government is repeatedly complaining of the widespread incidence of tax avoidance and evasion[5]. Our tax system has not succeeded in achieving the goals of revenue adequacy and equity. Revenue authority attempts to generate too much revenue but ends up with little.

A lot of reasons are responsible for the inadequate revenue generation. In the 1970s during the oil boom, the government depended much on oil revenue. Petroleum profit tax gained prominence at the expense of other taxes. The authority became relaxed to adequately harness other forms of taxes that would have boosted and complemented its oil revenue generation. This consequently brings about loops and slack in Companies' Income Tax Laws. It equally weakened the administrative and enforcement institutions of other non-oil taxes.

Apart from the fact that our corporation tax laws have not been overhauled and reviewed for a long period of time to make them more elegant and in tandem with the international best practices, their provisions are clumsy, unnecessarily verbose and complicated. This may increase the cost for tax payers to comply with their tax obligations. Besides, it is trite that for a tax to be justified at all, it must be found within the clear language of a statute[6]. In the observation of O. Akanke;

> ….the law forms the foundation upon which the structure of the tax system is built. It is trite law that there is no presumption about tax. Tax being a compulsory levy by government and therefore a compulsory

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LFN 2004), Capital gains tax regulated by *Capital Gains Tax Act* 1990,(Now Cap C1 LFN 2004), Customs and excise regulated by *Custom & Excise Act* 1990 (Now Cap C49 LFN, 2004).

4 While the former is the authority for the taxation of Incomes of corporations other than those of operators in the upstream of the Oil Industry, the latter is meant to regulate and control the companies engaging in oil and gas industry.

5 See *Daily Trust:* January 17, 2008; p. wherein it was reported that Nigerian Government lost N60bn due to tax evasion and wrongful tax waivers and concession during president Obasanjo's regime.

6 Wills J., in the case of *Styles V. Middle Temple (Treasurer)* (1899) vol. 68 Q. B. p157

> contribution by the subject must be clearly imposed upon him. Consequently the first cardinal principle of taxation is that there must be a clear manifestation of an intention on the part of the government to deprive the subject of his property. It is therefore pre-requisite for a good tax system to impose the tax clearly and unambiguously in a manner that who and what is being taxed is easily identifiable.[7]

The Companies Income Tax Act and Petroleum Profit Tax Act are far from fulfilling the above requirements. In fact, they are in the main inelegantly drafted. This makes compliance and implementation not very easy and consequently affects revenue generation. Although Nigerian government usually embarks on tax reforms, these reforms have failed to introduce any new principle of significance.

Allied to this, is the fact that a company is a distinct legal entity and by its very nature it poses taxation problems. A series of dimensions and developments have crept into the practice and procedure of corporation taxation which have not been adequately captured as a result of loop holes in our laws. Companies, like natural persons do engage in cross – border transactions and in that course, contrive various tactics to avoid and evade taxes in Nigeria. This poses a complicated taxation problem as techniques for corporation tax abuses have become too sophisticated for our own tax system to cope with. In other words, the business world is always a step ahead and there is a growing need to update knowledge through continuous review of the corporation tax laws and practice in Nigeria[8]. Otherwise these ingenious schemes will constitute conduit through which a lot of revenue will be eluding the government. This in turn will have adverse effect on the citizenry because the government will not be able to provide for their needs adequately.

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[7] Akanle O, (1991) ' *A New Framework for Tax Administration in Nigeria'.* In Akanle O.(1991) (ed) *Tax Law & Tax Administration in Nigeria,* NIALS, p 106

[8] Arogundade, J.A. (2005)*Nigerian Income Tax and Its International Dimension*, Spectrum Books Ltd, Ibadan, p xxii.

A corollary to the above is the fact that companies' income tax, like other taxes, is imposed under the authority of the legislature, levied by a public body and intended for public purposes[9]. It presupposes that government needs to provide for a coherent national tax policy and tax strategy to accompany it. These will ensure equitable distribution of the taxes remitted to government treasury. They will also guide the thinking and action of the government towards judicious and prudent management of public funds. Unfortunately, this is conspicuously lacking in Nigeria. A thorough search on the Constitution of the Federal Republic of Nigeria 1999 annual Budget Speeches and Records of the Federal Ministry of Finance reveals that Nigeria is bereft of any articulate tax policy[10]. In spite of this, the Federal Government of Nigeria recently reiterates the position of the government in making taxation the primary source of revenue of government thus:

> …For a nation like Nigeria to pursue and implement her development programmers like the vision 2020… it required a stable, predictable and sustainable source of revenue. This leaves us with a very limited choice other than to subscribe to international best practices and make taxation the primary source of revenue of government.[11]

The above mission statement by the Federal Government is marvelous. It will ensure diversification from extreme dependence on oil as the principal source of revenue in Nigeria. However, it is pertinent to note that though it is easy to so project but absence of articulate tax policy and tax strategy will definitely hinder the actualization of the mission by the government.

It is equally worthy of note that in recent times[12], the Federal Inland Revenue Service (FIRS) has undergone organizational and institutional reform to combat

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9 Abdulrazaq, M.T (2005)– *Nigerian Revenue Law*, Malt house Press Limited, Lagos, p.1

10 See the Report of the Study Group on Nigerian Tax System (2003), p23; see also the *Daily Trust* "Absence of Legislation gives room for tax mismanagement" October 28th 2008 p.3. Although one is aware of the Draft Document on the National Tax Policy by the Presidential Committee on National Tax Policy of 7th June 2008; same has not scaled through the legislative processes. One wonders why it takes Nigeria this long before thinking of one.

11 *Daily Trust:* "FG to Raise Taxes to fund budget", October 28th, 2008 p.3

12 Particularly from January, 2006

administrative ineptitude; to cope with emerging new trends in corporation tax administration; and to operate a transparent and efficient tax system that optimizes corporation tax collection and voluntary compliance[13]. Whether or not this alone can make qualitative changes happen in corporation tax system without adequate empowerment is another serious issue that needs scholarly scrutiny. Although the reform introduced the establishment of Integrated Tax Office, electronic filing system etc; the machineries to accomplish the objective are not adequate. This will surely hamper effective revenue generation.

Furthermore, the Federal Inland Revenue Service is the official body responsible for the administration of corporation tax laws in Nigeria[14]. To carry out its mandate effectively, the FIRS need to work harmoniously with the Corporate Affairs Commission (CAC) which is another official institution responsible for the registration of companies and other ancillary matters thereto[15]. The CAC does not feed the FIRS with accurate and up-to-date data of companies registered. This does not enable the FIRS prepare its own database in order to be able to enforce companies income tax effectively on the tax payers. As straight forward as this arrangement seems, it is posing serious fiscal hitch in practice that calls for researchers beaming their search lights into that direction. On daily basis, the FIRS and the public are amazed with the news of companies that do not exist in the books of the Corporate Affairs Commission (CAC) being awarded big contracts in the corridors of government, collecting various forms of taxes as agents of the government without any remittance to the government treasury[16]. By this, the government is consigned into the misfortune of huge revenue loss. It is therefore obvious that the trio of the corporation tax laws, the enforcement agency and the enforcement procedures need scholarly inquiry to forestall loss of revenue.

1.2 STATEMENT OF RESEARCH PROBLEM

13 FIRS – Operational Manual for Integrated Tax Office, 2006

14 See generally *Federal Inland Revenue Service (Establishment) Act,* 2007

15 Section 1, *Companies and Allied Matters Act (CAMA),* Cap C20, LFN, 2004

16 *Daily Trust,* Monday, November 3, 2008 pp.1 & 5 where it is reported that M/S KYMCO Motor Nigeria Ltd (among others) is awarded the contract of N400m for 7 cars to the Principal Officers of the National Assembly does not exist in the books of Corporate Affairs Commission and that N13.75m including 5 percent VAT paid to the company.

For Nigeria, meaningful, long lasting economic growth and development is almost entirely contingent upon securing substantial amount of foreign direct investment.

In order to attract foreign investments into the country successive Nigerian governments have put in place sufficient arrangement by way of incentives to potential investors. Notwithstanding these liberal incentives, administering corporate taxation with a view to reaping commensurate benefits from the investments is faced with daunting challenges. This includes the challenges posed by the current wave of globalization and technological revolution and its attendant effect on company's income tax in Nigeria. Nigeria is a signatory to many tax treaties[18] but it remains a point of contention how these treaties have been beneficial to its economy. The practice taxing Nigeria Company on its global income and a foreign company on its Nigerian source income though understandable is tainted with difficulties.

In view of the foregoing this research has formulated the following research questions:

a. Whether the generous tax reliefs, incentives and exemptions granted multinational companies or foreign investors operating in Nigeria have impact in the revenue of the country.
b. Does Nigeria tax policies and laws contribute significantly to the inflow of foreign investment?
c. are there other factors apart from the tax rules that affect inflow of foreign capital into the country.
d. What are the benefits of the several double taxation treaties and or agreements to which Nigeria is signatory to.

1.3 OBJECTIVES OF THE RESEARCH

The objectives of this research are:

[18] They are: Double Taxation Relief (Between the Federal Republic of Nigeria and the Government of the Kingdom of Belgium; Double Taxation Relief (Between the Federal Republic of Nigeria and the Government of the French Republic); Double Taxation Relief (Between the Federal Republic of Nigeria and Government of Canada); Double Taxation Relief (Between the Federal Republic of Nigeria and the Government of Romania); Double Taxation Relief (Between the Federal Republic of Nigeria and the Government of the Kingdom of the Netherlands) all these treaties now form list of subsidiary legislation to the *Companies Income Tax Act* op.cit. n. 3

a. To ascertain the adequacy of the current fiscal incentives to foreign investors by the Nigerian government and in that regards examine what fiscal taxing reforms are necessary to attract direct foreign investment to Nigeria.
b. To evaluate the impact of Nigeria's tax regulations on foreign direct investments and thereby ascertain the relationship between taxation and foreign direct investments.
c. To examine what is Multinational Corporation subject to Nigerian corporate tax and the impacts of globalization on multinational corporate taxation in Nigeria.
d. To examine how to bring in the legal regime of corporate laws on the taxation of Multinational Corporation that will be beneficial to the Nigeria economy through revenue drive from the investment made by multinational corporate.

The study will conclude with some viable suggestions and recommendations that can improve and strengthen the administration of the multinational corporation tax system in Nigeria so as to boost revenue generation in order to foster economic growth and meaningful development.

1.4 SCOPE AND LIMITATIONS OF RESEARCH

The scope of this dissertation shall geographically cover Nigeria and some foreign countries on the issues of multinational corporate taxation, tax incentives and foreign investments. The research work shall also be restricted to critical examination of the Double Taxation Agreements ("DTA"). In this regard, attention shall be focused on whether the target or aim of the agreement entered into is achieved in Nigeria by gaining relief through the bilateral agreement.

It is within the scope of this research to examine the taxes under the Nigerian corporate laws that encourages foreign investment in Nigeria. The major problems causing harms to Nigerian economy and to what extent the Nigeria Double Taxation can be favorable to Nigeria Tax Policy and Administration.

Nigerian Tax regulations are two numerous and varies according to analysts interest. No study of this nature can afford to examine all the Tax Laws. For this reason therefore, the Company Income Tax Act (CITA) and Petroleum Profit Tax Act will be accorded principal attention and analysis herein but mention will be made to other tax

laws where necessary including the *Personal Income Tax Act*[19], *Petroleum Profit Tax Act*[20], *Value Added Tax Act*[21], *Capital Gains Tax Act*[22], *Custom & Excise Act*[23], *Stamp Duties Act*[24] and *Education Tax Act*[25] through which sufficient revenue can be generated to meet her expenditure. It is no doubt that the whole gamut of income tax system in Nigeria requires thorough scholarly appraisal to make them more efficient and beneficial to the growth and development of Nigerian economy.

1.5 RESEARCH METHODOLOGY

The methodology adopted in this research is doctrinal and empirical. It involves the primary and secondary sources such as the relevant tax laws such as the Constitution of the Federal Republic of Nigeria, 1999; Companies Income Tax Act 1990, Companies Income Tax (Amendment) Act 2007, Petroleum Profit Tax 1990; Federal Inland Revenue Service (Establishment) Act, 2007. Under the secondary sources, textbooks written by legal tax scholars, seminars and conference papers, articles, official government gazettes, government tax policies, thesaurus, encyclopedia and the internet. Furthermore, the research will reach out to experts such as tax attorneys, tax practitioners, tax administrators and stakeholders in the realm of corporation tax law.

1.6 JUSTIFICATION OF RESEARCH

The realities of the current global recession which is affecting Nigeria significantly vis-à-vis the balance of payment equilibrium and the burden of the country's external debt service ratio has combined to make the injection of foreign capital a sine qua non for economic recovery and accelerated development, it is expected that the government will benefit immensely from this study since it is aimed at discovering the loopholes in its tax regulations which will be detrimental to the realization of its objectives and also determine tax regulations that would encourage the growth of foreign investment while enhancing total revenue.

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[19] 1990, Cap, p 8, LFN, 20004
[20] Cap P 13, LFN, 2004
[21] 1993, Cap, V1 LFN ,2004
[22] 1990, Cap, C1 LFN, 2004
[23] 1990, Cap, C49, LFN, 2004
[24] 1990, Cap, ---, LFN, 2004
[25] 1993, Cap 84, LFN, 2004

The topic of this research forms one of the items on which the National Assembly is competent to legislate upon. To that extent therefore, this thesis will inform better both the legislators and the legislative counsel in making valuable contributions to the development of Nigeria through law making; the Executive Arm of Government plays a crucial role in the development of a good tax culture in Nigeria. The Executive may not be able to discharge these important roles if it does not have adequate knowledge of the provisions and mechanics of the taxes it is to administer. This research work will benefit the executive immensely by increasing its knowledge on the loopholes in the tax system and the operations of the corporation tax laws in Nigeria; significantly, this study centers on the need for taxation to be properly planned and optimally utilized for the achievement of organization goals.

Also, judges will find the contents of the research very helpful in discharging their judicial functions. The classical responsibility of the courts is to interpret laws and apply them to the facts of the case before them. Decisions reached as a result of the interpretation by superior courts of records have the force of law and sanction like any other law made by the legislature[26].A careful digest of this research work will undoubtedly imbue our courts with a teleological stance in construing this aspect of our taxing legislation or constitutional provisions that bothers on corporation taxes so that the underling objectives of our tax policy can be achieved.

Another class of professionals that will benefit from the contents of this dissertation is the legal practitioners. They receive briefs on multifarious causes of activities such as tax, contract, tort *etc* on which they need to conduct a thorough legal research to be able to advise their clients appropriately. In discharging this task, the contents of this research work will be of immense assistance to lawyers.

Again, tax administrators will find the contents of this research work very helpful. They raise assessment on tax payers, collect and enforce corporation taxes among others. Some rules and basic principles of corporation taxes must be internalized as prerequisite to proper administration of these taxes. This research work will be a useful outlet to tax administrators from these administrative predicaments.

[26] Aboki Y. op. cit. P. 7

1.7 LITERATURE REVIEW

Some of the materials to be used in this dissertation are documentary data such as textbooks, statutes and articles. However, they are distinguishable from this dissertation. One of the earliest authors on corporation tax Laws is **Ola C.S**[27]. In his book, *"Income Tax Law for Corporate and Unincorporated Bodies in Nigeria',* the learned Professor treated the topics as *"Assessment of Companies and Statutory Corporations, Pioneer Companies Including Excess Profits Tax" & Petroleum Profit Tax".* He considered the topics under the Provision of Companies Income Tax Act 1961. His treatment of the topics does not represent the current position of the law on corporation taxes any longer. As a matter of fact, the 1961 Act had undergone several amendments and modifications before and after same was transformed into 1990 Act and now Cap p8 Laws of Federation of Nigeria 2004. Similarly the Federal Inland Revenue Service which is the official body responsible for the administration of corporation tax laws in Nigeria had been restructured and reorganized to catch up with some modern trends in our tax system. All these are not considered in the treatment of the topic by the learned author; and this research work shall appraise these emerging trends in corporation tax system.

One conspicuous gap in Professor Ola's book is that it failed to treat foreign investments under corporation tax laws while considering the topics. This thesis is out to fill that lacuna. Allied to this, the author treated the topics on corporation taxes in his book on *the law as it was*. This treatise shall go a step further to analyze the law regarding the topic under consideration from the perspective of *law as it should be*.

Another erudite scholar that had also written on the topic under research is **Ayua I.A**[28]**.** He treats the topic as *"Taxation of Companies Profits.*' He considered the basic principles of corporation taxes such as charge to companies income tax, exempted income, basis of assessment, rules for calculating a company's profits, deductions allowed, taxation of dividends of companies and petroleum profits tax, company income tax offences and penalties[29].

[27] Ola C.S. (1984) '*Income Tax Law for Corporate and Unincorporated Bodies in Nigeria'*, Heineman, Ibadan, pp .231- 365.
[28] Ayua I.A. (1991) '*The Nigerian Tax Law'*, Spectrum Law Publishing, Ibadan, p.163
[29] Ibid Pp 163 - 208

With due respect to the learned writer, his work is deficient from considering the modern trends of globalization and electronic commerce as they affect some principles and operations of corporation tax laws in Nigeria. This will be considered in this dissertation. He equally did not examine the contents and mechanics of bilateral tax treaties within the context of corporation tax laws, which this research work shall cater for.

Abdulrazaq M.T[30] is one of the foremost experts in Taxation in Nigeria. His textbook titled: "Abdulrazaq Nigerian Revenue Law, is one of the recent literature that treats the subject matter of this research work. The learned writer treats the topic as "Companies Income Tax". He honestly concedes to the fact that the work is not comprehensive enough. Rather, it is offered as a statement of the fundamental principles of revenue law and it aims to state those principles in as readable and intelligible a form as the subject matter[31]. According to the Learned Professor about his work: *"The principles it states are those which practitioners in the field… will need to have at their fingertips. The text will not reveal the solution to every problem….*[32]

True to the eminent Professor's concession and with due respect to him, the researcher humbly observes that his work is lacking in some important aspects which a recent work like his ought to have contained. Some of the problems which his work did not proffer solution to are: on tax incentives, foreign investments and double taxation treaties in Nigeria. To the extent that the research work will critically analyse them distinguishes it from his work.

Furthermore, **Arogundade J.A**[33] is a seasoned tax administrator who has written on the Companies Income Tax in Nigeria. In his book "*Nigerian Income Tax and Its International Dimension",*[34] he attempted an in-depth analysis of the taxation of incomes from the perspective of local and Cross-border transactions in Nigeria. Like the title of the book suggests, he considered all income taxes in Nigeria and their international

[30] Abdulrazaq M.T. (2005) *'Nigerian Revenue Law'*, Malthouse Press Ltd, Lagos, p.6
[31] Ibid P. 6
[32] Ibid
[33] He was the Director, Petroleum and International Tax, Member of F.I.R.S. Management of Federal Board of Inland Revenue and of its Technical Committee before his retirement in 2004.
[34] Op cit p5

dimensions which this work will examined in detail especially, the corporate taxes and their effects on revenue generation.

The author's work is comprehensive. He equally laboured very hard to transfer abstract knowledge to practical equivalent that can benefit stakeholders in the Nigerian tax system.

Olakunle Orojo[35] is another foremost author on Companies Income Tax Law in Nigeria. His work was predicated on the provision of the Companies Income Tax Act 1961 which has been substantially consolidated and amended. The opinions expressed and positions taken in his work can hardly be regarded as being current nowadays. More so, that Companies Income Tax Law and administration had undergone series of reform and restructuring. This research work will consider them in their recent contents and context and their effect on revenue generation in Nigeria. This distinguishes this dissertation from his work.

Some Accountants of repute have written on Corporation Tax laws. One of them is **Ani A.A**[36]. In his book titled *"Companies Income Tax and Petroleum Profits Tax in Nigeria"*[37], he examined and treated the Law as at December 1977. The Corporation Tax Laws have since undergone many amendments which are not incorporated in his work which this dissertation shall incorporate.

KANYIP B.B[38] is another notable erudite scholar and author on taxation in Nigeria. In one of his articles titled *"Taxation Issues in Foreign Investment"*[39], he examined some crucial issues in Companies Income Taxation in Nigeria such as tax incentives regime, classical methods of taxing companies and its implications for business, and investor friendly judicial disposition. The considerations of these issues are insightful and thought-provoking; but not all embracing.

Perhaps for the reason of constraint in scope, the learned writer's work left out the issues of administration and enforcement of tax treaties and some other cogent concepts in Companies Income Tax Laws in Nigeria. This dissertation will cover some of these

[35] Orojo O. (1979) '*Company Income Tax Law in Nigeria'*, Sweet & Maxwell, p277
[36] In Collaboration with Z.A. Abdullahi, M.A. Popoola and R. U. Uche
[37] University Press Ltd, Ibadan
[38] Honourable Justice B.B. Kanyip is of the National Industrial Court, Abuja
[39] Kanyip B.B. - *Taxation Issues in Foreign Investment* (1998) M.P.J.F.I.L. Vol. 2, No 1 P.107-126; see also Kanyip B.B. - Companies Income Tax, in Abdulrazaq M.T. (ed) C.I.T.N. Nigerian Tax Guide & Statutes, 2002 P. 117

lacunas and to that extent, it is wider in scope than the above literature review and consequently distinguishable from them.

Finally, this research will harmoniously juxtapose these various views to give recommendations, which we believe will re-focus and re-position the law, the policy, the practice and administration of international corporate taxation and foreign investments in Nigeria.

1.8 ORGANIZATIONAL LAYOUT

This dissertation has been planned, organized and arranged into six researchable formats. The first chapter gives the general overview of the research work such as the background information, statement of problem, scope of research, the methods of the research, justification for the research, literature review and this present brief summary of the chapterization.

Chapter two traces the detail historical background of corporation tax beginning from colonial era till date, various tax reforms and their impacts on corporation taxes, the Nigeria tax policy (or non-availability of same) regarding corporation tax system in Nigeria. It further discusses the basic concepts under corporation tax laws in Nigeria. It examines the statutory and judicial connotations of company for tax purpose, categories of company under corporation tax laws, the general scope of corporation tax in Nigeria; examination of concept of tiebreaker rule of corporation taxes in Nigeria.

Furthermore, under chapter three, corporate governance and investment outlooks have been highlighted by considering the mechanism of corporate taxation and investment. The nature and characteristics of corporate tax as it affects revenue generation are carefully examined.

Chapter four analysis investment incentives for multinational companies in Nigeria while chapter five deals with foreign investment and multinational corporation taxation in general. It focuses on the legal framework, tax incentives and the factors affecting foreign investments in Nigeria.

Finally, chapter six is the conclusion. It harnesses the whole work by bringing out the major findings and gives recommendations on how to improve on multinational corporation taxation in Nigeria and how it will improve revenue generation in Nigeria through proper and careful investment.

CHAPTER TWO

HISTORICAL DIMENSION AND THE CONCEPT OF MULTINATIONAL CORPORATE TAXATION IN NIGERIA

2.1 INTRODUCTION

The term Multinational Corporations (MNC) can be defined and described from differing perspectives and on a number of various levels, including law, sociology, history, and strategy as well as from the perspectives of business ethics and society. Multinational corporations are companies which seek to operate strategically on a global scale. A multinational corporation is a company, firm or enterprise that operates worldwide with its headquarters in a metropolitan or developed country. Multinational Enterprise is any business that has productive activities in two or more countries. Certain characteristics of Multinational Corporations should be identified at eh start since they serve, in part, as their defining features. Often referred to as "multinational enterprises," and in some early documents of the United Nations they are called "transnational organizations," Multinational Corporations are usually very large corporate entities that while having their base of operations in one nation – the "home nation" – carry out and conduct business in at least one other, but usually many nations, in what are called the "host nations." Multinational Corporations are usually very large entities having a global presence and reach.[1]

According to Rugman,[2] the principal objective of multinational corporations is to secure the least costly production of goods for world markets. This goal may be achieved through acquiring the most efficient locations for production or obtaining taxation concession from host governments. This objective confirms the views of Marxist who see the MNCS try in every way possible to cut down expenses and maximize profit. As stated, the MNCs usually have their head office in one country with a cluster of subsidiaries in other countries and maintain a very high standard management outfit. This managerial expertise give rise to maximum efficiency, that is, maximum result at minimum cost.

[1] Tatum, M. (2010). "The Activities of Multinational". Retrieved from: www.wisegeek.com/what-is-a-multinational corporation.htm

[2] Rugman, A.M. (1985 eds) – International Business: New York, McGraw-Hill Publishing Company, 1985.

At the same time, they are often also accused of destructive activities such as damaging the environment, complicity in human rights abuses, and involvement in corruption. Whether these accusation are fair or not, many MNCs are now attempting to manage these complex set of issues in the host countries by implementing corporate social responsibility (CSR) Strategies because such issues may risk the success of their operation.[3] It is not in the nature of the MNCs to solve social or economic problems of the host countries. Luis Echeveria, the former Mexican president had the belief and feeling that there is the need or transnational corporations to respect the social and cultural fabric, as well as the development priorities of the countries in which they are investing[4].

2.2 HISTORICAL DIMENSION OF CORPORATE TAXATION

A country's tax system is essentially a by-product of history, economic structure and political economy of that country[5]. In the case of Nigeria, the corpus of the modern concepts and principles outlining companies' taxation in Nigeria is of distinctly British origin. It dates back to 1939, when with the war looming in Europe, governments including Nigeria became tax-conscious. The idea of bringing companies into the tax net was conceived as a way out of the problem posed by the exigencies of the time. From that period till date, corporation tax has been used by the government at a stage of economic development or the other to achieve the purposes of, revenue generation, social reform or instrument of fiscal measure. Consequently, it is desirable to examine in some detail the annals of changes, motives and policy rationale which dictated tax impositions of each era.

Although, Companies Income Tax Act[6] and Petroleum Profit Tax Act[7] contain bulk of the Companies Taxation Laws and their general principles, there are nevertheless,

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[3] Bulus, H and Ango, N. A. (2012). "Multinational Companies Corporate Social Responsibility Performance in Lagos State, Nigeria: A Quantitative Analysis". European Journal of Globalization and Development Research, Vol. 5, No. 1, 2012.

[4] Robinson, J (1979 ed) International Division of Labour and Multinational Companies, London, Saxon House, Teakfield Ltd, p. 51

[5] Dotun Philips - *Nigeria Tax System at Cross-Road*; In: P.A. Omorogiuwa (ed) Nigerian Institute of Taxation Selected Papers NIT Lagos, 1987, p.39

[6] CAP C21, LFN 2004

[7] CAP P13, LFN 2004

a large number of other enactments which are directly relevant to their administration in Nigeria[8]. Over the years, these enactments have cross-bred one another in such a way that engendered series of reforms and modifications in Nigeria's tax structure, laws and systems useful to implement changes in policies. The historical knowledge of the prospects and problems of the reforms of these periods is therefore of a considerable importance. This will promote a better understanding of the existing principles relating to companies income tax and generally of the development of the tax on incomes.

The above arrangement is based on the motives and purposes of the tax reform of the government that characterized each stage of the development as the exigencies of the time dictated.

As late as 1929, there was no tax on companies anywhere in Nigeria. Although, there was income tax on individuals within the then colony of Lagos, that did not apply to those resident in the northern protectorate. The people in the protectorate were taxed by the native administrators by way mainly of poll tax, *Jangali* and special taxes levied on particular trades such as cocoa farmers, butchers and abattoir operators[6].

However, towards the end of 1938 or the beginning of 1939, when with the war looming in Europe, governments including Nigeria became tax-conscious; considerable interest was stimulated in bringing companies into the tax net due to the economic and political upheavals throughout Europe and changes in policy resulting from the development in England[7]. It is noteworthy that the conception of imposition of tax on companies' income was then mooted as a war measure for the specific purpose of generating sufficient revenue to enable Nigeria make her own contributions to the imperial government of the United Kingdom.

The first real effort at income tax legislation was enacted in 1939 entitled Companies Income Tax Ordinance (CITO)[7a]. It was to be administered by one Mr. Frank G. who was seconded from the Treasury to the tax office[8]. One noticeable pitfall of the

[8] Such as Federal Inland Revenue (Establishment) Act 2007, Tax Treaties and Conventions, Official Circulars and Regulations.

[6] Ani A. (et al) - *Companies Income Tax & Petroleum Profit Tax in Nigeria*, UPL, Ibadan 1989, p.vii. See also Ayua I.A. - *The Nigerian Tax Law*, Spectrum Law Publishing, Ibadan, 1991, p.22

[7] Toby R.A. - The Theory and Practice of Income Tax, Sweet & Maxwell, London, 1978 p.17 where he discusses Income Tax in a developing country.

[7a] Companies Income Tax Ordinance of 1939

[8] Ani (et al) op. cit. p.vii

1939 ordinance was that it left out individuals from the tax net. When this error was detected, the Nigeria Income Tax Ordinance was enacted in 1940 as a substitute[9]. This legislation brought into the tax net both companies and individuals under a single codification, and for the first time the first commissioner for income tax was appointed to cover Gambia, Sierra Leone, Ghana and Nigeria[10].

Three years after, the 1940 ordinance was again replaced by Income Tax Ordinance (No 29) of 1943. Under this law, 50 percent of taxable income of the standard rate of tax was payable subject to the discretion of the tax commissioner upon satisfactory proof to him of any dividend payment out of such chargeable income[11]. The Income Tax Ordinance (Revised Edition) of 1948 Cap 92 consolidated the 1943 ordinance and subsequent amendments. Companies and individuals were taxed under the Ordinance which was repealed along with Amendment ordinances by Companies Income Tax Act 1961[12].

The period from 1961 to 1979 is termed, in this dissertation, as the era of fiscal measure and inquisition in Nigeria. This is the period when Nigeria was grappling with challenges of fiscal stability in nation building. One of the challenges faced by Nigeria on her path to independence in 1960 was the issue of income tax. History had it that it generated a contentious argument in 1957 constitutional conference in London. As a result of this and in order not to allow it to distract the task of nation building on attainment of independence and thereafter, a two-man fiscal commission was established in 1958 under the chairmanship of **Sir Jeremy Raisman**. When the commission was on with its assignment, the Nigerian government observed and reasoned that companies that engaged in petroleum trade operations have their peculiarities arising from the specialized nature of the petroleum industry and from their multinational nature and activities and as such, taxation of their profits need be governed by separate enactment distinct from the one governing other non-oil companies[13]. To actualize this, the

[9] No 4, Cap 54, 1940
[10] By name, Mr. Walter Bliss Daye. See detail in Ani A. op. cit. p. viii
[11] Ibid
[12] Arogunadade J.A. - *Nigerian Income Tax & Its International Dimension*, Spectrum Books Ltd, Ibadan 2005 p.11
[13] Ola C.S. *Income Tax Law for Corporate and Unincorporated Bodies in Nigeria*, Heinemann Educational Books (Nigeria) Ltd., Ibadan 1984 P. 437

Petroleum Tax Ordinance[14] was enacted in 1959 but with a retrospective effect, since it was deemed to have come into operation on 1 January, 1958[15].

The result of the Raisman's commission was a prelude to the 1961 tax reform which eventually gave birth to the promulgation of Companies Income Tax Act 1961[16].

The dichotomy into Companies Income Tax (CIT) and Personal Income Tax (PIT) was introduced in 1961 with the creation of separate statutes for the taxation of companies and individuals - namely ***Companies Income Tax Act 1961 and Income Tax Management Act 1961*** respectively. Thus, the companies' income tax and petroleum profit tax became Federal taxes under the administration of Federal Board of Inland Revenue[17]; while regions and Lagos territory assume responsibility for personal income tax. The Income Tax Management Act was promulgated to ensure uniformity in the administration of the personal income tax.

Companies Income Tax Act 1961 imposed the duties of assessment, collection and remittance of taxes collected from the companies on the Revenue Board. The 1961 Act was broader in outline and scope than the earlier enactments. It introduced for the first time some salient fiscal measures governing principles, practice and administration of companies' income tax in Nigeria. The highlights of the tax measures are:

i. Power of Federal Board of Inland Revenue (FBIR) to levy distress on the property of tax defaulter where tax remained unpaid[18].
ii. Special levy introduced on excess profit of banks (i.e. 10% levy in addition to the flat rate of 50 percent on Companies Income)[19]
iii. Grant of fiscal incentives to pioneer companies [20]
iv. Establishment of Revenue Court[21]
v. Conditions for allowable expenses and deductions wholly, exclusively, necessarily and reasonably incurred[22]

[14] No 15 of 1959
[15] Ola C.S. op. cit. p 437
[16] No 22 of 1961
[17] FBIR was established under section 3 of the Income Tax Administration Ordinance (No 39) of 1958 and constituted by Legal Notice 209 of 1958 as the legal instrument. It came into operation on 1st January, 1959
[18] Pursuant to Decree 65 of 1966
[19] Introduced vide 1978/79 Fiscal year
[20] Pursuant to Industrial Development (Income Tax Relief) Decree (No 22) of 1971 (which repealed ordinance No 8 of 1958)
[21] Pursuant to Decree 13 of 1973

vi. Introduction of the application of turnover to corporate taxation in Nigeria as anti-avoidance scheme[23].

A keen perception of the tax measures above highlighted reveals the motives and policy rationale for the tax reform of the era as dictated by the prevailing exigencies. The company's income tax of the period was designed and characterized by a harsh inquisitorial system which was anxious to strengthen its powers by assuming the right to interrogate taxpayers examine bank accounts and insist on returns of total incomes of companies, and prosecute tax defaulters.

It is instructive to state that the available literatures put it that as at 1978, the corporation tax enactments in existence were; the Petroleum Tax Act, 1959, Companies' Income Tax Act 1961, Income Tax Amendment Decree 1966[24], Income Tax (Amendment) Decree 1967[25], Industrial Development (Income Tax Relief) Decree 1971[26], Petroleum Profit Tax (Amendment) Decree 1973 and Finance (Miscellaneous Taxation Provisions) Decree 1976[27].

The period from 1979 to 1992 marked the era of fiscal reprimand and condemnation either of the Companies Income Tax law, provisions, principles or administrations by the stakeholders in the system. This prompted the government into commissioning Task Forces on tax administration to have a thorough and dispassionate overhaul of the corporate tax enactments of the period, in order to slough off any noticeable fiscal impairment. Emphasis was basically on how to widen corporate tax base to cover a wide range of services and activities to boost revenue generation rather than introducing any comprehensive reform to the system.

Prior to 1980, government fiscal year ran from 1st April to 31st of March. This excited the setting up of Task Force on tax administration of 1978 by the government. The Task Force recommended a change to coincide with the current calendar year i.e. 1st January to 31st December. Although, before the commissioning of the Task Force, the

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[22] Introduced in 1973/74 assessment year. See detail in Arogundade J.A. op. cit pp 12-14
[23] Pursuant to Decree No 45 of 1967 See detail in Arogundade J.A. op. cit pp 12-14
[24] No 65 of 1966, published in the supplement to Federal Republic of Nigeria Gazette, No 110, Vol. 53, 6 December, 1966
[25] No 45 of 1967
[26] No 22 of 1971
[27] See Arogundade J.A. op. cit. pp 12-14, Ola C.S. op. cit. p.63

Petroleum Profit Tax of 1959 had been amended by Petroleum Profits Tax (Amendment) Decree 1973[28].

The acceptance of the recommendations of Task-force by the Government posed tax implications on the accounting year end of the companies. The change affected the determination of their basis period and the due dates of payment of income tax and provision tax[29].

The report of 1978 Task Force was an overture to the 1979 reform which produced Companies Income Tax Decree (No. 28 of 1979). The major aspects of the reform were: the introduction of withholding tax (WHT) - (which is the deductions from salaries and wages for income taxes to be remitted by the employer, in the employee's name to the taxing authority)[30]; Tax Clearance Certificate (TCC) and change in accounting year[31].

Thus, the Petroleum Tax Act of 1959 with sundry amendment thereto, the Companies Income Tax Act 1961 including various amendments thereto formed the two enactments that governed corporate taxation which were embodied in the Laws of Federation of Nigeria, 1990[32]

The period from 1992 till date marks the era when agitations were rife on the need for Nigerian income tax system to assume a progressive outlook which is designed to serve the public welfare and emphasize the fiscal objectives of taxation viz: ***raising revenue and effecting a general distribution of wealth*** - so as to achieve some improvements in the social conditions of the people within the society.

Thus, in 1992 the Federal Government commissioned a study Group on the Nigerian Tax System and Administration. The terms of reference of the study group were limited to a review of direct taxes under the jurisdiction of the Federal and State Revenue Services[33]. It is noteworthy that the period from 1992-1998 characterized the throes of military governance in Nigeria. The military rulers during this era adopted the annual practice of using a single omnibus decree to amend several tax laws simultaneously as

[28] Published in the Federal Republic of Nigeria Gazette, No 12, Vol. 60 of 1 March 1973 otherwise known as Decree No 15.
[29] Arogundade J.A. op. cit. P.16
[30] See Black's Law Dictionary, 6th edition p 1602
[31] Arogundade J.A. op. cit. P15
[32] While PPTA was cap 354 in the edition, CITA was Cap 60 thereof.
[33] See the Report of the Study Group on the Nigerian Tax System and Administration 1992 p.1

part of their annual government budgetary process. The omnibus decrees were given the standardized title **'Finance (Miscellaneous Taxation Provisions) Decree'** every time they were enacted[34]. This standardized title erroneously implied that issues of taxation are the same thing as issue of finance. Also, that omnibus nature has made it unnecessarily laborious and complex to ascertain the complete legal position of a tax law at any given time. Eventual codification of tax laws also becomes an unduly difficult and lengthy process[35].

On a return to democratic rule in 1999, Nigeria was posed towards genuine democratic governance, highly decentralized polity, private sector dominated pro-growth market economy; rule of law and due process and freedom of citizenry. The federal governments desired to put in place and execute a tax system that will remove all the fiscal freaks of military era in order to enable citizens derive immediate benefits attached to taxation. To achieve this, another Study Group on the Review of Nigerian Tax System was inaugurated by the then Federal Minister of Finance, Mallam Adamu Ciroma, on August 6, 2002 under the chairmanship of ***Professor Dotun Philips,*** with the following terms of reference:

a. Review of all aspects of the Nigerian Tax System and recommend improvements therein;
b. Review of all tax legislations in Nigeria and recommend amendments where necessary;
c. Review all assessment and collection procedures, including payment procedures, objection and appeal procedure and court proceedings and recommend appropriate improvements.
d. Review the entire tax administration and recommend improvements in the structure for the whole country as well as the administrative structures at the Federal, State and Local Government levels, with a view to enhancing performance and efficiency.
e. Consider and recommend the possibility of the grant of operational and financial autonomy to the Revenue Authorities;

[34] Such as; Finance, (Miscellaneous Taxation Provisions) Decrees Nos 21&63 of 1991; 3 of 1993; 30, 31 & 32 of 1996; 18, 19, 21 & 40 of 1998; 30 of 1999. See *The Nigerian Tax Reform in 2003 & Beyond; the Main Report of the Study Group on Nigerian Tax System*, July, 2003 pp 8-9.
[35] See the Nigerian Tax Reform in 2003 & Beyond op. cit. p. 9

f. Review and recommend the jurisdiction and scope of tax authorities and the federal, state and local government levels;
g. Examine and recommend the mode of financing revenue authorities to reflect constitutional provisions (for example section 165 of the 1999 constitution) in the light of the April 2002 Supreme Court decision on revenue and fiscal issues.
h. Assess the extent of implementation and the impact of the recommendations of the 1991 study group
i. Consider international developments in taxation and recommend suitable adaptation to Nigerian circumstances;
j. Evaluate and confirm the desirability or otherwise of the retention of the portfolio of fiscal incentives in the tax laws; and
k. Consider and recommend new taxes where necessary, with a view to significantly improve the overall tax system[36].

The study group identified some knotty areas which had hitherto constituted obstacles to the Nigerian tax system as:

i. Lack of articulate tax policy in Nigeria
ii. Taxation and Nigerian Federation
iii. Tax Incentives and Disincentives regimes
iv. Administrative ineptitude and lopsidedness
v. Issues on oil and Gas taxation etc[37]

The Report of the study Group is a prelude to the current tax reform which had excited the preparation of nine draft bills on Tax Reforms to the National Assembly in 2005[38]. The outcome of it produced, among others, the following tax enactments:

a. Federal Inland Revenue Service (Establishment) Act 2007 [39]

[36] Ibid pp 1-2
[37] Ibid Pp 1-288
[38] Nine Draft Bills on Tax Reforms Approved by the Federal Executive Council for the consideration of the National Assembly were: A Bill for an Act to establish FIRS as an autonomous service; A Bill for an Act to amend Companies Income Tax Act; A Bill for an Act to amend Petroleum Profits Tax Act; A Bill to amend Personal Income Tax Act; A Bill for an Act to amend Value Added Tax Act; A Bill for an Act to amend Education Tax Act; A Bill for an Act to amend the Customs, Excise, Tariff etc (Consolidation) Act A Bill for an Act to amend the National Sugar Development Council Act; A Bill for an Act to amend the National Automotive Act
[39] No 11 of 2007

b. Companies Income Tax (Amendment) Act 2007[40] (which enacted all the 49 proposed amendments to CITA)
c. Value Added Tax (Amendment) Act 2007[41]

Some of the noticeable significant developments introduced by the current tax reform are:

i. Administrative and institutional restructuring of Federal Inland Revenue Service
ii. Consistent public enlightenment for motivating compliance with tax laws, rules and regulations
iii. Introduction of Taxpayers Identification Number, to mention but few.

From the digest of the foregoing historical analysis, the following enactments are the laws governing taxation of profits and services of companies in Nigeria as at 28th day of February, 2009:

a. Companies Income Tax Act Cap C21, LFN, 2004
b. Petroleum Profits Tax Act Cap P.13, LFN, 2004
c. Companies Income Tax (Amendment) Act, 2007[42]
d. Value Added Tax Act Cap VI LFN 2004
e. Value Added Tax (Amendment) Act, 2007[43]
f. Capital Gains Tax Act, Cap CI, LFN 2004

2.3 NATIONAL TAX POLICY AND CORPORATE TAXATION

Corporation tax in Nigeria is as old as the Nigerian independence. Since the year of Nigeria independence in 1960, a period of almost five decades, Nigerian income tax system generally had been operating without any formal fiscal guidance. The Main Report of the Study Group on the Nigerian Tax System 2003 confirmed that:

> The study Group searched several sources, including the constitution, annual budget speeches and records of the Federal Ministry of Finance, and

[40] No 11 of 2007
[41] No 12 of 2007
[42] No 11 of 2007
[43] No 12 of 2007

> discovered that Nigeria lacks a formal, well-articulated and documented National Tax Policy which provides a set of fundamental principles which all taxes in Nigeria should comply with at all times[44].

It therefore means that hitherto, Nigerian income tax system has been operating on the whims and caprices of few political cabals and not necessarily in the overall interest of the citizenry. There was no stable point of reference for all stakeholders in the country on which they will be held accountable to facilitate economic growth and development.

The preamble to the 1999 constitution reiterates the firm resolution of the people of Nigeria to provide for a constitution for the purpose of promoting good government and welfare of all persons in the country. This is a basis for a collective safeguard to the constitution. One of the radical innovations of the 1979 constitution (which is retained in the 1999 constitution) is the inclusion of a chapter on fundamental objectives and Directive Principles of State Policy. The Fundamental objective means identification of the ultimate objectives of the nation, whilst directive principles of state policy indicate the paths which lead to those objectives[45]. They will guide the political class as to how society can be organised and ruled to the best advantage of all[46].

However, chapter II of the 1999 constitution specifies plethora of these guiding principles, such as political objectives, economic objectives, social objectives, educational objectives, foreign policy objectives and environmental objectives[47]. Despite the fact that income tax constitutes the sensitive nerve of government, chapter II of the constitution was and is silent on taxation in Nigeria. It therefore means there is no national philosophy and fundamental objectives of taxation in a dynamic and developing

[44] See the Nigerian Tax Reform in 2003 and Beyond op. cit. p. 23
[45] See Report of Constitution Drafting Committee Vol. P.V. See also Osita N.O. *Human Rights Law & Practice in Nigeria* CIDJAP Publishers, Enugu, 1999 p.68
[46] Ibid
[47] See Constitution of the Federal Republic of Nigeria 1999, sections 15-20 thereof.

country like Nigeria[48]. The Study Group on the Nigerian Tax System 2003 identified this lacuna and recommended that Nigeria should urgently adopt a National Tax policy[49].

The first effort in Nigeria towards having an articulate National Tax Policy was the blue print of the Presidential Committee on National Tax Policy compiled on 7th June, 2008. The Committee came out with a draft on National Tax Policy[50]

The National tax policy is a public document that provides direction for the future of the Nigerian tax system in order to help stimulate the economy in a way that will be of benefit to all Nigerians. Apart from providing a set of guiding principles for all taxation in Nigeria, it equally provides a stable point of reference for all stakeholders in the system and a standard on which they will be held accountable[51]. The need for a well-documented National Tax Policy in Nigeria is a ***sine qua non*** to an efficient income tax system. The policy document will among other things:

i. Spell out the overriding tax objectives of the Nigerian nation
ii. Spell out the types and focus on the Nigerian income tax system
iii. Prescribe incentive regimes and their uses
iv. Define relevant authorities that will be responsible for coordination of all inputs into national tax policies.
v. Define the tax jurisdiction of each tier of government and powers of each organ of government in the business of taxation in Nigeria.
vi. Determine the duration of periodic review of tax law, tax policy and administration
vii. Spell out the measures to monitor Nigerian international law obligations *etc*

It is instructive to state that existence of a tax policy alone cannot meet up with the fiscal expectations. It has to be accompanied by a strategy for implementation of the tax policy. Whilst the National Tax Policy, highlights crucial rules, principles and specifies the destination to which the tax system should be moving towards, the tax strategy maps out the way in which the country will get there[52].

Although there is a draft document on the National Tax policy which highlights some of the key elements above enumerated, it has not scaled through the legislative

[48] See Nigerian Tax Reform in 2003 and Beyond op cit p.23
[49] Ibid P. 23
[50] See the Draft Document on the National Tax Policy, 7th June 2008
[51] Ibid
[52] Ibid p.31

processes. Even if it does, it has to be eventually included in the constitution as a vital component of our groundnorm. Until this is achieved, Nigeria may continue to be consigned into a misfortune of colossal revenue loss.

One of the cardinal objectives of this chapter is to trace the origin and stages of development of corporate tax in Nigeria. The origin of Companies Income Tax in Nigeria is rooted in her colonial past. Indeed, the broad outline of Nigeria's tax system took shape during the colonial era and remains substantially unchanged till date. From that era up to the present period, corporation tax in Nigeria had undergone several amendments and reforms as demanded by the exigencies of the time, such as revenue generation, fiscal measures, social engineering. This chapter highlights the historical knowledge of the prospects and problems of these reforms.

Basically, one of the objectives of the companies' income tax is to generate sufficient revenue to enable government discharge its responsibility of providing for the basic needs of the citizenry. It presupposes that the yardstick to measure whether this objective (and host of others) is accomplished is for the government to provide for a coherent National Tax Policy to be included in the constitution. It will provide a set of fundamental principles which corporation tax and other income tax should comply at all times. This will guide the thinking and action of the government towards judicious management of public funds. The effect of this is that an avenue will be created for taxpayers to hold any policy executor liable for mismanagement of public fund. Unfortunately there is no national philosophy and fundamental objectives of taxation in a dynamic and developing country like Nigeria until 2008. The past five decades of the existence of corporation tax in Nigeria had being without any formal fiscal guidance. Hence, this chapter highlights the meaning and key components of National Tax Policy and advocates for its urgent inclusion in the constitution.

It can be seen from the foregoing that national tax policy goes hand in hand with the idea of corporate taxation and consequently its effects on foreign investments in Nigeria. Next issue to be discussed is the concept of corporate taxation and investment issues in Nigeria.

2.4 CONCEPTS OF MULTINATIONAL CORPORATION TAXATION IN NIGERIA

It is a general knowledge that the field of law of taxation is complex and highly technical. It requires clear perception of fiscal terms and concepts as well as strict application of myriad of rules allowing various deductions and exemptions. Some of these concepts connote something more than what is commonly understood by the terms under non-tax statutes by the tax payers. Surprisingly, some of these terms are either not defined at all by the corporation tax laws or they are incomprehensively defined posing more confusion than clarification.

In the same vein, there are certain concepts and issues which, though, are provided for by the corporation tax laws, but their bases are questionable making some of them constitute legal incorrectness. For instance, the *classicus* case of SALOMON V SALOMON & CO. LTD[1], illustrates the concept of corporate personality. The crux of the concept is that corporation is a legal person distinct from its members. The concept has tax implications. While companies are liable to pay tax on their retained profits[2], their distributed profits are charged to tax in the hands of the shareholders[3]. Be this as it may, companies are veritable vehicle for investments and profit making but liable to tax with different incidents unlike individuals. [4] However, some scholars, over the years, have queried the rationale behind taxing companies differently from the shareholders. They posit that the idea poses a situation of using companies as instrument of double taxation[5]. Again, the issue of whether the tax should be levied on the profits of the company rather than on its turnover is another issue of controversy.[6]

In another way round, Nigeria cannot afford to operate contradictory legislation whereby one will create a right and the other one will negate it. The *Companies and Allied Matters Act* [7] is the principal legislation regulating incorporation and management of companies in Nigeria. The Act prohibits the existence of a foreign company in Nigeria for any purpose unless assimilated as a Nigerian entity. [8] This position has a serious tax

[1] 1(1897) A.C. 22
[2] Section 9, *Companies Income Tax Act,(CITA)* Cap C 21,, Laws of Federation of Nigeria (LFN), 2004.
[3] Ibid, Section 19
[4] Sweeny C.A etal *(1975) Revenue Law in Australia*, Butterworths, Durban, p. 187.
[5] See Wington F, (199) '*Lecture Series No 1 for Review of Economic Literature*; See also Reamon *K. (1971) 'The Philosophy of Corporate Taxation*, quoted in John Tiley-*Revenue Law,(2000)* Butterworths, London. pp. 622-623.
[6] See Report of Richadson Committee on Turnover Taxation, 1964 also quoted in John Tiley op. cit (fn 5) p. 623.
[7] Cap C. 20 LFN 2004.
[8] *Companies and Allied Matters Act, (CAMA*), Cap C20, LFN 2004, Section 54.

consequence. As a matter of fact, some companies, especially those in shipping and air transportation operate globally and render their returns on global basis. Nigerian tax system cannot afford to overlook profits from their on-shore operations free from tax. Besides, *Companies Income Tax Act* treats Nigerian companies and foreign companies differently for tax purposes. This attempt is fraught with difficulties, which efforts on conceptual clarification in this work may solve.

Furthermore, the *Companies Income Tax Act* and *Petroleum Profits Tax Act* make companies assessable and chargeable to corporation taxes. One may tend to think that the companies envisaged by these Acts are profit making companies only. There is the need to ascertain whether the Acts contemplate companies in liquidation *(which will occasion the ascertainment of capital receipt or revenue receipt)* or re-constituted companies *(which will affect enforcement of cessation and commencement provision and exemption from any initial allowance) etc.*

In conclusion, the critical test of liability to corporation tax is residence[9]. The determination of a company's residence is an indispensable requisite in assessment to corporation tax in Nigeria. This makes the concept crucial in both domestic and bilateral tax treaties. As important as this concept is, it is not defined by the corporation tax statutes.

From a digest of the foregoing explanations, a conceptual clarification of the key terms like: company, foreign company, residence, fixed base, permanent establishment etc under the corporation tax laws becomes imperative.

2.5 REASONS FOR MULTINATIONAL CORPORATE TAX

A company is liable to pay corporation tax on its profits while a shareholder is liable to pay income tax in respect of any income distribution by the company. The charge to tax of both company and shareholder is a clear case of imposition of two taxes on one corporate profit. In other words, it occasioned a situation whereby corporate

[9] *CITA,*Cap C21, LFN, 2004, Section 13 (1)

profits are taxed twice; once to the corporation when earned; and once to the shareholder when the earnings are distributed as dividends.

This approach may exact double burden of taxation on the multinational companies, thereby making it detestable. The reason being that both Nigerian and foreign companies must be registered under the Nigerian Companies and Allied Matters Act that subjected to Nigerian bilateral tax treaties.

This is because the idea of levying tax on companies as juristic persons may lead to either juridical or economic double taxation[10]. The former is imposition of comparable taxes in two or more states on the same tax payer for the same subject matter or identical goods. It may occur in a situation whereby a company is regarded as resident in two different tax jurisdictions (*place of incorporation and place of central management and control*). The latter is imposition of two taxes on one corporate profit.[11]

Therefore the tax system should be contented with the emergence of the income in the form of dividends in the hands of the shareholders who could then be subject to income tax under the *Personal Income Tax Act*[12]. In other words, the doctrine of 'alter ego' can be invoked to impute the profits of the company to that of the individual share-holders and for it to be taxed as such in the hands of the shareholders.

Another school of thought argues that if the above view is accepted, it means companies will simply become repository for accumulation of income free of tax. [13] This will occasion huge revenue loss to the government. Otherwise, what happens should a company decide not to distribute its profit to its shareholders or device a ploy of a sale of the shares in order to realize a capital gain? This also will definitely occasion a revenue loss to the nation as companies will just be used as a conduit for tax free income. Thus, a tax on companies is needed to protect the individual income tax. Corporate status conveys certain privileges and the companies should pay for these privileges. In

[10] Tiley J. OP. CIT., p. 622.
[11] Bryan A. Garner – *Black's Law Dictionary*, 8th edition, West Publishing Co., USA, 2004, p. 1500.
[12] Cap P 8, LFN, 2004, Section 12, See also Tiley J. op.cit (fn 10)
[13] Tiley J. OP. CIT., p. 622.

particular, companies have limited liability status. This protects their shareholders in the event of bankruptcy[14].

Allied to this, is the fact that taxing companies is more acceptable than taxing individuals as it is less personal[15].It is our view that the latter position that supports taxing companies seems more plausible and we concur with it on the ground that it will generate sufficient revenue for the government to cater for the societal needs.

2.6 DEFINITIVE PRINCIPLES OF MULTINATIONAL CORPORATE TAXATION

A company formed and registered under the *Companies and Allied Matters Act* or any enactment replaced by it is what the Act recognizes as a company in Nigeria[16]. Although *CAMA* defines a foreign company to mean company incorporated elsewhere than in Nigeria, it does not recognize its existence in Nigeria for business activities. It only defines it for the purpose of identifying it to comply with the mandatory incorporation processes before carrying on business in Nigeria[17] and to benefit from exemption from registration[18].

Section 54(1) *CAMA* provides that:

> Subject to Sections 56 – 59 of this Act, every foreign company which, before or after the commencement of this Act, was incorporated outside Nigeria, and having the intention of carrying on business in Nigeria shall take all steps necessary to obtain incorporation as a separate entity in Nigeria for that purpose, but until so incorporated the foreign company shall not carry on business in Nigeria or exercise any of the powers of a registered company and shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other

[14] Abdulrazaq M. T__ *Nigerian Revenue Law*, Matthouse Press Ltd, Lagos, 2005, p. 28.
[15] Tiley, J. op.cit (fn. 10)
[16] *CAMA*, Cap 20, LFN, 2004, Section 54.
[17] Ibid
[18] Ibid, Sections 56 and 59.

than the receipt of notices and other documents as matters preliminary to incorporation under this Act.

Carrying on business in Nigeria may be at profit or loss. Corporation tax is charged by reference to profits. Besides, Nigerian system of taxation does not operate in isolation from the rest of the world. Some foreign companies operate globally and render returns on global basis. The profits made by these foreign companies cannot be ignored. In this regard, the definition of 'company' by *CAMA* cannot be accurate for tax purposes.

The *Companies Income Tax Act*[19] defines 'company' in a broader sense. Section 105 of the Act defines a company as: "any company or corporation (other than corporation sole) established by or under any law in force in Nigeria or elsewhere". [20]

By this definition, the Act recognizes both Nigerian companies and foreign companies though on different basis. Be that as it may, a thorough digest of *CITA* in its entirety reveals that companies yet to commence business; a profit-making company; a company on liquidation; a reconstituted company, a holding company are all contemplated by the *Companies Income Tax Act*.[21]

It is worthy of note that the mandatory statutory provision of *CAMA* is clearly unambiguous in prohibiting the existence of a foreign company in Nigeria for any purpose (including carrying on business to make profit. In fact, any violation of the provision is slammed with a penalty.[22] The *CITA* on the other hand permits the existence of foreign companies and charge their profits derived from Nigeria to tax. [23] These enactments are both Acts of the National Assembly made to serve economic and fiscal purposes. While *CAMA* regulates incorporation, control and management of companies, *CITA* charges to tax the profits of these companies. Before *CITA* can be effective, there must be existence of companies brought into being by *CAMA*. When *CAMA* prohibits the existence of a class of company can *CITA* permit or legalize it? This, no doubt, brings about two conflicting public interest. One is the prevention of proliferation of foreign companies, unless registered as Nigerian company. The second is the revenue generation

[19] Cap C21, LFN, 2004
[20] See also *Petroleum Profits Tax Act*, Cap P 13, LFN, 2004, Section 2.
[21] *Companies Income Tax Act*, 2004, Sections 40 (4), 47, 29 (10).
[22] *CAMA*, Section 55
[23] *CITA*, Section 13 (2).

from the profits of companies including foreign companies. The two constitute key components of Nigerian economic policy and needs to be reconciled and harmonized.

It is instructive to state that the definition of company above analyzed is the same under the *Petroleum Profit Tax Act*[24]. However, one is disturbed about the rationale behind the treatment of oil companies under a separate statute from other companies.

After all, oil companies are companies even though, they are operating in the petroleum sector, just as there are companies in the manufacturing sector and in other sectors. A company is a company, and its income should ideally be taxed under the regular *Companies Income Tax Act*[25] otherwise it is antithesis of a simple tax system which Nigeria aims at.

Furthermore, the definition of 'company' under *CITA* encapsulates other statutory or registered friendly corporations apart from the ones registered under *CAMA*; such as cooperative societies. The *CITA* exempts the profits of cooperative societies from tax. However, if the profit is from trade or business outside cooperative activities solely carried out with its members, it is taxable. [26] In other words, if the profit of the cooperative society is derived from any activities that constitute established badges of trade, it is taxable.

The question that comes to mind is whether the Federal Government or any of its revenue agencies can charge to tax the taxable profits of any cooperative society. Nigeria is a federal state that recognizes the doctrine of separation of powers and upholds the principle of autonomy of states within the federation. To this end, the 1999 Constitution of Nigeria provides for separate legislative lists namely: Exclusive, Concurrent and residual lists.[27] Under the exclusive legislative list of the 1999 Constitution of Nigeria, item 32 empowers the federal government to legislate on incorporation, regulation and winding-up of bodies corporate (other than cooperative societies, local government council and bodies corporate) established directly by any law enacted by a House of Assembly of a state. This makes any matter regarding cooperative societies an exclusive

[24] *CITA*, Section 105 and *Petroleum Profit Tax Act (PPTA,)*, Cap LFN, 2004, Section 2.
[25] Nigerian Tax Reform in 2003 and Beyond- The Main Report of the Study Group on the Nigerian Tax System 2003, p 266.
[26] *CITA*, Section 23(b), op. cit.(fn 2)
[27] Second Schedule, Parts I & II of the 1999 Constitution

preserve of state government including taxation of their profits. Surprisingly, item, 59 of the same exclusive legislative list empowers the federal government to charge incomes and profits generally to tax whether or not they are from the cooperative societies. This inconsistency poses a serious legal issue in Nigerian fiscal federalism. Also it may constitute legal fallacy while defining a company for tax purpose.

2.7 TYPES OF MULTINATIONAL CORPORATE BODIES SUBJECT TO TAXATION

The c*ompanies Income Tax Act* divides companies into two categories for tax purposes: Nigerian Companies and Foreign Companies. The division is essential to enable Inland Revenue ascertain the profits of the companies derived from and liable to Nigerian tax. A Nigerian company is the one incorporated under the *CAMA* or any enactment replaced by the Act. [28]Its profits are deemed to accrue in and taxable in Nigeria wherever they have arisen and whether or not they have been brought into or received in Nigeria[29]. Thus, a Nigerian company is charged to tax on its global income. In other words, its chargeable income is limited to the Nigerian source income and what has been brought to Nigeria from outside sources. A foreign company on the other hand is the one incorporated under any law in force in any territory or country outside Nigeria.[30] However, in case of a re-constituted company, a foreign company is a company incorporated outside Nigeria before 18th November, 1968 and having on that date an established place of business in Nigeria.[31] In other words, a foreign company is the one trading and making profits in Nigeria but incorporated outside Nigeria. The profit of a foreign company from any trade or business is deemed to be derived from Nigeria if the company has a fixed base of business in Nigeria and the profit is attributable to the fixed base; [32] or without any fixed base, it has an agent through whom it habitually operates business and the profit is attributable to the business, [33] or the foreign company involves

[28] *CITA,* Section 106
[29] Ibid, Section 13 (1)
[30] Ibid, Sections 11, 29 (10) and 106
[31] *CITA,* Section 29 (10)
[32] Ibid, section 13 (2) (a)
[33] Ibid, Section 13 (2) (b)

in a single contract of service deliveries, installations or construction and the profit is from that contract [34] or the company engages in inter-company transaction not at arms' length, the profit adjusted by the Revenue Board. [35]

Apart from the above division, *CITA* sub-categorizes foreign companies in terms of their trading activities and patterns of business as follows:

a. Companies engaged in shipping or air transport: The profits or loss deemed to be derived from Nigeria and chargeable to tax in Nigeria of shipping and Transport Company is the full profits or loss arising from the carriage of passengers, mails, livestock or goods shipped or loaded into aircraft in Nigeria .[36]

b. Companies engaged in cable and wireless undertakings: A foreign company that carried on the business of transmission of messages by cable or by any form of apparatus is assessable to tax in Nigeria as if it operates ships or aircraft. In other words, the profit or loss of this category of companies chargeable to tax is the same with and on principles similar to shipping and air transport companies.[37] One thing is notable in companies (a) & (b) above. The profit or loss is chargeable to tax. It is remarked that to tax a company making a loss is grossly inequitable of the company and destructive to business enterprise.

c. Companies engaged in insurance business: The *Companies Income Tax Act* though recognizes two basic types of Insurance companies viz: Life Insurance companies and Non-Life Insurance companies; it classifies insurance operation into four categories [38] as follows:

i. **Life Assurance by Non-Resident**: Whether Life Assurance Company is mutual or proprietary, provided it has a permanent establishment in Nigeria; the profit for tax purpose is the investment income less the management expenses and commissions.[39] Where the profit accrues partly in Nigeria and partly outside Nigeria, the taxable profit shall be the proportion that the total premium bears to the total premiums

[34] Ibid, Section 13 (2) (c)
[35] Ibid, Section 13 (2) (d)
[36] Ibid, Section 14 (1)
[37] Ibid, Section 15
[38] Ibid, Section 16 (1)
[39] Ibid, Section 16 (1) (b)

receivable less the agency expenses.[40] If the head-office of the company is outside Nigeria, the Revenue Board has the discretion to substitute a different basis from the above.[41]

It is instructive to note that section 16 (1) (b) of the *Companies Income Tax Act* [42] is fraught with difficulties, which may hamper revenue generation in Nigeria. First, it contains multiple provisos which may create problem of comprehension. This is antithesis to the basic rule of taxation that advocates precision of language and abhors verbosity or superfluity.[43] Second, the discretionary power given to the Board under the sub-section is susceptible to abuse. It can be arbitrarily exercised or deliberately rendered inoperative for personal reasons.

ii. **Non-Life Insurance company by Non-Resident:** The non-resident insurance companies, be they mutual or proprietary, that carry on non-life assurance business through a permanent establishment in Nigeria and the profit is partly derived from Nigeria and partly from outside Nigeria, the taxable profit consists of the gross premiums received in Nigeria, the interest received in Nigeria and other incomes received in Nigeria; less any premiums returned, premiums paid on re-insurance, unexpired risks, actual losses in Nigeria, Nigeria agency expenses and a fair proportion of head office expenses[44].

Section 16 (1) (a) of the *Companies Income Tax Act* provides for chargeable profits of non-life assurance company by non-resident. One noticeable defect of the section is that it is inelegantly drafted. It is unnecessarily verbose and complicated with clumsy legal coinage. Finding proper sequence of the provision is like going through the maze; whereas it is a pre-requisite of a good tax system to impose the tax clearly and with unambiguous and easily understandable language. The drafting style used in that section may make implementation and compliance not likely to be easy under such conditions and consequently occasion huge revenue loss.

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[40] See the proviso to Section 16 (1) (b) *CITA*, 2004

[41] Ibid. See also Arogundade J. A__ *Nigerian Income Tax & Its International Dimension,* Spectrum Books Ltd, Ibadan, 2005, pp303-304 and Ola C.S__ *Incorporated Tax Law for corporate and Unincorporated Bodies in Nigeria*, Heinemann Educational Books (Nig) Ltd, Ibadan p237

[42] Cap C21, LFN, 2004

[43] Colten Iron Company Vs Black (1881) 6 AC 315

[44] *CITA,* Section 16 (1)(a)

iii. **Nigerian Life and Non-Life Insurance Companies:** The profits of Nigerian insurance companies chargeable to tax are similar to those of non-residents mentioned above but the whole investments and premiums income are treated as if received in Nigeria and all expenses and other outgoings incurred in Nigeria.[45] It is trite that the current Laws of Federation of Nigeria is the 2004 edition. It encompasses all the amendments made to *Companies Income Tax Act* after Cap 60 of the 1990 Laws of Federation came into operation. The legal implication of this is that as from 2004 when the current Laws of Federation of Nigeria came into existence, it has expropriated the Laws of Federation of Nigeria 1990.

Surprisingly, the National Assembly enacted the *Companies Income Tax (Amendment) Act*, 2007 [46] to amend the *Companies Income Tax Act*, Cap 60 Laws of Federation of Nigeria 1990 – a non-existence law. The 2007 Act purports to amend Section 14 of 1990 Act which provides for insurance companies instead of amending section 16 of Cap C21 Laws of Federation of Nigeria 2004 – the current law. In law, it presupposes that section 16 *CITA* 2004 remains unamended. All the shortcomings identified from it above are not and cannot be said to have been amended by the 2007 Act.

2.8 FEATURES OF MULTINATIONAL CORPORATE TAXATION IN NIGERIA

Corporation tax possesses some features which distinguishes it from other taxation. Some of those distinctive features are highlighted under the following sub-headings:

a. **Scope of chargeable income:** By virtue of Section 3 (1) of the *Personal Income Tax Act,* [47] the scope of chargeable income is the aggregate amounts each of which is the income of every taxable person, for each year, from a source inside and outside Nigeria. However, Section 13 (1) *CITA* defines the chargeable income as the total profits of a Nigerian company taxable in Nigeria whenever they have arisen in Nigeria or have been brought into or received in Nigeria. It can be deduced from both

[45] Ibid, Section 16 (1) (c)
[46] No 11 of 2007
[47] Cap P8, LFN, 2004

provisions that while a Nigerian resident individual is chargeable on the global income which is made up of income from inside and outside Nigeria; the chargeable income of a Nigerian company is limited to the Nigerian source income and what has been brought into Nigerian from outside sources.[48] In essence incomes not brought into Nigeria are chargeable in the hands of a Nigeria resident individual but not chargeable in the hands of a Nigerian company until they have been brought into Nigeria.

b. Taxpayer's Identification Number – A distinctive feature of companies' taxation is that the company tax payer has tax identification number. The incorporation number of a company, on registration, serves as tax identification number of the company. The company is mandated to display the number in all the transactions with any individuals, other companies' revenue authorities, ministries and all government agencies.[49]

c. Company's Tax Affairs – A company is a 'legal persona' separate and distinct from its proprietors. The tax affairs of a company therefore, are treated separately from tax affairs of its shareholders. While the former is governed by *CITA*, the latter is governed by *PITA*.

d. Rates of Tax – The *CITA* is the only tax enactment that empowers the executive to usurp the power of the legislature. Section 100 *CITA* gives the president discretionary power to revoke, vary or alter the rate of tax for any year of assessment. This contrast with the principles of separation of powers enshrined in the Constitution. Section 4 of the 1999 Constitution empowers the National Assembly to make laws for Nigeria. The power of the national Assembly to make laws covers and extends to amendment of the law made. The words 'revoke', 'alter' and 'vary' used in section 100 of *CITA* are synonymous with amendment. The power to impose, increase, reduce, vary or cancel any rate of tax is and should be vested in the National Assembly with respect to all tax laws under the federal government.

e. Double enabling Enactment – Another distinguishing feature of corporation tax in Nigeria is that it is governed by two enactments. They are *Companies Income Tax*

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[48] Arogundade J. A op.cit (fn 41) p31

[49] *CITA*, 2004, Section 10

Act[50] and *Petroleum Profits Tax Act*.[51] While the former governs the taxation of profits of companies or corporations other than those operating in the upstream sector of the oil industry, the latter governs the profits of companies engaged in petroleum operations in the upstream sector of the oil industry in Nigeria. As earlier observed, this is uncalled for. It complicates corporation tax system in Nigeria.

CHAPTER THREE

MULTINATIONAL CORPORATE GOVERNANCE AND INVESTMENT IN NIGERIA

3.1 INTRODUCTION

The term Multinational Corporations (MNC) can be defined and described from differing perspectives and on a number of various levels, including law, sociology, history, and strategy as well as from the perspectives of business ethics and society. Multinational corporations are companies which seek to operate strategically on a global scale. A multinational corporation is a company, firm or enterprise that operates worldwide with its headquarters in a metropolitan or developed country. Multinational Enterprise is any business that has productive activities in two or more countries. Certain characteristics of Multinational Corporations should be identified at eh start since they serve, in part, as their defining features. Often referred to as "multinational enterprises," and in some early documents of the United Nations they are called "transnational organizations," Multinational Corporations are usually very large corporate entities that while having their base of operations in one nation – the "home nation" – carry out and conduct business in at least one other, but usually many nations, in what are called the "host nations." Multinational Corporations are usually very large entities having a global presence and reach.[1]

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[50] Cap C21, LFN, 2004
[51] Cap P13, LFN, 2004
[1] Coyle, B. (2006) '*Corporate Governance Institute of Chartered Secretaries and Administrators study text.'* ICSA publishing London 4th edition p.5

According to Rugman,[2] the principal objective of multinational corporations is to secure the least costly production of goods for world markets. This goal may be achieved through acquiring the most efficient locations for production or obtaining taxation concession from host governments. This objective confirms the views of Marxist who see the MNCS try in every way possible to cut down expenses and maximize profit. As stated, the MNCs usually have their head office in one country with a cluster of subsidiaries in other countries and maintain a very high standard management outfit. This managerial expertise give rise to maximum efficiency, that is, maximum result at minimum cost.

At the same time, they are often also accused of destructive activities such as damaging the environment, complicity in human rights abuses, and involvement in corruption. Whether these accusation are fair or not, many MNCs are now attempting to manage these complex set of issues in the host countries by implementing corporate social responsibility (CSR) Strategies because such issues may risk the success of their operation.[3] It is not in the nature of the MNCs to solve social or economic problems of the host countries. Luis Echeveria, the former Mexican president had the belief and feeling that there is the need or transnational corporations to respect the social and cultural fabric, as well as the development priorities of the countries in which they are investing[4].

3.2 MULTINATIONAL CORPORATIONS AND GOVERNANCE

"Governance" refers to the way in which something is governed and to the function of governing. The governance of a country, for example, refers to the powers and actions of the legislative assembly the executive government and the judiciary.

Corporate governance refers to the way in which companies are governed, and to what purpose[5]. It is concerned with the practices and procedures for trying to ensure that

[2] id
[3] Prasad K, (2006) '*Corporate Governance: PHI learning private limited*,' New Delhi Press p.1
[4] Olakanmi & Co, (2006) '*Companies And Allied Matters Act: Synoptic Guide, Law Lords'* Publications Lagos. p 4
[5] Charles C.O. and Oludele A.A, (2003) ' *A review of corporate governance in Africa: literature, Issues and challenges.* 'A paper prepared for the global corporate governance from 15, June 2003 at p. 3. Downloaded from the internet on the 30-1-2010

a company is managed in such a way that it achieves its objectives. This could be to maximize the wealth of its owners (shareholders), subject to various guidelines and constraints and with regard to the other groups with an interest in what the company does[6]. Guidelines and constraints include behaving in an ethical way and in compliance with laws and regulations. Other groups with an interest in how the company acts include employees, customer and the general public.

Corporate governance refers to the relationship that exists between the different participants, and defining the direction and performance of a corporate firm[7]. The main actors in corporate governance are:

a. The CEO, i.e. the management
b. The board of directors
c. The shareholders

The other actors who influence governance in corporations firms are the staff, suppliers, customers, creditors, government and the community. Before going further, it is pertinent to understand what a corporation is and what it stands for.

A corporation is an instrument or a body by means of which capital is acquired, used for investing in assets producing goods and services and their distribution. A corporation can be described as an association of a number of persons united for economic purposes, i.e. to carry on business for gain[8]

According to the dictionary of banking, a corporation is a legal "person" by itself and continues as a distinct body, irrespective of any changes which may take place among the members

A corporation is an invincible, intangible and artificial body, that exists in the eyes of the law, and it has such properties expressed or implied) as defined in the charter which has created it. The main properties of a corporation should be in consonance with the objectives for which it was created.

[6] The Cadbury Report U.K. (1992). The report was a major inquiry into the financial aspects of corporate governance.
[7] It came into force on the 30th of September 1961. See OECD principles 2004 at p.13
[8] ibid at pg 5

The definitions of a corporation are instructive because though the company is separate and distinct from its members. Human beings have to make decisions and arrange transactions in the company name.

Thus corporate governance has also been defined as "... an umbrella term that includes specific issues arising from interactions among senior management, shareholders, boards of directors and other corporate stakeholders"[9].

It is concerned with creating a balance between economic and social goals and between individual and communal goals while encouraging efficient use of resources, accountability in the use of power and stewardship and aligning the interest of individuals, corporations and society. It also encompasses the establishment of an appropriate legal, economic and institutional environment that allows companies to thrive as institutions for advancing long-term shareholder value and maximum human-centered development while remaining conscious of their other responsibilities to stakeholders, the environment and the society in general. Corporate governance is the system by which companies are directed and controlled[10].

The Organization for Economic Co-operation and Development (OECD)[11] states that corporate governance involves a set of relationship between a company's management, its board, its shareholders and other stakeholders. Corporate governance… provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance… good corporate governance should provide proper incentives for the board and management to pursue objective that are in the interest of the company and shareholders and should facilitate effective monitoring, thereby encouraging firms to use resource more efficiently.

Corporate governance is concerned with the processes, systems, practices and procedures as well as the formal and informal rules that govern institutions, the manner in which these rules and regulations are applied and followed, the relationships that these rules and regulations determine or create and the nature of those relationships. It also addresses the leadership role in the institutional framework. Corporate governance,

[9] Gower and Davies 'Principles of Modern Company Law 7th Ed London Sweet And Maxwell.
[10] Sampath,K.R., (2009) '*Law and Procedure on Corporate Restructure Leading to Merger/Amalgamation/Takeovers/Joint Ventures And Corporate Restructure,'* Snow White, New Delhi, 5th Edition p 8411
[11] ibid

therefore, refers to the manner in which the power of a corporation is exercised in the stewardship of the corporation's total portfolio of assets and resources with the objective of maintaining and increasing shareholder value and satisfaction of other stakeholders in the context of its corporate mission. Corporate governance implies that companies not only maximize shareholders wealth, but balance the interest of shareholders with those of other stakeholders- employees, customers, suppliers and investors so as to achieve long-term sustainable value.

The president of the World Bank, J. Wolfensohn in an Article in the Financial Times of June 21, 1999 stated "corporate governance is about promoting corporate fairness, transparency and accountability".

Corporate governance seeks to promote the following objectives: (a) efficient, effective and sustainable corporations that contribute to the welfare of society by creating wealth, employment and solutions to emerging challenges. (b) responsive and accountable corporations. Legitimate corporations that are managed with integrity, probity and transparency (c) recognition and protection of stakeholders rights. An inclusive approach based on democratic ideals, legitimate representation and participation.

The objectives enumerated above aptly captures the principles of corporate governance as provided by the OECD: **1**. the rights of shareholders (and others) to receive relevant information about the company in a timely manner, to have the opportunity to participate in decisions concerning fundamental corporate changes, and to share in the profits of the corporation, among others; **2.** the equitable treatment of shareholders; **3**. the role of stakeholders in corporate governance should be recognized and established by law; **4** timely and accurate disclosure and transparency in all matters material to company performance, ownership; **5**. the responsibilities of the board.
The above principles shall be dealt with in the proceeding chapters of this thesis.

Most writers associate corporate governance with the modern rules of best practices. But Davies [12] has warned that corporate governance is as old as the large company where a distinction between ownership and control is inevitable. In his words:

[12] ibid

> However, one could say that corporate governance whether recognized under that name or not is a topic which is as old as the large company. The fact which the corporate governance debate takes as its starting point is the appearance, in large companies, of a group of senior managers who are separate and distinct from the shareholders. There are good reasons, why in large companies, the functions of investment and management should be carried out by separate, though possibly overlapping, groups of people. Where there are large number of shareholders, taking management decisions through the shareholders meeting would be impossibly cumbersome. Further, where the company's capital needs have led to a public offering of its shares, there is no reason to suppose that those who buy the shares have the necessary expertise or commitment to run a large business organization, and this is likely to be just as true of professional fund managers as it is of individual members of the public. In such a situation, the emergence of a specialist cadre of corporate managers is a natural development, managers who do not simply do as the shareholders say but who develop and implement corporate strategy on their own responsibility.

Corporate governance is a code of conduct to be observed by a corporate entity reflected through the actions of its board of directors and others managing its affairs. This code of conduct is to be observed in order to protect the interest of its owners-shareholders, stakeholders -the public, the state, the employees and the creditors.

A company not being a living person, this code of conduct relates to the need to disclose, to its owners and those affected by its existence, the society, in a transparent manner the various aspects of the company's internal operations such as financial, administrative, personal interest of those in management, the extent to which external supervision exists and the like.

The Confederation of Indian Industries (CII) mentions that " corporate governance deals with laws, procedures, practices and implicit rules that determine a

company's ability to take managerial decisions vis-à-vis its claimants- in particular, its shareholders, creditors, customers, the state and employees"[13]

3.3 ISSUES ON MULTINATIONAL CORPORATE GOVERNANCE

Corporate governance systems have evolved over centuries, often in response to corporate failure or systemic crises. The first well documented failure of governance was the south sea bubble in the 1700's which revolutionized business laws and practices in England.[14] Similarly most of the securities law in the United States was put in place following the stock market crash of 1929.[15] Each crisis or major corporate- failure often a result of incompetence, fraud and abuse- was met by new elements of an improved system of corporate governance.

Through this process of continuous change, developed countries have established a complex mosaic of laws, regulations, institutions and implementation capacity of the government and private sector. The systematic enforcement of law and regulation has created a culture of compliance that has shaped business culture and the management ethos of firms, spurring them to improve as a means of attracting human and financial resources on the best possible terms. This continuous process of change and adaptation has accelerated with the increasing diversity and complexity of shareholders and stakeholders. Globalization, too, is forcing many companies to tap into international financial markets and to face greater competition. This has led to restructuring and a greater role for merger and acquisitions and to expanded markets for corporate control.

Even in Nigeria, the importance of corporate governance was stressed by the Atedo Peterside committee that "the importance of effective corporate governance to corporate and economic performance cannot be overemphasized in today's global market place. Companies perceived to be adopting international best corporate governance practice are more likely to attract international investors than those whose practices are perceived to be below international standards.[16]

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[13] Forward to the 2003 SEC Code of Best Practices on Corporate Governance in Nigeria p 2
[14] ibid p 10
[15] ibid
[16] The problem that arises because an agent takes decisions and acts on behalf of the principal. The principal has to accept the consequences of the agents' actions, but might want some redress against an agent acting outside his authority. This problem is comparable to the relationship between equity shareholders and directors of a company.

At this point, it is pertinent to quote the example of Daimler Benz, the "Crown Jewel" of the German industry, who learnt through hard experience to bring a change in its classical accounting system/procedure and practice on disclosure, so as to be able to attract foreign capital.

Countries realize that just as overall governance is important in the public sector, so corporate governance is important in the private sector. They also realize that good governance of corporations is a source of competitive advantage and critical to economic and social progress.

Increasingly, individual investors, pension funds, banks and other financial institutions base their decisions not only on a company's outlook, but also on its reputation and its governance. It is this growing need to access financial resources, domestic and foreign and to harness the power of the private sector for economic and social progress that has brought corporate governance into prominence the world over[17]

If local capital markets are to grow, corporate governance standards will need to improve to give investors the protection required to encourage them to provide capital.

Many developing and transition economies lack the supporting institutions and human resource so critical to sound corporate governance. The challenge for them is to adapt systems of corporate governance to their own corporate structures and implementation capacities, public and private, to create a culture of enforcement and complaiance[18]. They need to do so in a manner that is credible and well understood both internally and across borders.

What makes corporate governance necessary? Put simply, the interests of those who have effective control over a firm can differ from the interest of those who supply the firm with external finance. The problem commonly referred to as a principal- agent problem[19] or agency problem grows out of the separation of ownership and control and of

[17] i. Managers and director conflicts, particularly between managers and non executive directors over issues such as the appropriate level of remuneration for managers.
ii. Shareholders and directors/ or managers over issues relating to the degree of effort and loyalty expected of directors and managers.
iii. Employees and managers / directors / shareholders over issues such as wages and other conditions of employment.
iv. Shareholders themselves (e.g. between small shareholders and large institutional shareholders
[18] There duties are discussed in detail in chapter four
[19] see part A section 2(a)(b) of the SEC Code of Best Practices on Corporate Governance in Nigeria, 2003

corporate outsiders and insiders. In the absence of the protection that good governance supplies, asymmetries of information and difficulties of monitoring mean that capital providers who lack control over the corporation will find it risky and costly to protect themselves from the opportunistic behavior of managers or controlling shareholders.

The well known agency problems resulting from the separation of ownership from control still prevails in firms worldwide. Research suggests that firms with weaker governance structure have greater agency problems, that firms with greater agency problems allow managers to extract greater private benefits and those firms with greater agency problems perform worse. Specifically in Asia, it has been shown that both before and after the Asian financial crisis in 1997, firms that paid heed to good corporate governance practices fared better and provided greater protection to shareholders especially the minority shareholders.

3.4 MECHANISMS OF MULTINATIONAL CORPORATE GOVERNANCE AND INVESTMENT IN NIGERIA

A number of mechanisms play a role in corporate governance and investment by operating to minimize one or more of the conflicts[20] in the firm. Each will have a different degree of influence in relation to particular companies. In the case of those corporate governance mechanisms which focus on conflicts between shareholders and directors and/or managers, the mechanisms include:

a. Directors and officers legal duties, which have, as their objective, ensuring that directors and officers act honestly, with appropriate care and diligence, and in the best in interest of the company.[21]
b. The structure of the board, including such matters as the proportion of independent directors constituting the board and whether the positions of chairperson of the board and chief executive officer are combined or separate.[22]

[20] i. Managers and director conflicts, particularly between managers and non executive directors over issues such as the appropriate level of remuneration for managers.
ii. Shareholders and directors/ or managers over issues relating to the degree of effort and loyalty expected of directors and managers.
iii. Employees and managers / directors / shareholders over issues such as wages and other conditions of employment.
iv. Shareholders themselves (e.g. between small shareholders and large institutional shareholders
[21] There duties are discussed in detail in chapter four

The need for separating the roles of chairman and CEO is also of international applicability as the UK Combined Code in one of its principles states. "There should be a clear division of responsibilities at the head of the company between the running of the board and the executive responsibility for running the company's business. No one individual should have unfettered powers of decision"

c. Auditors, who assists in the monitoring of managers by attesting to the accuracy of companies' financial statements.
d. Institutional investors:[23] a major debate is occurring regarding the extent to which institutional investors are effective monitors of the companies in which they invest.

Institutional investors in the UK and USA now show active concern for good corporate governance from the companies in which they invest. In the UK, this concern is demonstrated in public largely through the various representative bodies of the institutional investors' organizations.

e. Takeovers. Takeovers operate as a discipline upon managers who may be replaced if an acquirer believes it can operate the company more efficiently. The impact of takeovers as a corporate governance mechanism depends upon the effectiveness of the market for corporate control which can be impeded either by defensive tactics by the managers of target companies or by government intervention.
f. Disclosure of information by companies. Such disclosure (which may be mandatory or voluntary) may be important for the proper monitoring of managers and directors. A current example of disclosure relating to corporate governance is a recently introduced Australian Stock Exchange Listing Rule 4.10.3 which requires listed companies to disclose their corporate governance practices.
g. The product market in which the company operates: a company which is managed inefficiently may lose market share to more efficiently run companies in the same industry provided that the market is competitive.
h. Shareholdings by managers/directors: It has been suggested that increasing managers and directors shareholding in their companies provides them with the incentive to

[22] see part A section 2(a)(b) of the SEC Code of Best Practices on Corporate Governance in Nigeria, 2003
[23] This shall be dealt with in chapter 3

improve corporate performance. However other commentators suggest that high levels of such ownership may simply entrench managers and directors.

i. shareholder voting and litigation - Shareholder voting could be used as a corporate governance mechanism. However, voting may not be a powerful corporate governance mechanism where there is significant free- rider problem, in that the shareholder bears the cost of working out that the company is underperforming and then bears the expense of launching a proxy fight. In addition, it may be difficult to motivate other shareholders to vote in that rational apathy may be the norm. In relation to shareholder litigation, such litigation plays a relatively minor role in corporate governance in the United Kingdom and there have been only two reported cases of any significance involving a derivative action by shreholders[24]

j. Intervention by regulators: regulators such as the Securities and Exchange Commission, Central Bank of Nigeria, play an active role in enforcing corporate governance standard.

3.5 THE PURPOSE AND NATURE OF MULTINATIONAL CORPORATIONS AND INVESTMENT IN NIGERIA

A corporation is created by an Act of Parliament or by a Charter granted by the Crown.[25] A corporation may also be a statutory company one which is incorporated by a special Act of Parliament or a Decree and are usually formed to carry out special public purposes e.g. the Nigerian Railway Corporation.

The most common form of companies today are registered companies, these are companies incorporated under the Companies and Allied Matters Act by the process of registration. A corporation is a legal "person" by itself and continues as a distinct body, irrespective of any changes which may take place amongst its members.[26]

[24] Harold F. (1997) ' Corporate Governance and the Duties of Company Directors ', Center for Corporate Law and Securities Regulation, Faculty of Law, University of Melbourne. p8

[25] These companies are classified as chartered companies. They are usually conferred with a monopoly of trading in a particular territory. Examples are B.B.C and some Universities in Britain. This type of company is no longer common today.

[26] As seen in the celebrated case of SALOMON v SALOMON & see section 37 Companies and Allied Matters Act 2004.

In the Nigerian context, the purpose of a corporation is enshrined in its Memorandum of Association. In the United States of America, it is as per its Charter vis-à-vis its Declaration at the time of incorporation.

The most common purposes of corporations may be outlined as:

i. To provide goods and services for the market
ii. To protect the environment- some corporations define, protect and promote environmental development and preservation polices.
iii. Satisfaction of human drives- corporations provide opportunities for the satisfaction of essential human needs-viz growth of creative expression and competitiveness.
iv. Investors in corporations opt for divestment when equity that is at risk in one corporation can be spread over to other firms by buying ownerships. The risk may be significantly reduced through divestment of a portfolio of a corporation.
v. Corporations raise the standards of the stakeholders within and around it. It enhances their wellbeing through employment and contributes to the gross domestic product of the economy

Corporations provide a durable and lasting social structure which bind the people and make them devoted to the goals and objectives of the organization. Corporations exist along with the attendant power/authority and rights. Section 38(1) of CAMA states that, except to the extent that the company's memorandum or any enactment otherwise provides, every company shall, for the furtherance of its authorized business objects, have all the powers of a natural person of full capacity. Thus a corporation is only limited as to its memorandum and the provisions of the Act.[27]

Corporations are persons under the US Federal Constitution /Bill of Rights. They enjoy "property protection" under US laws[28]. They enjoy freedom of speech and are reasonably entitled to contribute to political campaigns/issues.[29]

A corporation maintains its own identify not only as a producer of goods and services in the society but also as a corporate citizen. The corporate social responsibility

[27] see section 39(1) CAMA cap 20, LFN 2004
[28] Prasad, K: op. cit pg 2
[29] Section 38(2) of CAMA 2004 prohibits companies from making donations or gifts to a political party or political association for any political purpose.

of the corporations in India is enshrined in the firm's Memorandum of Association.[30]In 1986, the US Supreme Court had observed without any arguments in the court that the corporations are deemed persons in the context of the 14th amendment.

The fundamental attribute of corporate personality is that the company is a legal entity distinct from its members. Hence it is capable of enjoying rights and being subject to duties which are not the same as those enjoyed or borne by its members. In other words, it has "legal personality". It is a legal creation, an "artificial person" as opposed to a "natural person". It is capable of suing and being sued in its corporate name.

The most important illustration of this personality is seen in the locus case of SALOMON vs. SALOMON & CO.[31]

Mr. Salomon had, for many years carried on a prosperous business as a leather merchant. In 1892, he decided to convert it into a limited company and so formed "Salomon & Co. ltd." with Salomon, his wife and five children are members and Salomon as managing director. The company purchased Salomon's leather business as a going concern for £39, 000 the price being satisfied by £10,000 in debentures, conferring a charge on all the company's assets, £20,000 in fully paid £1 shares and the balance in cash. Seven shares were subscribed in cash by the members with the result that Salomon held 20,001 of the 20,007 shares issued, and each of the remaining six were held by a member of his family as a nominee for him. Barely a year later, had the company gone into liquidation. The asset was sufficient to satisfy the debenture, but the unsecured creditors with debts amounting to £7,000 received nothing. The liquidator instituted an action on behalf of the creditors against Salomon to indemnity the company. It was held that, the company had been validly formed, hence the business belonged to it and not to Salomon, and Salomon was merely the company's agent. The court established that the company is a different person altogether from the subscribers.

Section 37 of CAMA, 2004 states:

> As from the date of incorporation mentioned in the certificate of incorporation, the subscribers of the memorandum together with such other

[30] Prasad, K. op sit pg 3
[31] (1987) A.C. 22,66

> persons as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the powers and functions of an incorporated company including the power to hold land, and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act.

A business cannot profit merely by doing good things. A business cannot prosper if the cost of social responsibility is too high.

Firms observe the basic responsibility towards the society for example; they provide healthy and quality goods and services. But activities such as contributing to social causes may be roadblocks to higher profits. Basically corporations exist for economic reasons, making profits to the maximum. This is the reason for their existence and so they need to be competitive to survive in the market. Profit guarantees longevity of the firm, and such businesses survive. On the whole, the relationships between a corporation and its members is that of a contract under seal[32]

3.6 CHARACTERISTICS OF MULTINATIONAL CORPORATE INVESTMENT

Robert Clark, Dean, Harvard Law School, gave four critical characteristics of a corporation as follows:[33]

a. **The liability aspect**: As per the court ruling in SALOMON vs. SALOMON, a corporation is distinct from its owners and staff. What a corporation owes is not the liability of the group of persons who comprise the corporation. And, the liability of the group of persons is not the liability of the individuals who make the corporation. Therefore, in the event of a corporation going bankrupt, individually, the members of

[32] See section 41(1) CAMA
[33] Prasad, k: op cit pg 24

the corporation do not carry any liability if they are sued by its creditors for any debt. The American court had clarified in the case of SANTA CLARA COUNTY vs. SOUTHERN PACIFIC RAIL ROAD (1886) that a corporation is to be registered as a person.

b. **Stock transferability**: In corporations, the stockholding can be transferred to another person because stocks are liquid like cash. Once the stock price goes down, the shareholder can sell it and save the loss in value. Also, once the price soars the shareholder can sell off the shares and enjoy the gain.

   Section 115, CAMA 2004 states:

   "The shares or other interest of a member in a company shall be property transferable in the manner provided in articles of association of the company."

   Therefore a shareholder has unfettered right to transfer his shares to whomever he desires subject to provisions of the articles of the company.

   However, the shares can only be transferred by means of an instrument of transfer which must be in writing.[34]

c. **Life of a corporation**: unlike a partnership which becomes non- existent the moment one partner dies, a corporation exists so long as it has the necessary capital to run it. Until it is wound up, it has perpetual succession. The vicissitudes of the flesh have no direct effect on the disembodied company.

d. **MANAGEMENT control**: In a corporation, the chairman and the directors have the authority and responsibility to give direction to the organization. The power in centralized in the hands of the board of directors and the managers are delegated the powers to control and manage the day-to-day function so the business. The shareholders do not keep authority but pass it down to the management for effective operation of the business.

   Several countries the world over have initiated corporate governance codes/ principles for corporate behavior due to corporate scandals that have occurred or generally as a check against such occurrences.

[34] Section 151 CAMA, 2004

3.7 INTERNATIONAL INITIATIVES ON MULTINATIONAL CORPORATE INVESTMENTS

Different countries practice different systems of corporate governance. This is because the way in which corporations order their affairs, whatever their ownership structure, varies even within a single jurisdiction. Corporations work within boundaries set by law, by regulations, by those who own and fund them and by the expectation of those they serve.

The systems of corporate investment to be considered here are those of the OECD, the United Kingdom, and the United States of America.

a. **The OECD principles of corporate governance**.

The Organization for Economic Corporation and Development (OECD) is an international body established to help countries, particularly those with developing economies, by providing advice and assistance on economic matter and on ways of helping them to adapt to the demands of the international economy.

In 1998, the OECD set up a task force to produce a set of principles of good corporate governance. The principles were published in 1999 and subsequently revised in 2004. They were to help governments in their efforts to improve the legal, institutional and regulatory framework for corporate governance in their countries. The principles are a living instrument offering non-binding standards and good practice as well as guidance on implementation, which can be adapted to the specific circumstance of individual countries.

In 2002 the Emerging Markets Committee of IOSCO[35] recommended the OECD principles as a "benchmark". The focus of the principles is on corporate governance problems arising from the separation of the ownership of a company (i.e. the shareholders) from its control (by the board of directors).

The OECD principles are divided into six areas or sections. These are:

i. Ensuring the basis for an effective corporate governance framework
ii. The rights of shareholders and key ownership functions.
iii. The equitable treatment of shareholders.
iv. The role of stakeholder in corporate governance

[35] The International Organization of Securities Commissions.

v. Disclosure and transparency

vi. The responsibility of the board

I. Ensuring the basis for an effective multinational corporate governance framework

"The corporate governance framework should promote transparent and efficient markets be consistent with the rule of law and clearly articulate the division of responsibilities among different supervisory regulatory and enforcement authorities".

II. The rights of shareholder and key ownership functions

"The corporate governance framework should protect and facilitate the exercise of shareholders rights". Shareholders have certain property rights, which ought to be protected. A company cannot be managed by shareholder referendum, and shareholders cannot take over the task of management.[36]

The property rights of shareholders are:

a. Share in the profits of the corporation,
b. Elect and remove members of the board of directors,
c. Participate and vote in general shareholder meetings;
d. Obtain important information on the company on a timely basis.
e. Transfer or convey shares
f. Secure methods of registering their ownership of shares.

The shareholders should also be kept adequately informed on and participate in decision making on issues like:

a. amendments to the Memorandum and Articles of Association, or other governing documents:
b. authorization of additional shares,
c. extraordinary transactions, including the transfer of all or substantially all assets, that in effect results in the sale of the company.

The principles go further by recommending that shareholders should be able to vote in person or in absentia,[37] and equal effect should be given to votes whether cast in person or absentia.[38]

[36] Coyle, B: op cit pg 1
[37] Votes by proxy

III. The equitable treatment of shareholders.

"The corporate governance framework should ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights."

IV. The role of stakeholders in corporate governance

"The corporate governance framework should recognize the rights of stakeholders established by law or through mutual agreements and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises.

The principles proffer that a key aspect of corporate governance is ensuring the flow of external capital to firms that need to obtain it. Corporate governance is concerned with finding way to encourage the various stakeholders in the firm to undertake socially efficient level of investment in human and physical capital within their companies. The role of creditors is therefore significant.

Germany for example practices the institutional system of corporate governance where in it's a coalition of various participants striving for the continuity of the firm as a whole. Industrial Banks form an important part of stakeholders in German companies. [39]

The competitiveness and success of a company depends ultimately on the teamwork of the various stakeholders, including investors, employees, creditors and suppliers.

The principles add that the corporate governance framework should permit 'performance enhancing mechanisms for stakeholder participation'. Examples are employee representation on the board of directors, employee share ownership, profit-sharing arrangement.

This principle goes further and says "the framework should be complemented by an effective, efficient insolvency framework and by effective enforcement of creditor rights"

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[38] Only South Africa allowed proxy by mail in Africa. This information was from La Porta et al (1998) after making a comparative evaluation of good corporate governance in a number of African countries including Kenya, Nigeria, South Africa and Zimbabwe. Source Okeahalam C and Akinboade O. A Review of Corporate Governance in Africa: Literature Issues and challenges. A paper prepared for the Global Corporate Governance Forum on the 15 June 3003 downloaded from the internet on 30.01.2010.

Especially in emerging markets, creditors are a key stakeholder in the terms, volume and type of credit extended to firms will depend importantly on their rights and enforceability. Companies with a good corporate governance record are often able to borrow larger sums and on more favorable terms than those with poor records or which operate in non- transparent markets. (The framework for corporate insolvency varies widely across countries. In some countries, when companies are nearing insolvency, the legislative framework imposes a duty on directors to act in the interest of creditors).

V. Disclosure and transparency

"The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance ownership and governance of the company"[39].

VI. Responsibilities of the board

"The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board and the boards accountability to the company and the shareholders."[40]

b. **Corporate governance and investment in the United Kingdom.**

The United Kingdom, (U.K) is generally acknowledged as a world leader in corporate governance reform. This was not a predetermined strategy but the result of the growing interest of corporate governance issues within the board room, the institutional investment community and the government. It was also in part a reaction to scandals[41] such as the Maxwell case[42] and in part a result of introspection by boards and shareholders following economic decline in the early 1990's.

An insight of some of the reports on corporate governance in the UK is presented bellow.

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[39] This shall be discussed latter

[40] A detailed explanation shall be made in chapter four.

[41] Jil S. And Aris S.(2004) *' Corporate Governance and Accountability,* 'John Willey and Sons Limited, West Sussex p 5

[42] Robert Maxwell's abuse of power resulted in a scandal that was named the greatest fraud of the 20th century (styles and Taylor, 1993). Maxwell built up his corporate empire over time, but took on too much debt and pursued fraudulent activities in order to survive. After Maxwell's assumed suicide it emerged that he had taken money from the pension funds of his public company in order to fiancé his other activities. He was estimated to have stolen E727 million from the pension fund of the two public companies, as well as from the companies assets. Also, an estimated E1billion was lost from shareholder value after the public companies crashed.

1. The Cadbury (Report) Code (1992)

This Report represented the first attempt to formalize corporate governance best practice in a written document and to make explicit the system of corporate governance that was implicit in many U.K. Companies.

The committee that presented this report was established under the chairmanship of Sir Adrian Cadbury at the instigation of the London Stock Exchange.

The committee was asked to look into the financial aspects of corporate governance amid concerns that financial reporting by companies was often misleading and suffered from" window dressing". The attention of the committee broadened, however to include other aspects of corporate governance particularly the functions and effectives of the board of directors. The stated aim of the Cadbury Committee was to help raise standards of corporate governance and confidence in financial reporting and auditing, by setting out what it saw as the respective responsibilities of those involved and what it believed was expected of them.

Major provisions of the Cadbury Code were the following:

I. Board of Directors: The report did not give stronger rights over the decisions in the company to shareholders, rather, that, directors should have the essential powers, though they should be properly accountable to the shareholders for the way in which they use them.

In recognizing the risk that some directors might be accused of having insufficient experience or knowledge of some matters, the Code stated that such directors should be able to obtain professional advice at the company's expense.

Also the code stated that there should be a clear division of responsibilities at the top of the company. The two major roles of Chief Executive and Chairman should be clearly defined. The Code argued that it would be desirable to separate the role.

II. The Accounts of the Company: The Cadbury Committee viewed the audit committee as a key board committee, with the task of communicating with both the internal and external auditors and for providing a forum for the discussion of audit issues. The Audit Committee should include at least three Non- Executive Directors, and should have a written term of reference

The board of directors has a duty to present a balanced and understandable assessment of the company financial position to the shareholders. As part of this responsibility, the Code stated that the directors should include in the Annual Report a statement about the company's ability to continue as a going concern.

2. The Greenbury Report (1995)

This committee under the chairmanship of Sir Richard Greenbury was created in response to public and shareholder concerns about directors' remuneration. The press attacked 'fat cat' directors who paid themselves enormous salaries even when their companies were performing badly.[43] A very important provision was that, the Annual Report and Accounts of the company should disclose for each named director the elements of remuneration such as salaries, fees, annual bonuses, deferred and compensation for loss of office. For each director by name, information should also be given about share options and any other long term incentive scheme other than share options.

The committee also reduced the notice period in the service contracts of the directors to 12 months. This is to reduce the amount of payoff to be given a director where his contact is terminated for lack of performance.

Also disclosure should be made if any director with a notice period in excess of 12 months is in his or her service contract, together with an explanation of the reasons.

The Greenbury Report called for a report in the Annual Report and Accounts in directors' remuneration policy. This should provide details of how the remuneration of directors compares with other similar companies.

3. The Hampel Report (1998)

The Hampel committee was set up in 1996 to continue the review of corporate governance practices in the UK, following the Cadbury and Greenbury Committee Reports. The Hampel Committee suggested that the recommendations of all three committees should be integrated into a single code of corporate governance which was published in 1998 as the Combined Code.

[43] Provisions of this report shall be considered in chapter 5, under managerial compensation.

An important contribution made by the Hampel Report was the emphasis attributed to avoiding a prescriptive approach to corporate governance improvements and recommendations. The Report reinforced this by stipulating that companies and shareholders needed to avoid 'box ticking'[44] approach to corporate governance. The Hampel Report emphasized the need to maintain principles based voluntary approach to corporate governance rather than a more regulated approach.

Another significant feature of the Hampel Report was the recommendation originally made by the Cadbury Committee, but rejected at the time, that the board should maintain a sound system of internal control, to safeguard the shareholders' investment and the company's assets.

4. The 1998 Combined Code:

The combined code brought together a set of principles of good corporate governance and provisions of best practice, giving more detailed guidelines to follow. The Combined Code readdressed all the issues raised in previous reports, bringing the major points together.

The Code was in two sections. The first section sets out principles and a code of best practice for companies, it includes four parts (a) directors; (b) directors remuneration; (c) relations with shareholders; (d) accountability and audit. The second section set out principles and codes for institutional investors and included three parts: (a) shareholder voting; (b) dialogue with companies; (c) evaluation of governance disclosure[45] The Code was produced by a committee on corporate governance in 1998 and adopted by the London Stock Exchange it was also included in the UK Listing Rules.

5. The Turnbull Report (1999)

The Combined Code (1998) in its provisions on internal control stated that company directors should conduct a review of the effectiveness of their internal control system and should report this information to shareholders. The Turnbull

[44] A term that refers to a process of complying with the detailed requirements of a set of regulations (i.e. ticking the boxes against a list of things that have to be done), rather than complying with the spirit and purpose of the regulation

[45] Jil, S. and Aris S. op cit pg 53

Committee was established specifically to address the issue of internal control. The Turnbull Report dealt with risk aspects of corporate governance and its importance.

6. The Higgs Report (2003)[46]

The Higgs Report reviewed of the role and effectiveness of Non- Executive Directors (NED's), aimed to develop guidelines for making NED's more effective. A part of the problem was to ensure that the role of NED's is properly understood. Another is to ensure that NED's are suitably knowledgeable or experienced and sufficiently understand the affairs of the company.

Some recommendations in the report included the following:

a. The board

1. At least half of the board, excluding the chairman should be independent NED's
2. The board should promote the success of the company by properly directing the affairs of the company.

b. The Chairman

1. The roles of chairman and CEO should be separate.
2. The CEO should not become the chairman of the same company.

c. Non Executive Directors

1. Prior to their appointment, NED's should carry out due diligence on the board and the company to satisfy themselves that they have the knowledge, skills, experience and time to do their job properly.
2. NED's should be given induction upon appointment and the chairman is expected to be responsible for such induction.

7. The Smith Report (2003)

The main issues dealt with in this Report concerned the relationship between the external auditor and the companies they audit, as well as the roles and responsibilities of companies audit committees. This committee was established by the Financial Reporting Council and the report was published in January 2003.

The importance of this synergy cannot be overemphasized. The failure of the audit committee and internal audit function were one of the principal causes of the collapse of Enron.

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8. The Combined Code (2003)

The responsibility for the Combined Code 2003 was given to the Financial Reporting Council who published a revised version in July 2003. The Revised Code retained almost all of the 50 recommendations contained in the Higg's original report. Like the 1998 code, the 2003 code is divided into two sections, one for companies and the other for institutional investors.[47]

Whereas the 1998 Code consisted of principles and provisions (best practice) the 2003 Code consists of Main Principles, Supporting Principles and Provisions (practical requirement).

The second section of the Combined Code 2003 contains main principles and supporting principles for institutional investors which aimed at encouraging institutional investors to take a more active role in the governance of the companies in which they invest.

It is important to state here that the UK adopts a voluntary approach of 'comply or explain'.[48] This approach was preferred to a statutory code mainly because it would be more likely to develop a 'good' corporate governance culture within the UK companies. They would be encouraged to comply in spirit rather than in letter.[49] This is however different from the USA that prefers a more regulated rules based environment.

C. CORPORATE GOVERNANCE AND INVESTMENT IN THE UNITED STATES

Whereas corporate governance issues in Europe, UK and other countries have been introduced as largely voluntary measures for listed companies the United States of America by the Sarbanes- Oxley Act 2002 emphasizes on statutory regulation hence compulsory compliance.

The Act introduces 'corporate accountability legislation'[50] a legislation requiring companies to be accountable to their shareholders.

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[47] Jil, S. and Aris, S. op cit p 54
[48] id
[49] Cadbury Report, (1992)
[50] Coyle, B. op cit at pg p5

Following the collapse of Enron and other accounting frauds and corporate scandals involving firms such as Global Crossing, Adelphia, Tyco and World com and in light of the demise of Arthur Anderson, one of the "big five" accounting firms, the Sarbanes – Oxley Act of 2002(SOX) was signed into law. SOX was enacted in an attempt to eliminate accounting fraud and management wrong doing and to restore confidence in the US financial markets. SOX is the most sweeping package of corporate governance legislation since the Federal Securities Law enacted in the 1930's.[51] The SOX creates a number of new criminal offences relating to corporate fraud. Detailed rules to implement these charges have been developed by the US Securities and Exchange Commission (SEC). Now listing requirements approved by the New York stock exchange in August 2002 contain a variety of additional mandatory requirements relating to corporate governance.

The provisions of the Sarbanes – Oxley Act 2002 target top managers, board members, and the audit profession, especially firms that oversee the accounting and financial reporting of public companies.

The Chief Executive Officer (CEO) and the Chief Financial Officer (CFO) of such companies are now required to certify that their financial reports accurately reflect the company's financial condition.[52] False statements are treated as a criminal act.

The law also prohibits executives of any public company from receiving loans from their comanpy[53]. This applies to directors and executive officers and it extends to modifying or renewing existing loans. As far as management is concerned the acts most arduous requirement is Section 404 which directs the SEC to set rules requiring companies (SEC 'registrants') to include an internal control in their annual report: "the commission shall prescribe rules requiring each annual report… to contain an internal control in their annual report, which shall-

1. State the responsibility of management in establishing and maintaining an adequate internal control structure and procedures for financial reporting,

[51] Section 302 of SOX 2002 requires all companies with a listing in the US to provide in its Annual or Quarterly Report of the company a signed certificate to the SEC vouching for the accuracy of the company's financial statements. This certificate must be signed by the CEO and CFO (Chief Financial Officer)
[52] Section 302 SOX, 2002
[53] Section 402 SOX, 2002

2. Contain an assessment, as of the end of the most recent fiscal year of the issuer, of the effectiveness of the internal control structure and procedure of the issuer for financial reporting"[54]

The US SEC applied the requirement of section 404(a) [This section obliges managers to review the company's' financial control every year to certify that they are adequate] in its own rule 33-8238

Whenever the company's accounts are restated due to material non- compliance with accounting rules and standards, the CEO and CFO must give up previous bonuses in the past twelve months including equity or incentive compensation awards[55].

The Sarbanes-Oxley Act also has a significant impact on boards of directors and public accounting firms. It cuts all ties between management and outside auditors. It demands that a board audit committee oversee all internal audits and take responsibility for the company's relationship with the external auditor.

3.8 NIGERIAN INITIATIVES ON MULTINATIONAL CORPORATE GOVERNANCE AND INVESTMENT

Nigeria has a legal framework derived from British common law and similar commercial codes to deal with issues relating to corporate governance. The main corporate code is the Companies and Allied Matters Act 1990 now CAP C20 LFN 2004. The Act contains several sections dealing with issues of corporate governance, from directors,[56] shareholders and their rights[57].

The Act requires among other things for directors of every company to prepare and present financial statemetns[58]. Section 334(2) CAMA 2004 lists what the financial statements should include. It is a criminal offence to lay before the company in General Meeting or deliver to the Corporate Affairs Commission (CAC) any such document without the necessary signatures. [59]

[54] Section 404(a) SOX, 2002
[55] Section 304 SOX, 2002
[56] This shall be discussed in chapter four.
[57] This would be discussed in chapter three
[58] section 334(1) CAMA 2004
[59] Section 343 (2)(b) CAMA 2004

The Act also outlines various disclosure requirements and requires the disclosure of director's emoluments and any interest the directors (or connected persons) have in transactions with the company.

The remuneration of directors shall be determined by the company in General Meeting.[60] Also directors will not be paid remuneration free from tax[61]. Similarly section 270 CAMA 2004 prohibits the making of loans to directors unless:

a. The company is one whose ordinary business includes the lending of money or giving of guarantees in connection with loans, and even at that, the loan or guarantee must first be approved by the general meeting; or
b. The loan is to enable the director to meet expenditure incurred or to be incurred by him for the purposes of the company or to enable him properly to perform his duties as an officer of the company.

Accounts should be prepared in accordance with Nigerian Accounting Standards and comply with the Law. An independent auditor must also be appointed from persons belonging to a body of accountants.[62] For publicly listed companies an audit committee of no more than three executive directors and three non- executive directors must examine the audit report and review accounting and internal controls.

The main regulators for listed companies are the Securities and Exchange Commission (SEC) and the Corporate Affairs Commission (CAC) which registers all incorporated companies. Financial Institutions, Banks and Insurance companies are also under the jurisdiction of the Nigerian Deposit Insurance Corporation (NDIC), the Central Bank of Nigeria (CBN) and the National Insurance Commission of Nigeria or the Pension Commission (PENCOM).

The CAMA and the Investment and Securities Act (ISA) provide basic guidelines on company listing and more detailed regulations are covered in the Nigerian Stock Exchange and the Securities and Exchange Commission. In March 2003, a committee set up by the SEC, chaired by Mr. Atedo Peterside of Investment Banking and Trust Company Limited (IBTC) and representatives from the SEC, Institute of Directors, Institute of Chartered Accountants of Nigeria, Central Bank of Nigeria as well as other

[60]
[61] Section 269(1) CAMA 2004
[62] Section 358(1) CAMA 2004

stakeholders, developed a code of best practices for public companies in Nigeria. The Code is voluntary and aims to clarify the respective responsibilities of directors for listed companies but it is hoped that all companies will adopt it[63].

Elements of the Code include a separation of the roles of Chairman and Chief Executive Officer and a description of the duties, number and required caliber of non-executive directors. Companies are required to form audit committees, remuneration committees and an outline covering duties, appointment procedures, and constitution of these committees.

The Central Bank of Nigeria also published a Code of Corporate Governance for Banks in Nigeria post consolidation in March 1, 2006 which took effect April 3, 2006. In its introductory paragraphs its stated that for the financial industry, the retention of public confidence through the enthronement of good corporate governance remains of utmost importance given the role of the industry in the mobilization of funds, the allocation of credits to the needy sectors of the economy, the payment and settlement system and the implementation of monetary policy.

The Bank recognized the contribution of the principles in the Code of Best Practices on Corporate Governance 2003 by the Securities and Exchange Commission and also the Code of Corporate Governance for Banks and other Financial Institutions earlier in 2003. It stated that the 2006 Code of Corporate Governance for Banks in Nigeria, post consolidation was necessitated by the consolidation in the banking industry. One major departure of the Code of Corporate Governance for Banks, post consolidation of the CBN from the SEC Code of Best Practices on Corporate Governance 2003 by is that the former makes compliance with the provisions of the code mandatory.

Many quoted companies also have recognized codes of corporate governance which guide the practices in such corporations.

The Nigerian Accounting Standards Board issues standards that are in line with international accounting standards and adapted to local conditions. The Board derives its functions and powers from the Act establishing it. Pursuant to the powers conferred on it by section 7 of the Act, the Board was mandated by the Minister of Commerce and

[63] Sani N, Vimal J. and Mark A: Corporate Governance in Africa: A survey of publicly listed companies, 2003 at pg 15 downloaded from the internet on 25/09/2010

Industry to ensure the action plan and framework for the smooth transition to the International Financial Reporting Standard[68] are complied with by all reporting entities by January 2, 2012.

This convergence has become imperative following many corporate scandals when the account profession came under scrutiny and led to the global questioning of accountants experience integrity and existence of standards in corporate governance.

Basically the Nigerian corporate governance legal framework is primarily governed by the Investment and Securities Act (ISA) 2007, the Rules and Regulations of the Securities and Exchange Commission the Companies and Allied Matters Act, The PENCOM Code of Corporate Governance for Licensed Pension Administrators and the Investment Trustees Act, 2004.The SEC Code of Corporate Governance in Nigeria, 2003 being voluntary is implemented on a comply and explain basis. However in 2008, the Head of SEC, Musa Al-Faki in a presentation stated that some provisions of the SEC Code would be incorporated in the ISA, 2007 to make them legally binding.[65] The relevant provisions of all the aforementioned legislation shall be quoted in the proceeding chapters as they relate to the matters discussed.

3.9 CONCLUSION

The interaction between taxation and corporate governance is highly essential. According to Hartnett,[66] Corporate governance is a key element in improving efficiency and economic growth, as well as investor confidence. In general terms the companies consider the payment of taxes as a cost to business and that by paying taxes higher than necessary would violate the duty of good governance to the investors of the company. In time, tax authorities cannot yet be considered ready to regard companies that embrace corporate responsibilities as being fully tax complaint.

Tax system can influence corporate governance. When government institutes changes in tax system, corporate governance systems can be affected. Corporate governance is only part of the economic context in which firms are embedded and the framework related to corporate governance regulations depends on legal, tax and even the

[65] The Guardian, 20th May, 2008

[66] Hartnett, Dave. The link between Taxation and Corporate Governance. In SCHON, Wolfgang, MP1 Studies in Intellectual Property, Competition and tax law, tax and corporate governance, Springer, Munich, P.3-8, 2008.

institutional environment. Hence there is correlation between corporate governance and taxation. An aggressive tax can create significant financial risks (adjustments and penalties).

Corporate governance and taxation have been considered as antagonistic, notably because of the frequent use of tax havens by transnational companies considered to have good governance. The basic intuition for how corporate governance and taxation interact is that tax avoidance demands complexity and obfuscation to prevent detection.

The foregoing expositions underscores the vital relationship between corporate governance and tax planning in a developing country like Nigeria. There has been a dearth of empirical analysis of the phenomenon of corporate governance and its effect on taxation and tax planning. In other words there must be conscious efforts to bear in mind, the economic consequences of corporate governance as regards tax planning in Nigeria.

As corporate taxation influences corporate governance, the quality of corporate governance plays an important role in determining the sensitivity of tax revenue to tax rate changes.

When it is difficult for the management to divert income (good corporate governance), an increase in tax rate can increase the tax revenue. By contrast when the corporate governance system is ineffective (management is easy to divert income), an increase in the tax rate can reduce tax revenues (Desai) on the other hand corporate governance has different components. It is interrelated between several parties, like Directors, Shareholders and the Board.

Infact, the Board of Directors bear the ultimate responsibility for the tax affairs of the corporation and is held accountable for them by the shareholders and stakeholders (Erle, Hartnett).

CHAPTER FOUR

INVESTMENT INCENTIVES FOR MULTINATIONAL COMPANIES IN NIGERIA

4.1 FOREIGN INVESTMENT IN NIGERIA

Foreign investors are partners with the Nigerian Government and people to develop the Nigeria economy. This relationship should however be reciprocal and not exploitative. Nigeria Government guarantees security of investments, hence investors should discharge their obligations (tax, corporate social responsibility etc).

Consequently, tax incentives are special arrangements in the tax laws to attract, retain or increase investment in a particular sector with a view to stimulating growth in specific areas and assisting companies and individuals as they set up businesses. The underlying wisdom in such incentives is to bring about general growth and development across sectors and the economy at large. According to Morisset [1] (2003), Tax incentive is a reduction in the corporate income tax rate, through tax holidays or temporary rebates for certain types of investment or companies. This is corroborated by Adegbile[2] (2011) that Tax incentives are part of the system by developing countries and usually established by governments in order to grant foreign investors more attractive conditions to invest in their country.

The Current policy of Nigerian Government is to ensure that incentives are sector based and not granted arbitrarily. The benefit to the Nigerian economy must however exceed the cost of taxes foregone.

Incentives are reviewed regularly to Foreign Investors and if they are serving the expected purpose incentives are expected to voluntarily plough back into the Nigerian economy. The arguments against use of tax incentives for foreign investments argue against the vain objective of such effort as they condemn the strong abuse of some discretionary waivers and duty suspension schemes. However tenable their cries might be, proponents of the use of such incentives describe it as statistically significant enough to drive foreign investments in the positive direction. It is these and other reasons that we

[1] Morisset, J. (2003) Using Tax Incentives to Attract Foreign Direct Investment. Retrieved from http://www.rru.worldbank.org.document

[2] Fakile, A.S. & Adegbile, F.F. (2011). Tax Incentives: Tool for Attracting Foreign Direct Investment in Nigeria Economy International Journal

set out to explain Tax incentives, its cost and benefits with emphasis on its relevance for investors.

4.2 THE ESSENCE OF TAX INCENTIVES

The question about interest in the offer of incentives lie in the impact of foreign Direct Investment on productivity as measured by the Gross Domestic Product (GDP). This provides ready and measurable yardstick for justification or rejection of sustenance of such regime of incentives so as to forestall economic loss and absence of resource efficiency.

Nigerian government accepts the private sector as the engine of growth and the creator of wealth, while the government's major responsibility is to provide the enabling environment for the private investors to operate. In this regard, laws which had hitherto hindered private sector investments have been either amended or replaced and a national council on privatization was been established to oversee orderly divestment to private operators in vital areas of the economy such as mining, transportation, electricity, telecommunications, petroleum and gas[3].

In addition, the Nigerian Investment Promotion Council (NIPC)[4] has been strengthened to enable it serve as a one-stop office for clearing all the requirements for investment in the country. The tariff structure is being reformed with a view to boosting local production.

Government has introduced a new visa policy to enable genuine foreign investors to procure entry visa to Nigeria within 48 hours of submission of required documentation. Existing "expatriate quota" requirement for foreign nationals working in Nigeria is in the process of being replaced with "work permit" which will be administered by the Nigerian Investment Promotion Council (NIPC).

4.3 TAX EXEMPTIONS AND INCENTIVES

Tax laws provide various incentives to companies carrying on businesses and these Incentives may be granted on industry basis or on tax type and may include:

[3] M.C.A. Dike (2013): An overview of Nigerian Tax System and Tax Payable by individuals and Corporate Bodies
[4] Retrieved from: www.nipc.nigeria.org/FAQ.htm

- Exemption from payment of taxes
- Reduction in rate of tax to be paid
- Grant of allowances and educations from profits subject to tax etc[5]

The President has broad powers to grant tax incentives to any company or individual.

1. **Under the Industrial Development Act,** Pioneer Status is granted to qualifying companies and/or products and services resulting in 3-5 year tax holiday. Qualifying industries include; Mining, manufacture of cement, glass and glassware, lime from limestone, ceramic products, rubber, leather textile and other areas of industry that are of economic benefit to the country.

   Tax Incentives are also granted to companies in certain industries where it is deemed that:

- The industry is not being carried on in Nigeria on a scale suitable to Nigeria's economic requirements or at all, or there are favourable prospects of further developments in Nigeria
- It is in public interest to do so from payment of taxes

   The Incentives attract tax exemption for a three year period in the first instance and a maximum of five years in total. Also tax free dividends during pioneer period, and carry forward of losses made and capital allowances (on assets) incurred during the pioneer period.

2. **Under the Companies Income Tax Act:** The Companies Income Tax Act has been amended in order to encourage potential and existing investors and entrepreneurs. The current rate in all sectors, except for petroleum is 30%.

   Dividends interest, rent or royalty earned by companies outside Nigeria and brought in through specified channels are exempt from tax. Interest earned by a foreign company on its bank deposits in Nigeria are exempt from tax.

   Nigerian companies with a minimum of 25% foreign equity and within their first four years of operation are exempt from payment of minimum tax.

[5] Ifueko Omoigui Okauru (2012): "Tax Incentives for Foreign Investors in Nigeria" at the Nigeria Investors Business Forum in Berne Swizerland.

The President of the Federal Republic of Nigeria in April 2012 signed into law an Order for the part exemption of profits of companies from tax. The order is to last for five assessment years from the effective date and is definitely aimed at stimulating employment of fresh graduates and school leavers, as well as to encourage the channeling of private sector investment in critical public infrastructure.

The tax incentives contained in the Order can be classified under the following headings:

(a) Employment Tax Relief (ETR)

The relief claimable is 5% of the assessable profits of a company subject to a maximum of 100% of the gross salaries of the qualifying employees. The relief is available if the company has a minimum net employment of 10 employees (counting two employees from the same immediate family as one). Not less than 60% of the new employees must have had no previous work experience and must have graduated from school or vocation within 3 years of assessment. The employees must be Nigerians in full-time employment of the company. The relief must be utilized in the year of assessment in which the company qualifies and any unutilized amount cannot be carried forward.

Companies claiming this relief would be expected to furnish the tax authority with a list of joining and leaving employees during the year, their qualifications, year of graduation and gross salaries earned during the year, together with the PA YE tax paid on such salaries.

(b) Work Experience Acquisition Programme Relief (WEARP)

This relief is claimable at the rate of 5% of the assessable profits of a company subject to a maximum of 100% of the gross salaries of the qualifying employees. The relief is available if the company has a minimum net employment of 5 new employees (counting two employees from the same immediate family as one). Such employees must be Nigerians in first-time full- time employment by the company and must be retained for a minimum of 2 years from the year of assessment the employees were first employed. Also, this relief must be utilized in the year of assessment in which the company qualifies and any unutilized amount cannot be carried forward.

Companies involved in Human Resources outsourcing could generate good tax savings from claiming this relief so long as they are able to retain the same personnel on their contracts for the mandatory two-year period. The inability to carry forward the relief also means that new companies would not be able to claim the relief unless they record taxable profits by their third year of commencement.

(c) Infrastructure Tax Relief (ITR)

The relief claimable shall be 30% of the cost of providing completed infrastructure/facilities of a public nature, for use by the company and the public except where it is impracticable to be used by the public or an exemption from public use has been obtained from the Minister of Finance.

The qualifying infrastructure (facilities) include power/electricity, roads and bridges, water, health, educational and sports facilities and others as may be specified by an order issued by the Minister of Finance. The relief shall be treated as additional deduction/expense in arriving at the assessable profit of the company. Any amount that cannot be utilized is available for carried forward for a maximum of two assessment periods.

This relief appears to be a duplication of the Rural Infrastructure Relief in Section 29 of CITA, except that the qualifying infrastructure has been expanded in the order and the limitations in Section 29 (such as the nearness to Government infrastructure), which are not mentioned in the order. This means that companies can claim both reliefs within the same tax return.

3. **Incentives under the Personal Income Tax Act:** Non-Nigerian employees of foreign companies in Nigeria may be exempt from tax in Nigeria, where they spend a cumulative period of less than 183 days in Nigeria during a 12 months period and their income is subject to tax in their home country. The Minister of Finance also has wide powers to grant exemptions to any person based on a treaty entered into with Nigeria.
4. **Under the Capital Gains Tax Act:** Foreign companies carrying on business in Nigeria are exempted from capital gains tax on disposal of assets, except such proceeds are brought into Nigeria.

5. **Incentives under the Value Added Tax Act:** Import of several items exempted from value added tax. Exported goods and Import and Export Duty Exemptions services also exempted from value added tax and Reductions .Import and export duty exemptions and reductions are available for several items. List of exempt items and rates is reviewed annually based on economic considerations and developments in the Nigeria economy.
6. **Incentives under the Petroleum Sector:** The incentives in this sector are granted to companies that are into joint ventures with the Nigerian National Petroleum Corporation and have signed Memorandum of Understanding. The incentives are:
   - Guaranteed minimum margin of USS2.50bl;
   - Accelerated capital allowances which provides that the capital allowances can be carried forward indefinitely;
   - Graduate royalty rates approved for oil companies.
   - Onshore production in territorial waters and continental shelf areas beyond 100 meters.

   Investment tax allowances (ITA) is granted to a company in respect of any asset for the accounting period. The ITA is graduated as follows:

   On shore - 5%

   Offshore in depth of up to 10m - 10% Offshore in depth of between 100-200m - 15% Offshore in depth of over 200m - 20%
7. **Nigeria's Double Tax Treaty**

   This network offers significant incentives to investors, there is considerable room for further expansion subject to development of a clear tax treaty strategy. Nigeria has existing treaties with:
   - UK;
   - France;
   - Netherlands;
   - Belgium;
   - Pakistan;
   - Canada;
   - Czech Republic;

- Philippines; and
- Romania.

Negotiations are in progress at various stages with other countries like Turkey, Russia, India, and Korea.

Other countries have indicated their interest to commence negotiation of tax treaties with Nigeria. As a concession to Nigeria's treaty partners, government has approved a lower treaty rate of 7.5 on dividends, interest, rent and royalties when paid to a bonafide beneficial owner of a treaty country.

8. **Liberalisation of Ownership Structure**

   The government in repealing the Nigerian Enterprises Promotion Act of 1972 (Amended in 1977 and in 1989) and promulgating the Nigerian Investment Promotion Commission Act of 1995 has liberalized the ownerships structure of business in Nigeria. The implication of this is that foreigners can now own 100% shares in any company as opposed to the earlier arrangement of 60%-40% in favour of Nigerians.

9. **Repatriation of Profit**

   Under the provisions of the Foreign Exchange (Monitoring & Miscellaneous Provision Act No. 17 of 1995), foreign investors are free to repatriate their profits and dividends net of taxes through an authourised dealer in freely convertible currency.

CHAPTER FIVE

FOREIGN INVESTMENT AND MULTINATIONAL CORPORATE TAXATION IN NIGERIA

5.1 INTRODUCTION

The economic growth of any nation is traceable to so many factors among which investment is major. For any economy to grow, it must divert part of its resources from current consumption and invest it on capital formation. But many poor countries of the world including Nigeria are plagued by shortage of domestic savings and capital that can be put into such investment purposes. The alternative to this is to attract direct foreign investment in order to bridge the gaps created by shortage of domestic savings and capital. Foreign direct investments occur when foreigners either wholly of jointly with local investors established their physical presence in another country through the acquisition of physical assets such as factories, buildings, plants, machineries.

5.2 MEANING OF FOREIGN INVESTMENT

Foreign investment is the movement of capital from one country known as the home base to another country known as the foreign base.[1] This flow of capital across national borders could be through official sources i.e. foreign governments or multi-national agencies. It could also emanate from private sources i.e private individuals, companies and other institutions. The foreign investment could come in the form of official development finance, international capital market loans, private port folio investment or foreign private direct investment.

Foreign investment, which can be broadly categorized into two viz: Foreign Direct Investment (FDI) and Portfolio Investments (P1). Loans to government i.e foreign debts) have also been seen as a third category[2] has been defined elsewhere as involving the transfer of a package of resources including capitals technology management and marketing expertise. Such resources usually have the effect of extending the production

[1] Ogwu David, "Attracting Foreign Investment into Nigeria: Imperatives of the Local Capital Market" **Modus** International Law and Business Quarterly, Vol 5,No. I, 66. According to the Encyclopedia of Public International Law, London, Bestman Publishers, Vol 8, 246 (1987), Foreign Investment is "the transfer of (funds or materials from one (called the capital exporting country) to another country (called the host country) in return for a direct participation in the earnings from its employment".

[2] Pritchard Robert: "The Transformation in Foreign Investment Law- More Than a Pendulum Swing" (1997) 7 ICCLR 233-234.

capabilities of the recipient country.[3] The purpose of direct foreign investment is to acquire a lasting interest and effective control in the management of an enterprise without necessarily having majority shareholding"[4] Portfolio investments on the other hand are directed at earning, dividends, interest, capital gains without participating in management.[5] When portfolio investment carries control, it becomes Foreign Direct Investment.[6]

5.3 THE HISTORY OF FOREIGN INVESTMENT

Every foreign state has power under accepted principles of international law to exclude alien investors as provided in Magna Carta of 1215, yet as a practical matter and in the interest of mutual commercial benefit states have refrained from excluding foreign investors. Under the Magna Carta of 1215, English Domestic law provided legal protection for foreign trader, quoting clause xxx (3D) of Magna Carta:

All merchants, if they were not openly prohibited before shall have their safe and sure conduct to depart out of England, to come into England, to tarry in and go through England, as well by land as by water, to buy and sell without any manner of (evil torts) by the old and rightful customers, except in time of war; and if they be of a land making war against us, and found in our Realm at the beginning of the wars, they shall be attached without harm of body or goods, until it be known unto us, our chief justice, how our merchants be entreated there in the land making war against us, and if our merchants be well treated there, they shall be likewise us[7].

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[3] Guobadia D. A. (prof) "Issues in Facilitating Foreign Investment for National Development in_Nigeria" **MPJFIL,** Vol 2, No 4, 1998, 39, citing with approval Odozie Victor: "An Overview of Foreign Investment in Nigeria: 1960-1995". CBN, Research Department Occasional Paper No. **11.**

[4] Guobadia D.A. (prof) *ibid,* at 39. "Direct Investment" has been defined by the International Monetary Fund (IMF) as Investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of an investor, the investors purpose being to have an effective choice in management of the entreprise". See Balance of payments manual (1980) para. 408, p. 250. see also Sornarajah M. "The International Law on Foreign Investment." ambr1dge Groting Publications (1994) 4.

[5] Guobadia D.A. (Prof) *Op. Cit.,* .39.

[6] Pritchard Robert, *Op. Cit,* 234.

[7] Akanki E.O.,(1999) "*Legal and Extra Legal Framework for Protecting Foreign Investment"* a paper deliver at the International Seminar on Protecting Foreign Investment under Nigerian Law., p 1.

The flow of private capital was the earliest form of resource transfer to the developing countries. Even before its deployment in the developing world, Raymond Vernon observed that:

the possibility that nationals of one state could profitably own large-scale assets in another country goes back at least to the days when the Phoenicians were operating their fabled tin mines on the rocky Cornwall coast.[8]

In the last thirty-years, the United States and other highly developed countries initiated the programme of global bilateral investment treaties in order to encourage and protect their investments in developing countries.[9] Between November 25, 1959 and February 25 1989, some two hundred and sixty such treaties were concluded.[10] The bilateral investment treaties contain provisions satisfying the specified objectives designed for the protection of foreign investments.

For example, the bilateral investment treaties concluded by the United States contain the following four objectives:

1. Foreign investors are to be accorded treatment in accordance with international law and are to be treated no less favourably than investors of the host country and no less favourably than investors of third countries, which ever is the most favourable treatment ("natural" and most favoured-nation").
2. International law standards are to be applied to the expropriation of investments and to the payment of compensation for expropriation.
3. Free transfers are to be afforded to funds associated with an investment into and out of the host country.
4. Procedures are to be established which allow an Investor to take a dispute with a party directly to binding third-party arbitration[11]

Each of all these objectives of the bilateral investment treaties is very important and a very Interesting problem of international law, which will aid in encouraging or

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[8] Venon Raymofl (1972)"*The Economic Environment of International Business"*. New Jersy: **Prince Hall,** New Jersey p.97.

[9] Oresotu P.O (1985) *"Foreign Investment and Nigeria's Economic Recovery: Issues and Prospects*" Economic and Financial Review, Vol 1, p10.

[10] Czapiewska Malgorzata,(1990) *"General Principles of International Responsibility of the State for Nationalization of Foreign Investments. As one of the Means of their protecton"* Sri **Lanka Journal on International** Law, Vol. 2, p.*59*

[11] Ibid. at 59.

discouraging foreign investments. In its contemporary structure, foreign investment consists of foreign equity capital, the share of reinvested earning of existing joint venture companies between foreign and indigenous investors, and net liabilities of these joint venture companies to their parent companies or other corporations[12]. In its direct form, foreign Investment is undertaken essentially to enable an investor exercise control on the operations of the established enterprise through the flow of capital as well as participate in the sharing of the returns on the investment.[13]

A growing recognition of the importance of direct foreign investment in the development process account for the considerable increase in the number of developing countries who have become receptive of it since the direct flow of those resources to the recipient economy represents significant addition to those already available and thus raises the productive capabilities.

African countries vary widely with respect to the significance of foreign Investment to their economies. Some of the major foreign investment recipients are Egypt Morocco, Tunisia while Equatorial Guinea, Namibia, Gambia, Swaziland etc, receive relatively small amounts of these investments. However, the small size of their economies makes these amounts very significant.[14]

Overall, there is a trend among all African countries towards the liberalization of their foreign investment policies as part of their efforts to attract more foreign investment.[15] However, the implementation of new policies opening up foreign investment is being pursued in different manners in various countries in the region. The Foreign Investment (Fl) picture in Africa is also, diverse; investment flows are concentrated in a few host countries for an overwhelming share of total Foreign Investment Inflows in Africa. Apart from those countries, the rest of Africa receives negligible amount of Foreign Investment as stated earlier. Western European investors dominate Foreign Investment into Africa capitalizing on their post-colonial ties with countries in the region.[16] The United States also account for a significant share of

[12] Czapiewaska .M. *Op. Cit.,* 61.
[13] Ogwu J.O., "Foreign Investment and National Security" paper presented at 33rd Anniversary Conference of Nigerian Society of International Law Benin, *5.*
[14] World Investment Directory. Foreign Direct Investment, Legal Framework 1996 Vol V., ix
[15] "Ibid ix
[16] Ibid ix

Inflows, while investments originating in Japan are very small and concentrated in Liberia, a "flag-of convenience" country.[17]

Furthermore, contrary to their inward-looking and unfavourable policies towards foreign direct investment that, were adopted by most African countries in the 1960s and 1970s, after their independence, most African countries, have established, since the mid 1980s, national regulatory frame-works conducive to these investments.[18] Between 1982 and 1987 alone, about one *half* of all African countries either introduced Foreign Investment Codes or guidelines or made adjustments to existing ones in order to attract more investments. During the end of 1980s and the beginning of the 1990s the move towards greater openness to foreign direct investment spread to many other African countries that have since then liberalized their policies through legislative changes.[19] Countries that have traditionally been relatively open to foreign direct investment such as Kenya and Zimbabwe liberalized further their regulatory frameworks to attract more investments. Even countries with traditionally unfavourable attitudes towards foreign direct investments such as Ethiopia and Mozambique, Introduced new legislation offering a wide range of guarantees and opportunities for foreign investors.[20]

Despite the fact that foreign direct investment policies have permeated virtually the whole Africa, the approaches followed as well as the way in which changes are implemented administratively vary across the region. Some countries still maintain mechanisms designed to protect domestic enterprises from foreign competition in order to encourage local industrial development such as the industrialization policies embarked upon in order to encourage domestic industries. Others encourage foreign investors by forming joint ventures with local partners. In addition, for a number of countries, foreign investment legislation is aimed specifically at the development of individual industries, the transfer of technology or the promotion of exports, while for other countries the objectives of foreign investment legislation are broader.[21]

[17] *Ibid* ix.
[18] *Ibid* ix.
[19] *Ibid* ix.
[20] *Ibid* ix.
[21] Ibid ix

In Nigeria, the incidents which form the basis of foreign investment history would not be complete without breaking some specific events into the eras where they belong. They are:

(i) The Colonial Era

British concern in Nigeria was principally to serve its own economic interest.[22] While it pursued a policy of maintaining law and order, it extracted raw materials for the home market and created Nigerian demands for "made in Britain goods". Products such as timber, tin, coal which form the nucleus of Nigeria's economy were exploited. The Royal Niger Company was by the Royal Charter, granted to it by the British Government in 1886 both a politically administrative and business organ in Nigeria from 1886-1900.[23]

As soon as the Royal Niger Company discovered in the 1890's that some areas of Nigeria possessed mineral wealth (mainly tin and bauxite in the North) it formulated and promulgated regulations, the effect was to have a monopoly over mining rights in Northern Nigeria. This continued till 1900 when the British Government officially revoked the Charter of the Royal Niger Company.[24] Thereafter, the British government passed legislations, in 1902 reserving all mineral rights in the land to itself. No attempts were made to restore the legal rights of ownership usurped from the indigenous Nigerian owners nor pay them compensation for their lands.

In 1922, the colonial government enacted Companies Ordinance of 1922[25], which allowed for the incorporation of non British companies in Nigeria. British companies did not register in Nigeria to do business in Nigeria. Some of those foreign companies were United African Company (UAC) John Holt Group of Companies, Patterson Zachonis (PZ), Societe Commercialè de I' Quest Africane (SCOA) among others[26].

However, in 1952, the Aid to Pioneer Industries Ordinance was passed. Its purpose was to make provision whereby the establishment and development in Nigeria, of commercial enterprises, may be encouraged by way of relief from income tax. The

[22] Kachikwu .1.(1988) '*Emmanuel; Nigerian Foreign Investment Laws and Policy***;'** Mikzek Law Publications Limited, Lagos, p17.
[23] Scott R P (2002) "The Economic Imperialism of the Royal Niger Company". Journal of Food Research Institute Studies in Agricultural Economics, Trade and Development, Vol 10. No 1,
[24] Kachikwu **I. E** *Op. Cit.* 17.
[25] Kachikwu I.E Ibid 17
[26] Ibid 17

Ordinance was unsuccessfully implemented from the beginning. This was as a result of the large amount of money required of a pioneer investor to invest, hence only the big foreign companies could afford it at that time. Besides, the colonial government failed to liberalize credits to small business men to enable them reap any of the advantages of the ordinance. Thus, the law was, for all intents and purposes, a show piece meant to protect and expand the colonial business interests in Nigeria. Indeed, a World Bank Mission to Nigeria at that time, commenting on the Act, called for if the liberalization of the implementation of the pioneer status scheme under this law. It was of the opinion that industrialization was to be achieved, there was a need to encourage every new industry and any existing industry not yet in Nigeria.[27] The 1952 Ordinance however, inspired the 1958 Industrial Development (Income Tax Relief) Act, 1958.

Prior to the enactment of the above mentioned ordinance in 1958, the Constitutional Conference in 1957 submitted a declaration endorsed by the Regional Governments highlighting the opportunities for and government policy towards overseas investments in Nigeria.

The documents contained the following inducements:

A. Capital allowances for accelerated write-off of capital expenditure on buildings and plant - 20% and 40% respectively.
B. Import duty relief in the form of a refund in whole or in part of duty paid.
C. Income tax relief for companies granted pioneer status.
D. Freedom by expatriate investors to repatriate at will, profits dividends and capital owned by them to both a sterling and a non sterling area country:
E. An assurance of non-interest in nationalization, but that if it becomes necessary, a fair compensation assessed by independent arbitration would be paid;
F. Tariff protection, if economically necessary and justifiable to local industries.

From this point onwards, the attempts made by the Federal Government of Nigeria to encourage foreign investment and promote Industrialization were represented in a gamut of succeeding legislations some of which are still applicable today.[28]

Among the legislations passed were:

[27] Kachikwu I.E *Op. Cit.* 20
[28] Kachikwu 1.E, Ibid 20

(a) The Industrial Development (Income Tax Relief) Act of 1958 which gave Nigerian registered public limited liability companies with "pioneer status" a holiday from the 40 percent federal company tax for up to five years[29]. It also permitted a refund of import duties on certain imported materials.

Also in 1958, the Custom Duties (Dumped and subsidized goods) ordinance was passed permitting the imposition of a special duty on goods which were dumped in Nigeria or were subsidized government or authority outside Nigeria.

(ii) The Period Between 1960 and 1971

In 1961 the Companies Income Tax was passed and granted tax incentives to companies in the form of accelerated depreciation.[30] In 1962, the first National Development Plan was drawn up. It recognized that the vigorous expansion of the private sector was an important part of the first National Plan; and it promised to take measures to induce greater private investment A significant role for private enterprise in the diversification of the economy and particularly, in the expansion of industry, was recognized. Under the plan, the foreign investor was given access to all incentive policies available to the Nigerian Investor. The government required the full Nigerian Participation in the ownership, direction and management of a foreign Investment at the earliest possible time.

In 1968 the Companies Act[31] was promulgated to replace the Companies Ordinance of 1922; and to regulate the management of corporations registered in Nigeria. As a result of the civil war between 1966 and 1970 private investment was affected and only ten companies were registered in 1968 as compared with 45 in 1965.[32] 1970 witnessed to emergence of another national development plan[33] namely, 1970-1974 National Development Plan. One of its objectives was the establishment of a united, strong and self- reliant nation and reduction of foreign domination of the country's economy. Another was to ensure better government and participation of Nigerians in the

[29] Kachikwu I.E, *Ibid.* 20
[30] Kachikwu I.E, *Op Cit 25* 7
[31] *Ibid.*
[32] Kachjkwu I.E. *Ibid* 25
[33] Federal Republic of Nigeria, Second National development Plan; (1970 - 74) Federal Ministry of Information Printing Division; Lagos.

economic and industrial development and proper management of the country's economy.[34]

At this point in time, government policy of ensuring Nigerian participation began to crystallizes in reality. This period also, coincided with the period of increased production of oil and a growing awareness by the citizens of Nigeria's wealth. Hence, this second period was mainly one of legal developments and formulations of the main policies regarding foreign investment.

However, the indigenization programme did not meet the wide yawning of the Nigerian people after few years of its implementation. The reasons for this are varied. However, to put it in the opinion of one writer,[35] the Act engendered sufficient fear among foreign Investors, who felt that the programme was geared towards the nationalization of private foreign enterprises in Nigeria. The fears were heightened after the 1977 Act replaced the 1972 Act on the issue not only enlarged the list of businesses affected, but also introduced more rigorous provisions thereto as penalties and enforcement. There was the problem of non employment of qualified Nigerians by the foreign companies.[36] The foreign investors fraudulently abused the opportunities they had, by promoting some companies on forged securities while others used antiquated machineries to purchase equity shares.

(iii) The Period between 1972 and 1995

One observable trend in the legal regime for the protection of investments in Nigeria during this era was the apparent lack of consistency. By 1977, however, governmental policy on the indigenization of the economy had given impetus to a more enhanced and redefined legislation on indigenization as well as the creation, by statutes, of several corporations owned by government. The changing profile of government by 1977 was to descend into the Nigerian market as an active participant. In the process, foreign investors are, by these legislations1 greatly discouraged from

[34] Ibrahim Adamu "An Appraisal of the Legal Framework for Foreign Investment in Nigeria;" **Modern Practice Journal of Finance and Investment Law,** Learned Publishments Limited, 2004 Lagos Vol. 8 No 1-2, 134.
[35] Kachikwu I.E, "Corporate Control by Law in Nigeria as a Test Case", Fair Land Publishers, 1989, No. 6 Vol. 2, *75.*
[36] The 1970-74 plan notes that many firms that placed a good number of Nigerians In management positions, did not give them management functions.

taking part in direct foreign investments, while the indigenous private entrepreneurs could not compete with the growing profile of government corporations.[37]

Between 1972 and 1995 about six regimes with Seven Heads of State had ruled Nigeria. People have held diverse opinion on which regime that encouraged foreign investment. Some Nigerians feel that Murtala Muhammed/Obasanjo (1975 - 1979) regime was more ttentive to the demand for Nigeria's development, others feel that General Yakubu Gowon's regime was more attentive to the need for Nigeria's expanded foreign investment. No matter who wins that particular tussle, we can say that the need for foreign investment had become more pronounced under the policies of the Babangida administration.

The Fourth National Development Plan of 1981- 1985, called for new investment, particularly, in Agriculture. The plan included among others, the *following:*

A. Reduction in the level of unemployment and under development

B. Increased participation by citizens in the ownership and management of productive enterprises etc. Implicit in these goals was the expectation of continuing foreign participation.[38]

The down-turn in the economy since 1983, and the emergence of three military governments, between that time and now, obviously affected the achievement of the lofty aims of the 1981-1985 development plans, not to talk of encouraging investment[39]. The harsh economic realities that went into the formulations of 1986 fiscal budget could not have allowed for anything less than a pro-foreign investment stance.[40]

The period of Structural Adjustment Programme (SAP), 1985-1993, brought into existence, several legislations meant to protect local investments in trade and manufacturing and equally, gave impetus to government's desire, not only to get out of the market place through privatization and commercialization but also to provide overall macro-economic environment that will sustain the developments expected from SAP.[41] Essentially, it is observed that several of the laws promulgated during the SAP era were

[37] Ibrahim Adamu, *Op Cit. 559.*
[38] Kachikwu E.I, *Op Cit. 28*
[39] Ibid
[40] Ibid
[41] Ajibola Bola (Prince), SAN "Keynote Address" at the 10th Anniversary conference of the Institute of Advanced Legal studies, 1989 Lagos.

seen by the western world as protectionist and by Nigerians, as too harsh to tolerate. Several persons actually proposed alternatives to the SAP.[42] Tsui Selatile captures the very complex scenario thus;

> Equally, the African Alternative Framework, neither questions the wisdom of doing business with transnational corporations perse, but stresses the necessity of upholding and of having in mind, the laws governing the political economy of the African economy in doing so. These are very complex questions and, as it is, they are not questions which we can confine within economics only. They go into politics, they go into law but what is important is that, for the first time, Africa is beginning to make its voice heard by the world on economic matters[43]

(iv) The Period Between 1995 Till 1999

The year 1995, may be regarded as a benchmark in the policy turn around of investment, trade laws and practices in Nigeria. The regime of investment regulation in Nigeria gives impetus to the advancement of foreign direct and portfolio investments at the detriment of indigenous investments. Consequently, while foreign investors were given through legislation, a large measure of investment security in Nigeria, the indigenous industrial and commercial sectors lacked in modern equipment, adequate funding and inability to produce with any competitive edge. The crises were compounded by the increased reluctance of foreign investments inflow inspite of the investment incentives that abound in the country.

(v) 1999 Till Date.

During this period under review, the Federal Government encouraged foreign investments and at the same time, took steps to protect the local industries from crashing. The Federal Government banned several items, including imported frozen turkey, chicken, canned juice, among others, in order to protect the local industries. On the other side, it set up the Economic and Financial Crimes Commission, and the

[42] Tsui Selatile "African Alternative Framework to Structural Adjustment Ogramme for Socio-economic Recovery and Transformation". Regulation of trade and Investment in an Era of Structural Adjustment: the African **Experience,** Ajomo M.A (ed) Lagos. Nigeria Institute of Advanced Legal Studies, 1995, 1-11.
[43] Ibid .5

Corrupt Practices and Other Related Offences Commission to check the incidence of advanced fee fraud, money laundering and terrorism. These were geared to encourage the inflow of foreign investments into Nigeria. Advance fee fraud, terrorism and other financial crimes have been an impediment to the inflow of foreign investments into Nigerian. In addition to this, the Federal Government went into privatization of government owned industries, recapitalization of banks, opening up of the petroleum sector, especially in the area of gas to attract foreign investments.

Also, this period saw the enactment and amendment of laws to enhance foreign investment in Nigeria. Laws such as the Corrupt Practices and Other Related Offences Act[44], Economic and Financial Crimes Commission Act[45], Nigeria Export Processing Zone Act[46], Investments and Securities Act[47], Nigerian Investment Promotion Act[48] and others, were enacted and some were amended to create the needed investment climate.

5.4 LEGAL FRAMEWORK OF FOREIGN INVESTMENTS IN NIGERIA

Economic growth is an important objective and one of the main focus and achievements any governments whether military or civilian, can proudly arrogate to itself. The routes towards achieving these objectives are diverse, involving a combination of political economic, legal and social factors in determining success.[49] In the consideration of the legal framework in this direction, it is intended to examine the rationale and objectives of the legislative and regulatory central mechanisms of foreign investments in Nigeria.

The Dictionary[50] defines a "framework" as: a skeleton structure for supporting or enclosing something... to think out, arrange, conceive as a plan, or theory to shape, adopt to a purpose. Legal framework therefore, relates to various investment and related laws.

[44] Cap. C.31, Laws of the Federation of Nigeria, 2004.
[45] Cap El, Laws of the Federation of Nigeria, 2004.
[46] Cap N. 109, Laws of the Federation of Nigeria, 2004.
[47] Cap 24, Laws of the Federation of Nigeria, 2004.
[48] Cap N. 117, Laws of Federation of Nigeria. 2004.
[49] Yerokum 0. "Legal Aspect of Export Trade in Nigeria", Gravitas RevieV of Business and Property Law (GRBPL) Lagos: Gravitas Publishing Limited, 1990, 76 86at78.
[50] Webster's Dictionary of English Language: Deluxe Edition. New York: PMC Publishing Co. Inc., 1992, 72

These municipal legislations have the common objective which is the promotion of trade and greater economic development of the state[51].

Since every state has the right to regulate and control foreign investment through its municipal legal framework, Nigeria has equally, tried through some of its municipal laws to achieve this objective.

The Permanent Court of International Justice (PCIJ) in the Panevezys Saldntiskis Railway case held *inter alia* that: in principle the property and the contractual rights of individuals, depend in every state, on the municipal law and fall more particularly within the jurisdiction of the municipal laws[52].

Apart from the municipal legal framework of the host state, the general principles of international law have equally played a significant role in this direction. These, in some cases, have led to the problems of conflict of laws in some instances because there is bound to be conflict problems in international trade. This inevitability of conflict in the laws of the municipal host state and the international legal framework has often been diluted through the harmonization of some of these legal frameworks so as to decrease the incidence of conflict. This is with a view to achieving a situation whereby near complete similarity in laws is achieved hence disputes emanating from such trades could be commonly resolved.

Protection of investor in colonial Nigeria was taken for granted. The colonial power, Britain, understood the relevance and importance of foreign capital, hence the Lebanese, the Indians, the Greeks and the French, were allowed to invest or do business in Nigeria with reasonable protection of law.

Most Investors would like to have some parts of their funds invested abroad. It is true of European and American capitalists because of the economic advantages in the form of cheap labour, relative industrial peace and taxation reliefs like the one associated with double taxation.

Additional factors associated with large population makes Nigeria an attractive destination for foreign capitalists. But, beside natural endowments hand recent legislative measures, Nigeria offers very little or no other inducements to genuine capitalists.

[51] Ibrahim Adam U, *Op Cit.*, 131-132.
[52] P.C.1.J. Series AIB NO. 78. 18.

Blinded by her oil wealth and claim of being the giant of Africa, Nigeria placed heavy restrictions on foreign Investments. It is in the face of unending poverty, unemployment, inflation and industrial collapse that Nigeria suddenly realized that legislation concerning a matter as significant as foreign investments should be carefully conceived. Like a nation without foresight, Nigerians always became wise after the event. Had Nigerians been good managers, the 30 year old legal barriers, would not have plagued our foreign investment fortune for so long.

It was the 1962 Exchange Control Act that completely altered the liberalized economic environment of the pre-independence Nigeria. It provides that nobody within Nigeria could make any payment on behalf of anybody resident outside Nigeria without the permission of the Minister of Finance[52a] An individual could not make any payment in respect of any loan, bank overdraft or other credit facilities outside Nigeria.

Furthermore, the Act[53] provides that no resident of Nigeria could make any payment outside Nigeria to a person resident outside Nigeria or take any loan, bank overdraft or other credit facilities. The same rule was applicable to company securities.[54] Taken together with section 25 which extends the Act to control of Nigerian Companies by Foreigners, the Act[55] did not encourage foreign Investment in Nigeria. As If this was not enough, the Immigration Act of 1963[56] which is still extant, puts greater restriction by requiring permission before a foreigner can work or establish a business In Nigeria.

There is no need to recapitulate here the various faces of the enterprises promotion legislative policy[57], merits and demerits. It is enough to state that it did not achieve its goal. Rather it provided another fortress against foreign investment. In a move to facilitate flow of foreign Investments, the Federal Government repealed the Foreign Exchange Act and the 1989 (last) version of the Enterprises Promotion Decree[58]in April, 1995.

[52a] Sec 7, Exchange Control Act. 1962.
[53] Sec. 8 Exchange Control Act, 1962
[54] Sec. 10 Exchange Control Act, 196-2
[55] Akankj E.O. *Op. Cit.,* 3-4.
[56] Sec.8 of Immigration Act 1963.
[57] Enterprises Promotion Decrees of 1977 and 1989
[58] The Repealing Acts are the Nigerian Enterprises Promotion (Repeal) Decree No. 7 of 1995 and the Exchange Control (Repeal) Decree No. 8 of 1995.

Merely repealing an enactment which had adversely affected a society for such a long time is not enough. It is necessary to enact into law the purpose or the - policy behind the repeal. In this context, the sociologist is right in stating that law achieves nothing:

it is the policy behind the law. Therefore, two other statutes were put in place in July 1995 in order to back up the policy of liberalization of inflow of foreign Investment to boost the economy. They are the Nigeria Investment Promotion Commission Decree[59] and the 1. Foreign Exchange (Monitoring and Miscellaneous Provision) Decree[60] These two Decrees marked a sln1ficaflt shift from control to promotion of foreign investment.

Rather than seek prior government authorization, what a foreign investor requires to invest are

(I) incorporation or registration of a business to satisfy the legal requirement of local Incorporation of foreign companies as a precondition of carrying on business in this country and

(II) According to section 20, registration of the enterprise with the Nigeria Investment Promotion Commission (NIPC) an act which the latter is obliged to accomplish within 14 days[61] Undoubtedly, the aim of this provision is to ensure that foreign investor's documents are handled with dispatch. But, to prescribe a period of 14 days for registration appears too ambitious. The Industrial Development Coordinating Committee had 30 days and yet could not perform effectively.

Under the FEMAMP Decree, permission is no longer required for importation of foreign capital. Central Bank Certification is also to be dispensed with. Not only foreigners but any person may invest in any security or business with foreign currency or capital[62].

Other Salient features of the NIPC and FEMAMP Decree are:

(i) the abrogation of the indigenization of business policy enshrined in the Enterprises Promotion Decrees; which means, in effect, that excepting the cases of so-called

[59] No 16 of 1995 NIPC Decree (Now Act).
[60] No. 17 of 1995 hereinafter referred to as (FEMAMP) Decree.
[61] SS 17 and 20 of the NIPC Act.
[62] *S.15* FEMAMP.

negative list "and petroleum enterprises", foreigners can acquire full control of any Nigerian enterprises

(ii) The Nigerian Stock Exchange, that is, our Capital Market is now open to foreign traders in securities.

(iii) The fear of expropriation is allayed as the new legislation prohibits nationalization, except where national interest demands.

In the latter event, adequate compensation and recourse to judicial redress are guaranteed. Presently, the statutes that affect the foreign investment in Nigeria include:

a. The 1999 Constitution,
b. The Industrial Development (Income Tax Relief) Act[63]
c. Nigerian Investment Promotion Act Investment Act,[64]
d. Investment Securities Act,[65]
e. Foreign Exchange (Monitoring and Miscellaneous provisions) Act of 1995,[66]
f. The Nigeria Export Processing Zones Act[67]
g. Economic and Financial Crimes Commission Act,[68]
h. Corrupt Practices and Other Related Offences Act[69]
i. Companies and Allied Matters Act,[70]
j. Companies Income Tax Act,[71]
k. Personal Income Tax Act[72]
l. Pre-shipment Inspection of Imports Act,[73]
m. Immigration Act[74].

These enactments and how they affect foreign investments are fully discussed in the next subheading.

[63] Cap 1. 7 Laws of the Federation of Nigeria. 2004.
[64] Cap N. 117, Laws of Federation of Nigeria, 2004
[65] Cap. 1.24 Laws of the Federation of Nigeria. 2004.
[66] Cap F. 34, Laws of the Federation of Nigeria, 2004.
[67] Cap N. 109 Laws of Federation of Nigeria. 2004.
[68] Cap F. 34, Laws of the Federation of Nigeria,2004.
[69] Cap C. 31, Laws of the Federation of Nigeria, 2004.
[70] Cap C. 20, Laws of the Federation of Nigeria, 2004.
[71] Cap C. 21. Laws of the Federation of Nigeria, 2004.
[72] Cap p. 8. Laws of the Federation of Nigeria, 2004.
[73] Cap P. 26 Laws of the Federation of Nigeria, 2004.
[74] Cap 1. 1, Laws of the Federation of Nigeria, 2004.

5.5 FACTORS AFFECTING FOREIGN INVESTMENT IN NIGERIA

A critical policy challenge still facing most nations, especially African countries, remains the terms upon which they should relate to the rest of the world in their economic transactions. A writer,[75] had identified that, given the long historically determined unequal exchange system, Africa must first struggle for a new international economic order, if it is to derive any enduring benefits beyond serving as neo-colonial outposts. There are others who fear that, Africa is indeed, already becoming rapidly marginalized politically, economically and technologically; and that it must now catch the last trains of liberalization in the world trade and payment.[76]

The truth of the matter is that since the attainment of political independence in the 1960s, many African countries have experimented with a variety of models of economic organization, ranging from central planning to free market, orthodoxy; from import substitution strategies to near total openness[77]. Almost without exception, those efforts have failed to bring their economies to a path of sustainable development.

The nature of the economic crisis facing African countries is perhaps best understood in the context of the characteristics of the relevant key indicators. As a writer[78] rightly observed, there are certain distinct features of the underdeveloped economy which African countries share with other less developed countries (LDCs) but which are probably more severe in the case of the African countries. These include:

1. Low and falling investments which generally lead to a low absolute level of national income and poor growth rates, with all the other macro-economic implications attendant thereto.
2. A tendency to possess only a small industrial productive base, most of which is foreign owned.
3. Low and falling national output coupled with capacity under utilization.
4. A large government sector with many inefficient public corporation.

[75] Aboyade Ojetunji, "Selective Closure in African Economic Relations" (1991) N.LI.A **Lecture Series No. 69.** p.2.
[76] Popoola Ademola, "Privatization and the Stimulation of Foreign Investments in Nigeria . Paper delivered at the Annual Conference of the Nigerian Society of International Law, 2001. *5.*
[77] Okogu Bright Erakpower: **Africa and Economic Structural Adjustment, Case** Studies of Ghana, Nigeria and Zambia (1992) OPEC Fund Pamphlet Series, 18.
[78] Popoola, A; *Op Cit., 6.*

5. High and rising rates in inflation which may be attributed largely to a shortage of supplies as well as being due to the effect of imported inflation.
6. Declining agricultural sector arising from a long history of neglect of that sector in particulars and the rural sector in general.
7. The economies tend to be mono-cultural, thus vulnerable to fluctuations in the international prices of particular commodities on which these countries depend.
8. Balance of payments difficulties and debt arising from a combination of the factors mentioned above, which had directly led to a need for an approach to the IMF and other international creditors for new loans, debt- rescheduling etc.

The Nigerian economy is an integral part of the world capitalist economy. Nigeria has strong trade, commercial and non-financial economic relations with the rest of the world. Consequently, developments in the world economy impact on the Nigerian economy, based on its high degree of openness. One implication, therefore, is that it renders the economy vulnerable to external shocks, a situation which is aggravated in the case of Nigeria by undue reliance on oil exports and the undiversified nature of the structure of non-oil exports.

As Mike Obadan noted, "the vulnerability of developing countries to global economic disturbances may not only retard development efforts, but also limit the countries' ability to take independent decisions or adopt the most desirable development strategies".[79]

There has been a dearth of research studies on the subject of the factors that determine foreign direct Investment, however, the preponderance of studies have concentrated on economic factors[80]. A leading proponent of the economic approach sets of influences on foreign direct investment[81].

1. Market factors such as the rise and growth of the market re-assured by the GMP of recipient country.
2. Cost factors such as the availability of labour low labour costs and inflation and

[79] Obadan Mike *Prof:* The Nigerian Economy arid the External Sector; *(1996):* (Ass Monograph No.8).
[80] Popoola A *Op. Cit. 9*
[81] Chete, Louis N. **Determinants of Foreign Direct Investment in Nigeria** 1998 NISER Monograph Series No. 7. 14.

3. The investment climate as assured by the degree of foreign indebtedness and the state of the balance of payment.

Other factors are: political factors, political instability and. the threat of nationalization. There also exist, a variety of economic factors such as investment incentives, the size and growth of the recipient's market, its degree of economic development (e.g infrastructure) market distance and economic stability in terms of Inflation, growth and balance of payments.

Leics[82] lays emphasis on political factors. He tested the dual hypothesis that economic considerations are the price determinants of foreign investment flows, and that political variables are of residual importance. In deciding whether or not to invest in a particular country, the manner and extent to which its legal regime addresses certain concerns is likely to be a determining factor for the potential foreign investor.

According to Pritchard[83], these concerns are the foreign investors' right to:

a. Acquire or develop assets,

b. Procure materials,

c. Engage labour,

d. Sell products Into a market,

e. Obtain payment,

f. Repatriate profits and

g. In due course, to repatriate capital[84]

Thus, over the years, Nigerian economy like other developing economies, has operated within a hostile International environment. A mere legal framework without more cannot provide effective solution to the problem of foreign investment protection.

Another problem to be faced by the foreign Investor is associated with lack of conducive environment. Features of our environment Include worsening terms of trade and external debt burden. Nigeria is a wasteland of economic opportunities because there is no solid platform for exploitation. These factors shall also be dealt with in subsequent sub-headings.

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[82] Popoola A *Op. Cit.,11*.

[83] Prichard Robert: "The Transformation in Foreign Investment Law-More Than Pendulum Swing" (1997) 7 ICCLR233-234

[84] Ibid 234

5.6 THE INTERNATIONAL FRAMEWORK AND INCENTIVES TO FOREIGN INVESTMENT

Incentive is any measurable economic advantage afforded to specific enterprises or categories in order to encourage them to behave in a certain manner.[85] They Include measures specifically designed, either to increase rate of return of a particular direct foreign investment undertaking or to reduce and redistribute its cost or risks.

As part of their policy to improve their investment climate and attract Foreign Direct Investment (FDI), many African countries have concluded bilateral investment treaties. Such treaties typically prescribe general standards of treatment, including fair and equitable treatment, as well as national and most favoured nation treatment. In addition, they contain clauses dealing with specific aspects of investment relations, such as the transfer of payments and the repatriation of capital and profit, losses due to armed conflict or international disorder, nationalization and expropriation and settlement of disputes.[86]

By June 1996, about 260 bilateral investment treaties had been signed by African countries.[87] While most of the 55 African counties have concluded bilateral Investment treaties, there are large differences among them in terms of both the overall number of agreements signed and the countries with which the agreements were concluded.

The North African countries (notably Egypt, Morocco, and Tunisia) stand out as the most active countries In the region In this respect. The combined number of bilateral treaties signed by these three countries accounts for about *35* percent of the total number of treaties singed by all countries in Africa.[88] In contrast, some countries namely, Angola, and Gambia have not concluded any bilateral agreements at all, while others, such as Botswana and Malawi, have concluded very few such agreements. Some countries such as Botswana, Kenya and Malawi that have not been active in concluding bilateral Investment treaties, have nevertheless, been receiving relatively significant amounts of foreign direct investment.[89]

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[85] **"Incentives and Foreign Direct** Investment" A publication of United Nation Conference on Trade and Development, Geneva (1996) 3.
[86] World Investment Directory Foreign Direct Investment. Legal Framework Vol. V Africa 1996, xiii.
[87] Ibid xiii
[88] Ibid xiii
[89] Ibid xiii

A large number of African countries have also concluded bilateral treaties for the avoidance of double taxation of Income and capital. As with Investment treaties, Western European countries dominate the list of double — taxation treaties. Within Western Europe, France stands out as the country with most treaties reflecting numerous double-taxation agreements.[90]

Bilateral treaties have been supplemented by multilateral treaties. Two particular important conventions that are widely accepted in Africa are the International Convention on the Settlement of Investment Disputes (ICSID) between States and Nationals of other States, which provides a system for the resolution of investment disputes. The other is the Convention establishing Multilateral Investment Guarantee Agency (MIGA), (which guarantees foreign investors insurance coverage against non-commercial risks as nationalization and losses owing to arrived conflict or internal disorder).

The Nigerian government has over the years placed regulatory policies to guide foreign investments. This is as a result of the fact that foreign investors, will only go to where they believe their investments would be safe and where they feel their bread is best buttered or where they will earn the best returns of their investments. These policies metamorphosed into laws that enhanced foreign investments in Nigeria. These laws are discussed below:

(i) The Nigeria Investment Promotion Commission NIPC Act, 2004

The NIPC Decree No.16 1995 (now NIPC Act found in Laws of Federation of Nigeria 2004) established the Nigeria Investment Promotion Commission[91]. It is a Federal Government Agency charged with the responsibility of coordinating and monitoring such investment promotion activities as:[92]

(a) The initiation and fostering of measures to enhance the nations' investment climate for all investor&

(b) The promotion of investments within and outside Nigeria.

[90] Ibid xv

[91] Section 1(1) NIPC Act, 2004.

[92] Section 4, NIPC Act, 2004. The NIPC was only recently constituted some two years after the promulgation of the enabling Decree.

(c) The collection and dissemination of Information concerning investment opportunities and sources of investment capitals as well as advising on the availability of partners in joint-ventures.

Of particular relevance is the provision of the Act relating to investment which allows free entry by any foreign investor into any type of investment in Nigeria except those of:[93]

(a) Production of arms, ammunitions, etc

(b) Production of and dealing in narcotic drugs and psychotropic substances

(c) Production of military and paramilitary wears and accoutrement, including those of the police, customs, immigration and Prison services;

(d) Such other items as the Federal Executive Council may, from time to time, determine.

Aside from this negative list, a non-Nigerian may participate in any enterprise In Nigeria[94].

The provision of the Act is the kernel of Government Policy regarding foreign investment. It is further strengthened by a series of provisions which give incentives for investment. One issue the NIPC Act has created is the opening up of Nigerian economy to foreign investment; a move which is considered a major shift in government policy.

It will be recalled that in the 1970s, the emphasis of government in the area of investment was to give impetus to Nigerian participation in the Investment process by restricting foreign participation in some industries to 40% or 60% with Nigerians taking up the rest.[95] This was in furtherance of the policy of indigenization referred to earlier, the legal framework of which was provided by the Enterprises Promotion Decrees promulgated between 1972 and 1989.

The 1989 Decree was repealed by the Foreign Exchange (Monitoring and Miscellaneous Provisions) (FEMM) Decree, No 17 of 1995. The aforementioned Enterprises Promotion statutes were promulgated to achieve certain aims for Nigerians which the 1995 Decree has seriously reversed by throwing open, the investment field. It

[93]Sec. 17, l8and3l ofthe NIPC Act 2004.

[94]See Sections 18 and 22. Note all enterprises listed are prohibited for Nigerians and non-Nigerians alike. The public policy issues propelling this are obvious.

[95]Guobadia, D.A., "Issues in Facilitating Foreign Investment for Nation Development in Nigeria". **MPJIFL** vol. 2, No. 4, 1998, 42.

has often been said that the foreign investor milks the systems for next to nothing commensurate is left by way of returns for the host country[96].

Government's package for foreign investors under the NIPC Act Include:[97]

(a) A guarantee of unconditional transferability of dividends or profits (net of taxes) attributable to the investment.

(b) Transferability of payments in respect of bay servicing where a foreign loan has beer obtained and

(c) The remittance of proceeds (net of all taxes and other obligations in the event of a sale or: liquidation of the enterprise or any interest attributable to the investment.

Another provision worthy of note[98] deals with issues relating to provisions of guarantees against expropriation and nationalization. Where acquisition of any enterprise has to take place in the national interest, under any law providing for payment of fair and adequate compensation, such compensation shall be paid without delay. There is also provision to authorize the repatriation of such compensation in convertible currency. If a dispute arises between parties where there is a bilateral or multilateral agreement, such disputes shall be settled within the framework of such an agreement or in accordance with any other national or international machinery for the settlement of such disputes which the' parties may agree upon[99]. It is Important to observe 'however, that these Incentives could easily be manipulated to the detriment of the host country.

(II) ***The Foreign Exchange (Monitoring and Miscellaneous Provisions) Act[100].***

This statute repealed the Exchange Control (Anti Sabotage) Decree No 7 of 1984. It authorizes any person, including a non-Nigerian to deal in, invest, acquire or dispose of, create or transfer any interest in securities and other money market instruments whether denominated In foreign currency in Nigeria or not[101]. This is the same as the portfolio investment referred to earlier. This decree established an autonomous foreign exchange market for the conduct of transactions in foreign exchanges.

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[96]Okeke S.O, Government Sponsored and Private Insurance Schemes Available for Protecting Foreign Investment Under Nigeria Law" paper presented at the Seminar Jointly organized By Nigeria Asian Chamber of Commerce And A.M. Orji Associates on "Protecting Foreign Investment Under Nigeria Law". Ikoyi Lagos, May, 1999 p.10.

[97] Section 24 empowers the Commission to provide such packages.

[98] Section *25* NIPC Act.

[99] Section 26(2) of the Act.

[100] Cap F.34 Laws of the Federation. 2004 herein referred to as the FEMM Act.

[101] Section 26(1)

As in the NIPC Act[102], the FEMM Act[103] guarantees an unconditional transferability of funds through an authorized dealer in free convertible currency relating

a. Dividends or profits (net of taxes) attributable to the investment;
b. Payments In respect of loan servicing where a foreign loan has been obtained; and
c. The remittance of proceeds (net of all taxes) and other obligations in the event of sale or liquidation of the enterprises or of any interest attributable to the investment[104]

What can generally be said of the NIPC and the FEMM Acts is that they have the combined effect of liberalizing the nation's investment climate.

(III) Tax Reliefs

Recent budgeting/fiscal policies have reflected a policy of generous tax incentives in the area of personal income tax and companies' income tax. The paramount aim of which, is to promote the welfare of citizens and to attract foreign investment. The 1997 budget for instance, enunciated a policy of exemption from Value to:

Added Tax (VAT) of certain goods with a view to encourage investments in certain preferred areas of the economy. These goods include plant and machinery imported for use in the Export Processing Zones (EPZ)[105].

Moreso, with effect from January 1971, any loan of an amount (or of any aggregate amount) of not less than 150,000 is granted by a foreign company to any person in Nigeria for the purpose of carrying on a trade, business or vocation, any interest derived by the foreign company shall be exempted from tax as follow:

Repayment	Tax exemption
10 years and above	100%
5-10 years	50%

While interest on foreign loans granted after April 1, 1978 will be exempted as follows: -

Repayment Period Including Moratorium	Moratorium period	Tax exemption

[102] Section 24
[103] Section 17
[104] Section 15 (4)
[105] Others include locally produced fertilizer, tractor. Phurghs, agricultural equipment and implements purchased for agricultural projects.

Above 7 years	Not less than 2 years	100%
5 —7 years	Not less than 18 months	70%
2 — 4 years	Not less than 12 months	40%
Below 2 years	Nil	Nil

In order to enjoy the above incentives, the agreement for all foreign loans must be approved by the Federal Ministry of Finance and copies thereof deposited with both Federal. Ministry of Finance, and Federal Board of Inland Revenue.[106]

With regard to loans by banks for agricultural and export businesses, Petroleum Industry and Petroleum Profit Tax, the major policies outlined in that budget include a tax-free status to dividends distributed to investors during the tax holiday in respect of investments in foreign currency or introduction of plant and machinery of not less than 30% of the equity of the company. Other tax reliefs will be treated in the next chapter.

(iv) The Nigeria Export Processing Zones Act [107]

Export processing zones are designated physical areas set aside by government to encourage foreign investments in the production of goods for export. Nigeria's policy on this is articulated in the EPZ scheme introduced in 1991 pursuant to the first Nigeria Export Processing Zones Decree No. 34 of the same year. That first decree was repealed by the Nigeria Export Processing zones Decree No. 63 of 1992.

The NEPZ Act provides incentives for investors and enterprises in the zones with a view to encouraging foreign investments in Nigeria. It provides that approved enterprises operating within a zone shall be exempted from all federal, state and local government taxes, levies and rates[108]. Section 12 of the NEPZ Act, empowers any approved enterprise to import into a zone, free of customs duty, any capital good, consumer goods and raw materials, components or articles intended to be used for the purpose of and in connection with an approved activity or any article for the construction,

[106] Randle, J.K.B., "Business Opportunities and Investment Incentives in Nigeria." Nigeria at 40; Towards Economic Revival, Hague 2000, P.62.
[107] Cap N. 107 Laws of the Federation 2004 (herein referred to as NEPZ Act.) The enactment was brought in to being by Decree No. 63 of 1992.
[108] Section 8 of the NEPZ Act

alteration, reconstruction, extension or repair of premises in a zone or for equipping such premises. Other Incentives include, items as set out in section 18(1) of the Act viz:

a. The non applicability of legislative provisions pertaining to taxes, levies, duties and foreign exchange regulations within the zones.
b. The right to repatriate foreign capital investment in the zones at any time with capital appreciation of the investment.
c. The right to remit profits and dividends earned by foreign investors in the zones.
d. The non requirement of import and export licenses.
e. Allowing up to 25% of production to be sold in the customs territory against a valid permit and on payment of appropriate duties
f. Rent free land at construction stage; thereafter rent shall be or determined by the Authority.
g. Allowing up to 100% foreign ownership of business in the zones
h. Allowing companies operating in the zones to employ foreign managers and qualified personnel.

The export processing zones scheme is a clear attempt to attract foreign investment into the count The incentives provided by the NEPZ Act as well as t provisions of the other statutes discussed, earlier attractive and do address some of the underlying

5.7 CURRENT INCENTIVES FOR ATTRACTING FOREIGN INVESTMENTS IN NIGERIA.

In demonstrating its resolve to attract foreign Investment, which is seriously needed to fund continued growth government has made total efforts in the following areas:

1. Tax relief for companies involved in exploitation and utilization of natural gas embedded in various recent bud provisions.
2. Democratic government which was ushered since 29 May 1999.
3. Gradual improvement on our relations in the international community through varied diplomatic approaches with various count and international institutions.

4. Privatization process, and the continued regulation of key sectors of the economy, telecommunications, shipping service airways, electricity etc.
5. Abolition of the Capital Gains Tax on Shares and stocks to encourage ploughing back investment returns and new investment containing the financial sector distress and efforts of management initiatives.[109]
6. Tax holidays of three years for pioneer companies involved in certain production concerns, which government *wants* to encourage. The three years tax holidays can be extended to five years.[110]

5.8 FACTORS INHIBITING FOREIGN INVESTMENTS IN NIGERIA

An average scholar or practitioner of international economic law or commerce cannot dismiss with a wave of the hand, the fact that a lot of legal requirements regulating foreign investment in Nigeria are encouraging. In other words, the legal regime for foreign investment in Nigeria is filled with incentives.[111] The re-occurring question in the minds of some scholars and indeed, the average Nigerian and the international communities, is why has there not been appreciable level of promotion of foreign investment In Nigeria after about forty-eight years of independence, despite the encouraging legal framework?

Various factors have culminated to give this regrettable picture and position the country has found itself in. Some of these factors are:

(i) Lack of Political Stability and Risks:

This appears to be one of the most current concerns of the foreign investor in Nigeria and indeed, in any developing country. Nigeria's political history is a clear picture of how military adventurism has truncated the country's political landscape for about 30 years of the country's forty-eight years of independence. The long years of military rule and the attendant high level risks associated with such regimes, have negatively, affected foreign investments in Nigeria. The aver age Investor is always

[109] Kalu Idika kalu; "Protecting Foreign Investment Under Nigerian Law: A consideration of Socio-Economic Factors in the Environment;" paper presented at a Seminar Organized by Nigerian-Asian Chamber of Commerce and *AM.* Oji & Associates, Lagos. 1999.
[110] Section 10, 16, Industrial Development (Income Tax Relief) Act; Cap 1.7 Laws of the Federation 2004.
[111] Kachjkwu El. *Op ('it.,* 120.

afraid to invest because of the unpredictability of the political atmosphere. So, rather than attract foreign and local investors, what some military regimes had succeeded in doing was to ostracize Nigeria from the league of international economic communities and organizations.

The present democratic dispensation being enjoyed in the country may be said to have reduced to some extent, the ugly scenario. This could be seen in the statistics from Corporate Affairs Commission (CAC) when compared to what bad hitherto, obtained during the military dispensation[112] The table diagram below explains it better: It shows the value of businesses in both the military and Democratic Dispensations[113].

Business transactions of corporate affairs commission	First half of 1999	Second half 1999	Marginal increase between first half and second half of 1999
Companies incorporated	9.612	11,196	1,584
Registration of business names	17,024	29,869	12,845
Company searches	4,540	7,332	2,792
Filing of shares capital increase	592	847	225
Filing of mortgages	289	334	45

From the above table, it is obvious that the new democracy, which was enthroned on 29th May 1999, was a great political stimulant to a higher level of Investments locally. The above situation is a direct reflection of what is equally obtainable in foreign investments in the country. This is, because direct and indirect foreign investments can only flow when the host community itself is enthusiastic about Investment.[114]

(ii) **Lack of Basic Infrastructure**

The basic infrastructure needed for the promotion and protection of foreign investments in Nigeria is not only grossly inadequate but also, appears to be non-existent.

[112] Ibrahim, Adamu; *Op Cit., 155*.
[113] Special. Report by the Director-General Corporate Affairs Commission Alhaji Y.*M.* Abdullahi. The News Magazine. 7th August 2000. 8.
[114] Ibrahim Adamu Op Cit., 115 — 156.

In the case of the Nigerian Telecommunications Limited (NITEL), for example, its decision (even in the new democratic dispensation), to close down international calls connecting functions of its international operations department on 9th December 1999,[115] was not an action that can be said to encourage foreign investment. The normal practice before the closure was that, foreigners seeking information about the country normally call NITEL International operations number 171, for information. The closure has further scared foreign investments. Even with the introduction of Global System Communication in Nigeria (GSM), there are still lapses in the efficiency of the GSM operators.

The power and energy situation in the country is another area that has perennially been a source of worry to both foreign investors and the people. The much-talked-about transfer of technology, has remained a mirage in the face of epileptic power supply in the country. Ironically, the National Electric Power Authority (NEPA) now Power Holding Company of Nigeria PLC has, unfortunately, been ridiculously nicknamed "Never Expect Power Supply Always". The issue, becomes unimaginable when compared with the prevailing situations in some neighbouring West African countries which get their power supply from Nigeria. Many of the roads are indeed death traps which very few foreign investors are willing to tread on.

The Airlines are not left out as the Aviation Industry has consistently witnessed dismal performances with little or nothing to show for its existence. The recent crashes of Sosoliso and the Bell- view planes have put the country under a search light. It has been discovered that world safety standards have not been observed by our airline operators.

(ii) Hazardous Financial Institutions and Failed Banks Syndrome

With the high rate of crime and fraudulent financial transactions by some financial institutions and banks in Nigeria, the Federal Government promulgated the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994. This Decree was subsequently amended by Decree No. 18 of 1995. This legislation has enjoyed commendations and criticisms. Some of the objectives of the legislation are:

[115] **The Punch Newspaper** 15th July. 2000.

a. The provision of a sound and enabling environment for the then ever expanding banks and other allied institutions in order to provide the requisite services desired of them in the nation's economy.

b. To provide relief to financially troubled banking institutions, by facilitating how best, banks can solve their problems of unpaid loans.

c. To provide sanity to financial sector where fraud syndicates were coming up in the name of banking and allied services.

In order to ensure sanity and transparency in the banking sector, the Failed Banks and Financial Malpractices Tribunal, was set up all over the country to boost the image of the financial institutions[116].

The recent reforms in the banking sector, has given credence and reliability to the sector. It has indeed, brought sanity to the Banking industries. Small bank were encouraged to merge, consolidate or be taken over by the big banks instead of crashing with deposited funds.

(iv) Advance Fee Fraud /Crimes

This has badly affected our economy in the sense that the desired flow of foreign investment is rather limited or in some cases not even there. In the opinion of Professor C.O. Okonkwo[117] "The fraud commonly known as "419" has done immense harm to the economic and business interest in Nigeria, damaging as well its international image. The Central Bank of Nigeria, the police and many citizens of Nigeria, have expressed deep concern about the devastating effects of the new wave of fraud"

This new wave of fraud within and outside Nigeria, have caused a near irredeemable damage to the socio-economic life of Nigerians. Many foreign investors are deep scared of investing in an environment where dishonesty and fraud associated with local and international commerce appears to be the order of the day. The most worrisome aspect of it all is the abundant evidence that some people within the corridors of power, and in some government organizations, are linked or appear to be in support of this nefarious act. Many of the foreign investors, have been tricked or defrauded all in the

[116] It is now found in Cap F2. Laws of the Federation of Nigeria, 2004. as an Act.

[117] Okonkwo CO. "Advance Fee Fraud and Other Related Offences Decree 1995: An Appraisal" In Ayua IA. (ed) **Law Justice and the Nigerian Society: Essays in Honour of Justice Mohammed** Bello, Lagos: Nigerian Institute of Advance Legal Studies. 1995. .306.

name of foreign investment in the country. The effect of this therefore, is the lukewarm attitude of other foreign investors to come into the country.

5.9 PROTECTING FOREIGN INVESTMENTS IN NIGERIA

Protection policy is an economic policy which Increases Industrial cooperation. One of the purposes of foreign trade policy and international law, is to protect trade. It also aims at a stable and globally comparable protective framework for foreign investments.

International law Imposes upon every state in which foreign natural or juristic persons reside, operate or possess property, an obligation to respect acquired rights of such persons. In its judgment, the Permanent Court of International Justice declared that:

"the principle of respect for vested rights... forms part of generally accepted International law" [118]

The same idea was expressed by the special German-Romanian Arbitral Tribunal, which stated that 'respect for private property and to acquired rights of aliens undoubtedly forms part of the general principles recognized by the law of nations"[119]

The International Court of Justice in its decision on protection of alien property in **Barcelona Traction light and Power Company Limited** held that:

> When a state admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them, the protection of the law and assumes obligations concerning the treatment to be afforded them.[120]

An active investment protection policy exists only in relations with Third World Countries. Of all the industrial countries, there is a comparable and sufficiently stable protection framework so that investments flow freely to their optimal economic use.

5.10 STANDARDS FOR THE PROTECTION OF FOREIGN INVESTMENT

[118] Permanent COLI1 of International Justice (referred hereinafter as PICJ Series A. o. 7, 42.
[119] U.N. 2 Rep. Int'l Arbitrary Awards, at 909.
[120] International Court of Justice. Barcelina **Traction, Light and Power Company Limited Rep.** 1970. 32

The following standards can be found in many investment treaties and are prominent, not only in the field of foreign investment but also, in trade agreements and international economic law generally: (i the open door standards,

(ii) The most favoured nation (MFN) standard;

(iii) The national treatment;

(iv) The International minimum standard;

(v) The equitable standard;

(vi) The standard of reciprocity;

(vii) The preferential treatment standard; and

(viii) The standard of good neighbourliness.

(i) ***The Open Door Standard***

The open door standard advocates for an economic world system that is devoid of trade barriers of any nature. It prefers a situation whereby investors hop from country to country unhindered by entry laws. It frowns at economic policies or laws at the country level that restrict the influx of foreign capital. The message of the open door standard is that the world will be a better economic global village if *states* do not adopt protectionist policies. The standard prefers a situation whereby states throw their doors open to all and sundry. Its crusade is for the reduction of tariffs, custom duties, preferences, restrictions, subsidies, state trading, etc. The foreign investor should enter into the host country without any let or hindrance. There should be no area of the economy of the host state that is classified and made the exclusive preserve of either the host government or citizens.[121]

The inclination of capital exporting countries for the open door standard has historical, economic and political reasons. Historically, the capitalist west, was in the 1930s, struck by a devastating economic depression. In reaction to that depression, states adopted policies restricting the influx of foreign capital into their economies. No state was willing to open its doors to the outside world and as a result, there was more depression. The situation is well described by A.W. Hooke, when he wrote that –

[121] Karigbo Sam "International Protection of Foreign Investment," 2004 Modern **Practice Journal of Finance And Investment Law,** Vol. 8 Nos. 1-2, 83 at 112.

In the 1930s, many countries attempted to maintain domestic income in the face of shrinking markets through competitive devaluation of their currencies and resort to exchange and trade restrictions[122].

With this experience, it became evident to these countries that world trade and investment could be expanded by the elimination of those protective national policies and measures that have hindered world trade and the new orientation. Every state was therefore, urged to open its doors to aliens but entitled to stipulate conditions under which the foreign investor could be admitted into its territory. Every state could determine the role that such an alien investor may or may not play in economic and social development and, to prohibit or limit the extent of the alien investor's presence in specific sections.

(ii) The Most Favoured Nation (MFN) Standard

This is a core element of international investment agreements. It means that a host country should treat investors from one foreign country no less favourably than investors from any other country. The MFN standard gives investors a guarantee against certain forms of discrimination by host countries, and it is crucial for the establishment of equality of competitive opportunities between investors from different countries[123].

The MFN standard is usually incorporated into treaties and it can take different forms. For instance, two states can incorporate into a bilateral treaty requiring that subjects of one contracting party are entitled to the immunities and privileges accorded to the subjects of any other state whatsoever. The MFN advocates for the elimination of trade barriers such as custom and export duties. However, where a contracting party is to impose such duties, then it must levy equal duties in all products of a similar kind without discrimination as to state of origin. Whereas MFN agreements seem to work very well for bilateral treaties, practice has shown that they have their limitations in the context of multilateral treaties. Just like the open door standard, the adoption of the MFN is a voluntary process and not one dictated by law. It is therefore, within the discretion of a state to qualify the MFN to suit its economic and political interest.[124]

(iii) The Standard of National Treatment

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[122]Ibid 112

[123] COM. 2-Expert Meeting on International Agreements 24-26 March 1999: International Investment Agreements Multilateral Framework on Investment. UNCTAD Series on issues in international investment agreements file://C:\ my Documents\UNCTAD.htm. Fele///c:\ my Document \ UNCTAD.html.

[124] Ibid.

This standard specifies that foreign investors, whatever form their investment takes, should be treated as if they were domestic investors. In other words, the alien investor should be entitled to and contend himself with the remedies available in municipal law of the citizen. The foreign investor is therefore, entitled to only those benefits and protections that are provided for the citizen by the local laws. Conversely, the foreign investors should be subject to all the Investment risks which the local or domestic investor is exposed to and, he should not be given any preferential treatment or exposed to higher risks than the domestic investor. The scope of the Standard of National Treatment was well stated by Sir Henry Strong, the arbitrator in **Rosa GeIbtnk Vs** Salvador[125] when he observed that:

A citizen or subject of one nation who, in pursuit of commercial enterprise, carries on trade within the territory, and under the protection of the sovereignty of a nation other than his own, Is to be considered as having cast his lot with the subjects or citizens of the state in which he resides and carries on.[126] The national treatment, interacts with several other investment issues and concepts. Most notable there are strong interactions with the issues of admission and establishment, the MFN standard, host country operational measures and inter-state dispute settlement. National treatment raises some of the most significant development Issues in the field of foreign investment as it stipulates formal equality between foreign and national investors. This does not occur without qualification in practice as host countries are justified in protecting infant Industries. Political exigencies can also, force host government to reserve certain privileges for their nationals.

Brownie summarizes the rationale of the national treatment standard in the following words:

There has always been considerable support for the view that the alien can only expect equality of treatment under the local law because he submits to local conditions with benefits and burdens and because, to give the alien a special status could be contrary to the principles of territorial jurisdiction and equality.[127]

(iv) The International Minimum Standard

[125] Cited by Sonarajah, M., The **International Law on** Foreign **Investment,** Cambridge University Press 1994, 125
[126] *Ibid* 125.
[127] Brownlie J., Principles of Public International Law, Oxford University Press, 1973, *523.*

As regards what treatment or protection that should be accorded to a foreign investor, proponents of the international minimum standard emphatically say that the foreign investor must be accorded a treatment according to external, international law standard. Capital exporting countries hold firmly to the view that there is an international standard for the treatment of a foreign investor and host states are under obligation by law to accord this international standard to foreign investors or aliens in their territories.

The claim here is not just that the foreign investor is entitled to a standard of treatment protected in international law but that, where there is a conflict between the standard accorded by local law and that accorded by international law, the latter prevails. In other words, the municipal laws are binding on the foreign investor only to the extent that it conforms with international law.

The standard was stated in the case of the **Need** Claims[128] as follows:

> ...The proprietary of governmental acts should be put to the test of international standards...., the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.[129]

The obvious opposition to this Standard is the standard of national treatment, which insists that the foreign investor should confine himself to the local law and standard of treatment and that, the alien investor, should contend with the same rights of protection as citizens of the host country. The claim as to the existence of international standards to which host states are subject in their dealings with foreign investors, does not seem to have a very firm root in customary international law and, does not stand a chance with the national treatment standard for obvious reasons.

The territorial principles give the host state jurisdiction over all persons and things within its territorial limits and in all causes, civil and criminal arising within these limits.[130] The kind of treatment given to foreign investors by the host state can be the concern of other states, especially the home states of those investors. Such a concern does

[128] Cited by Brownlie. J., **Principles of Public International Law;** Oxford University Press 1993. *525.*
[129] *Ibid* 525.
[130] The Christiana Case (1938) AC. 155.

not ground reasons for the host state to be subjected to principles that stand higher than state sovereignty within the international system.

In an economic world, a system that is divided into the capital exporting and capital importing countries, there is no standard that would constitute the "International minimum standard" that is generally accepted as law by the international economic world system. No doubt, the foreign investors needs protections from the international community but it will not make sense if such protective efforts try to insulate the foreign investors from the reach of the international law[131].

(v) The Equitable Standard

In recent years, the concepts of fair and equitable treatment, has assumed prominence in investment relations between states. The earliest proposals that made reference to this standard of treatment for investment are contained in various multilateral efforts in the period immediately following the World War II. The other authority for the practice of the concept of fair and equitable standard is to be found in bilateral investment treaties, which have become a central feature in international investment relations.[132]

In essence, the fair and equitable standard provides a yardstick by which relations between foreign Investors and governments of capital importing countries may be assessed. It also acts as a signal from capital importing countries, since it indicates, at the very least, a state's willingness to accommodate foreign capital on terms that take into account, the interests of the investor in fairness and equity.[133] Basically, the standard enjoins host states to treat foreign investors fairly and equitably and should take the situation of the foreign investors into consideration in the formulation of their investment policies.

All states should, seek to treat local and foreign enterprises fairly and equitably. The inclusion of a clause on the fair and equitable standard in investment agreements does not, generally raise complex issues, except that the precise meaning of the fair and equitable standard may vary in different contexts.

(vi) The Preferential Treatment

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[131] Kargbo Sam "International Protection of Foreign Investment **"MPJFIL, vol 8,** No. *5,* 1-2, 2004, 83 at 119.
[132] Com. 2-Expert meeting on International Investment Agreements LOC.. ICT; Cited by Kargbo Sam, *Ibid,* 120.
[133] *Ibid* 121.

There are generally acceptable reasons for the host to accord preferential treatment to either the foreign investors or the domestic investors. For Instance, ECOWAS member countries accord preferential treatment to investors from member countries. Capital exporting countries often demand preferential treatment for their citizens and investors residing abroad. The thrust of the standard of preferential treatment is the discrimination in favour of domestic or foreign investors by the host state. This discrimination can take many forms. It can take the form of an exemption from payment of taxes customs and excise duties or some form of subsidies.

(vii) The Standard of Reciprocity

The standard of reciprocity emphasizes the adage that "one good turn deserves another". States usually give themselves reciprocal privileges and benefits. For example, ECOWAS member states give privileges to the nationals of each other as far as foreign Investment is concerned. This standard also favours professionals as it allows professionals of one state to practice in another state that offers reciprocal standards. Judgments of states that give reciprocal treatment to our judgments can be enforced in Nigeria.[134]

(viii) The Standard of Good Neighbourliness

This standard does not have a direct relevance to the issue of the type of treatment to be accorded to the foreign investor. What matters about the standard is its quest for reciprocal concern for the interest of the states. The standard seeks to obligate states to check the activities of citizens and aliens within their territories that are harmful or injurious to the economies or interest of other states. The standard, like other standards, is to be found in bilateral and mulifiateral treaties. Examples of the treaties that embody this standard are the Extradition Treaty, Criminal Investigation, Co-operation Treaty, and the Agreement on Mutual Administrative Assistance in matters relating to customs, Trade and Immigration between Benin Republic, Ghana, Nigeria and Togo, signed on December 10, l984[135].

5.11 THE CONSTITUTIONAL PROTECTION OF INVESTMENTS IN NIGERIA

[134] Section 4, Foreign Judgments (Reciprocal Enforcement) Act, Cap F.35, Laws of the Federation of Nigeria, 2004.
[135] Kargbo Sam, *Op. Cit*, 122.

The economic objectives of Nigeria are well spelt out in the constitution.[136] While the fundamental objective and directive principles of state policy, has constitutionally entrenched a free market propelled economy, a few of its provisions may be seen by some as undue restraint on freedom of investments.

The first of these anti-investment stipulations[137] grants in exclusive rights to the state[138] to manage major sectors of the economy.

Section 16 (1) (c) of CFRN provides thus:

> … major sector of the economy shall be construed as reference to such economic activities as may, from time to time, be declared by a resolution of each House of the National Assembly to be managed and operated exclusively by the Government of the Federation; economic activities being operated exclusively by the Government of the Federation immediately preceding the date when this section comes into force, whether directly or through the agencies of a statutory body, corporation or company, shall be deemed to be major sectors of the economy.

Another constitutional factor for the encouragement and protection of investments in Nigeria are contained in chapter 4 of the 1999 Constitution.[139] The constitution guarantees a constitutional right for every citizen in Nigeria to acquire and own immovable property[140] anywhere in Nigeria. A citizen of Nigeria would naturally include a body corporate registered under the Companies and Allied Matters Act 1990 (CAMA)[141].

The Act provides thus,[142]

> As from the date of Incorporation mentioned in the certificate of incorporation, the subscriber of the memorandum together with such other persons as may, from, time to time, become members of the company, shall be a body corporate by the name contained in •the memorandum, capable forthwith of exercising all the powers and functions of an

[136] Sec 16 (1) (2) (3) (4) of 1999 (Constitution herein referred to as CFRN).
[137] Sec 16(1) (C) of CFRN
[138] The State is represented by the Federal Government.
[139] Sec 43 and 44 of CFRN.
[140] "Immovable property" generally refers to land or anything forming part of land either above it or in the sub soil.
[141] Cap C. 20 Laws of Federation of Nigeria, 2004.
[142] *Ibid*, **section** 37.

incorporated company, including the power to hold land and having perpetual succession and a common seal

Aside from the right to own land and perpetual succession, section 38(1) defines the status of a company by vesting It within all the powers of a natural person within the scope of its authorized business or object.[143]

It is therefore, submitted that reference to "a citizen of Nigeria" in section 43 of the CFRN 1999 must include Nigerian registered companies, including those with a hundred percent foreign equity holdings.[144] Consequently, the protection guaranteed in sec. 43 of CFRN by extension, applies to foreign investors doing business In Nigeria.

This is particularly so as foreign investors can only invest in Nigeria today through the incorporation of an enterprise under the provisions of the Companies and Allied Matters Act, 1990[145] or through. Portfolio Investments[146] in the acquisition of shares in any Nigerian enterprise.[147] The most fundamental constitutional guarantee for investment protection in Nigeria today is sec 44 of the constitution. The section protects every person (including companies and investors) against "compulsory acquisition of any moveable property or of any interest therein in any part of Nigeria.

According to section 44(1) CFRN "no moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things:

a. Requires the prompt payment of compensation therefore; and
b. Gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria[148].

[143] Akpotaire Vincent, Nigerian Company and Securities **Law; Sylva** Publications Akure 1999, 31-41.
[144] Akpotaire Vincent, "An Appraisal of Investment Protections;" 2002, Modern **Practice Journal of Finance and Investment** law, Vol. 6 No. 3-4, Learned Publishments Limited, p. *555* at *565.*
[145] Sections 17 and 19 of the Nigerian Investment Promotion Commission Act
[146] Sections 32, NIPC Act defines "Portfolio Investment" to mean an investment In shares or other securities traded on the Nigerian Stock Exchange.
[147] Suckow Samuel, **Nigerian Law & Foreign** Investment, Paris; Mouton, 1966, 13-19.
[148] Note that the Nigerian government got away with the Indigenization Decrees of 1972 and 1977 given all their dictatorial imperatives essentially because the fundamental rights of the 1963 Republican Constitution was suspended by the ruling military junta, vide the Constitution (Suspension and Modification) Decree 1966.

The security provided by the above guarantee to investors must be regarded as sacrosanct by every succeeding Nigerian government. The good thing is that the provisions are declared to be Fundamental Rights of citizens; and consequently allowing litigation on it by the special and expeditious procedure provided for the general enforcement of those rights.[149]

Even pre-emptive actions for threatened breach could be redressed[150]. The exceptions provided in section 44(2) (a) (m) of the 1999 constitution however, appear rather too wide. For example, section 44 (2) (j) of the Constitution excludes any general law relating to property vested in bodies corporate directly established by any law in force in Nigeria.

On the whole, it can reasonably be assumed that if the current democratic alternative is sustained, the constitutional guarantees against expropriation of property and other personal liberties provided for in the 1999 Constitution are adequate to safeguard investments in the Nigerian economy.

5.12 CONCLUSION

Multinational direct investment according to the findings is a stimulant to economic growth of any country including Nigeria. It is an effective strategy that can be used to achieve sustainable growth and development. But for the multinational direct investment to achieve this noble goal, a competitive economy through liberalization, deregulation and privatization should be pursued. The conclusion therefore is that multinational direct investment is good for Nigerian economy. The only thing is that the country should minimize political violence, social and economic vices capable of discouraging and jeopardizing the interest of the multinational corporation to investment in the country. In other words democracy together with its complementary institutions should be adequately tackled. Above all, multinational corporation should comply with various national and industrial regulations and code of conduct.

[149] The provisions of the Fundamental Human Rights (Enforcement Procedure) Rules 1979 made pursuant to the Constitution of the Federal Republic of Nigeria. 1979 but applicable *mutatis mutandis* to the 1999 Constitution provides a special and expedited procedure for redressing any threat to or breach of the rights guaranteed in chapter IV of the said constitution.

[150] Ibid

CHAPTER SIX

SUMMARY, FINDINGS AND RECOMMENDATION

6.1 SUMMARY

Strengthening International tax co-operation with the Nigerian tax regime and the consideration of the peculiar case of Nigeria when promoting trade liberalization policies by multilateral instructions are essential for guaranteed development.

For a tax system to be effective and efficient especially on international corporate taxation and investment, it is necessary to create statutory authorities which perform both technical and management functions in the administration of the tax law. Otherwise, a good tax policy may end up looking remarkably alike in the hands of incompetent administration. At the Federal level, the Federal Inland Revenue Service (FIRS) and the Joint Tax Board (JTB) are the administrative machineries for this purpose. It is informative to note that the FIRS as it is constituted has some unique features which make it more democratically inclined than as it was before 2007.

Remarkably, the new service is clothed with democratic prospects. Its objective is to control and administer inter-alia, *Personal Income Tax Act and corporate taxation nationally and internationally* etc, as well as subsidiary legislations thereto; with the mandate to account for the tax collected in such a manner that the citizenry shall have a sense of fulfillment in having participated in paying their taxes honestly and promptly.

Throughout this research, an attempt has been made to appraise the legal framework for corporate taxation and investment in Nigeria by analyzing the rules, procedures in Nigeria and those obtainable outside the country. The recourse to foreign material in this field is not farfetched as the literature is quite developed. The corporate taxation and investment agenda is large and includes but is not limited to the quality of internal and external delegated monitoring and the effectiveness of control and the development of institution.

Also, double Taxation as seen is economically counterproductive. For Nigerian's goods to be competitive, there has to be a treaty that will deal with its international economic challenges and review of Nigerian's tax laws which must be put in place to

streamline compliance and also make it more efficient to attract both foreign and local investment, especially, in the face of the country nullifying the imposition some unconstitutional multiple taxes. It is ability of the firms to generate employment and make an additional investment that in the long run boosts state and inter-state revenues, not short-term and different taxes their ability to expand or which drive them out of business. Having said this however, it is not to be forgotten that loss of revenue to the government arising from granting these inducements, particularly, in a situation of declining foreign reserve, may result in short term problem. Notwithstanding, it is opined that the double and multiple effects of the induced investments overtime are likely to be far excess of the immediate revenue loss.

6.2 FINDINGS

a. There is the issue of lack of a clear and coherent distinction between Nigerian and foreign companies under the Nigeria tax statutes which tends to create confusion in compliance and understanding particularly on international corporate taxation and investment laws
b. Some provisions of company income tax laws relating to international corporate investment and revenue generation are not in consonance with constitutionalism which made it difficult to know how to tax Nigerian and foreign companies in terms of how to generate revenue through the taxation of the investment by multinational corporations.
c. The tax legal regime relating to the national tax policy does not augur well with the granting of tax reliefs that will encourage foreign investments in Nigeria by multinational corporations.
d. There are noticeable incidences of tax avoidance and tax evasion perpetuated by the national companies operating in Nigeria and quite significant amount of tax revenue otherwise accruable to the government are lost through these practices.

6.3 RECOMMENDATIONS

a. There should be a clear and unambiguous meaning and the distinction between Nigerian and foreign companies in terms of corporate tax that can facilitate foreign investment by multinational corporation in Nigeria an attempt to maintain.
b. A coherent tax policies should constantly be reviewed according to the fundamental objective of the Nigeria tax system and the prescribe qualities that must be embedded within all future tax laws that will encourage investments by multinational corporation in Nigeria.
c. Fair and just taxation is the fundamental principle of modern taxation and is indispensable in obtaining the confidence of the tax payers in tax system. In this regard, it is important that the procedures for calculating taxable income of multinational corporations be set forth clearly. The procedure should also induce in both tax payer and the authorities a willingness to abide by the system. A tax system that does not have clear procedures and relies on the arbitrary judgment of tax authorities in deficient and inappropriate.
d. The Nigerian tax statutes should be amended in respect to the above findings so as to carefully create a tax haven that will attract multinational corporations to invest in Nigeria. Thus, government should finalize the development of the National Tax policy and have a system of enacting tax legislations on tax issues on a continuing basis in order for maintain the global best practice;
e. The government of Nigeria needs to restructure the tax system by putting in place effective tax legislation, which criminalizes tax avoidance, tax evasion, illegal capital flight and other trans-organized financial crimes which are major sources revenue leakages.

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