AN ANALYSIS OF THE LEGAL FRAMEWORK FOR THE PROMOTION OF FOREIGN DIRECT INVESTMENT IN NIGERIA

BY

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LLM/LAW/12788/2010-2011

A THESIS SUBMITTED TO THE SCHOOL OF POSTGRADUATE STUDIES, AHMADU BELLO UNIVERSITY, ZARIA IN PARTIAL FULFILLMENT OF THE RQUIREMENT FOR THE AWARD OF MASTER OF LAWS DEGREE LLM

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AHMADU BELLO UNIVERSITY,
ZARIA, NIGERIA

DECEMBER, 2015

DECLARATION

I declare that the work in this thesis titled **AN ANALYSIS OF THE LEGAL FRAMEWORK FOR THE PROMOTION OF FOREIGN DIRECT INVESTMENT IN NIGERIA** has been carried out by me in the department of commercial law. The information derived from the literature has been duly acknowledged in the text and a reference list provided. No part of this thesis has been previously presented for another degree or diploma at this or any other institution.

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Name of Student	Signature	Date

CERTIFICATION

This thesis titled **AN ANALYSIS OF THE LEGAL FRAMEWORK FOR THE PROMOTION OF FOREIGN DIRECT INVESTMENT IN NIGERIA** by Samson Ogbonna EZE meets the regulations governing the award of the degree of Master of Laws-LL.M of the Ahmadu Bello University Zaria and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This work is dedicated to God Almighty who makes all things possible and to my family for their love and support.

ACKNOWLEDGEMENTS

To God be the Glory for the successful completion of this programme. I want to express my profound gratitude to my supervisors Dr A.A Akume and Dr.Yusuf Dankofa for their patience, diligence and understanding.

I thank and appreciate my loving wife, Edna, for her support, prayers and encouragement. I also want to appreciate my wonderful children, Chidera and Ifunanya for their understanding throughout the period of the programme.

I appreciate my parents, brothers, sisters, in-laws and some of my friends for their encouragement during the course of this programme.

May God Almighty bless you all.

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ABSTRACT

The legal regimes of protection of investments in Nigeria have over the years suffered not only from a lack of policy drive, but also a sustainable and development driven legal framework. Policy inconsistencies and consequent uncertainty on investment issues in the Nigerian economy has impacted somehow negatively on the psyche of both local and foreign investors who are genuinely desirous of investing in Nigeria. From all indications, the quest for greater economic development on the part of the developing host nation in any foreign investment is a primary motive for foreign investment. The maximization of capital and profit on the part of the foreign partner is the main objective of such investors. Hence the need for an elaborate legal framework for the promotion and protection for foreign investments in Nigeria becomes very fundamental.. The methodology to be employed in this research is doctrinal which includes the primary and secondary sources. This work has x-rayed the relevant Nigerian legal framework for the promotion and protection of foreign investments in Nigeria. This work has diagnosed relevant Nigerian laws as they relate to the promotion and protection of foreign investment in Nigeria. The historical evolution of foreign investment in Nigeria has been discussed. The determinant factors of and sectorial analysis of foreign investment is also treated. Issues like investment dispute resolutions, and arbitration have equally been discussed and fully analysed with proffered recommendations. Issues like privatization as they relate to investments and Nigerian economy have equally been discussed with solutions proffered. The regulatory institutions and legal mechanisms of foreign investment in Nigeria have equally been examined where some shortcomings have been observed and solutions proffered in that regard. The research established that the legal framework for the promotion of foreign direct investment in Nigeria is inadequate. The research also recommends establishing a strong legal system for the promotion of foreign investment and strengthening the relevant institutions promoting foreign investments in Nigeria.

CHAPTER ONE: GENERAL INTRODUCTION:

1.1 BACKGROUND TO STUDY

Foreign Direct Investment is widely regarded as the potential source of funding for growth and development and is generally a global policy of many countries, whether developed or developing. The United Nation Industrial Development Organization reported that the flow of foreign direct investment (FDI) globally reached an all time high of USD 1.3 trillion during the year 2000[1]. Investment promotion agencies (IPAs) in many parts of the world, especially in the highly developed economies of Europe and North America, and also booming Asian economies of China, recorded high volumes of business and celebrated further success in attracting new investment to their countries.[2]

Most of this investment flow however, was concentrated in the highly developed areas of European Union, the United States of America and Japan which together accounted for 71% of world inflows of FDI. Consequently the African share of world investment fell from its previous 1% to a further low of a mere 0.67%. [3]As a consequence, African countries were encouraged and supported to create an investment friendly environment so as to "market" their attractions and to smooth the pathway for incoming investors.

In the case of Nigeria, foreign direct investment has been a pivotal government policy even before her attaining political independence in 1960. This situation has for long stimulated a great desire and need for the reappraisal of the already existing legal framework on foreign investment against the background and the need for a larger foreign investment development in Nigeria.

[1] UNIDO, (2008): United Nation Industrial Development Organization Report
[2] Syed Akhter, *Foreign Direct Investment in Developing countries: The Openness Hypothesis and Policy Implications*, The International Trade Journal, Vol. 7. (1993)
[3] Op.cit UNIDO, (2008)

There is in existence legal framework for regulating foreign direct investment in Nigeria, but how effective these frameworks have been in the promotion of foreign investment has continued to be a subject of varying economic and academic opinions in different circles. Although the various institutional and legal mechanisms have long been established for the regulation of foreign investment in Nigeria, the effectiveness or otherwise of some of these mechanisms in meeting the yearnings and aspirations of the state, as well as, foreign investors on the other hand, has been a re-occurring decimal point that needs a lot of further academic research.

The fact still remains that, notwithstanding the various governmental policies and regulations, the general in built legal mechanisms and regulations, have not given the desired goal or effect in terms of the promotion of foreign investment in Nigeria. Foreign investment is inevitable towards the sustainability of any meaningful socio-economic development in Nigeria. This argument is further strengthened on the premise that the overall development of any given state has depended to some extent on an increased net flow of its investment both foreign and internal.

Ajomo puts it this way:

> Foreign investment is inevitable from the point of view of any state, be it developed or developing. However, the odds are weighted more against the developing countries that lack the technical know-how and the capital for economic development. In consequence, governments of developing countries have endeavoured to formulate laws, regulations and adopt policies that would attract foreign investment and technology in the face of competition from even the developed countries[4].

[4] "The Dimension and Legal Framework of International Investment Agreements in Nigeria: The Joint Venture Model" in Ajomo, M.A. (ed) New Dimensions in Nigerian Law (Lagos: Nigerian Institute of Advanced Legal Studies, 1989) pp. 1-40 at p. 1.

Nigeria, like several countries in the 1970s and 1980s embarked on expropriation of foreign investments, imposed trade restrictions and capital controls as part of a policy of import-substitution industrialization aimed at protecting domestic industries and conserving scarce foreign exchange reserves. There is now substantial evidence that this inward-looking development strategy discouraged trade as well as foreign direct investment (FDI) and had deleterious effects on economic growth and living conditions in the country.[5]

The disappointing economic performance of most of these countries like Nigeria beginning in the late 1970s up till the mid 1990s, coupled with the globalization of activities in the world economy, has led to a regime shift in favour of outward-looking development strategies. Since the mid-1990s, there has been a relative improvement in economic performance in a number of developing countries as a result of the change in policy framework

One learned Professor puts it this way:

> the period between 1985 and 1991 witnessed the promulgation of many laws in various areas of the economy. Since independence in 1960, no period has witnessed such legal development. This legal development can easily be linked with the leadership role played by the Attorney-General of the Federation. The various laws have become powerful structures in bringing about economic, political and social changes. One of the areas which witnessed these changes is in our investment policy which is linked with the various investment laws[6]

It is not in doubt that during the last two decades, the role of Nigeria in foreign economic affairs has undergone a fundamental transformation. This can be attributed to

[5] Adamu Ibrahim, The Legal Framework for the Promotion and Protection of Foreign Investment in Nigeria; unpublished thesis for Doctorate Degree, University of Jos 2009, pg 3.

[6] Yerokun, O. "The Changing Investment Climate through Law and Policy in Nigeria." In Okonkwo, C.O. (ed) Contemporary Issues in Nigerian Law. Essays in Honour of Justice Bola Ajibola (Lagos: Nigerian Institute of Advanced Legal Studies, 1989) pp. 67-75 at p. 31.

the role of the new global economic order as well as the emerging markets in the under industrialized nations especially the third world countries. These are positive developments that have made Nigeria's hitherto traditional international trade and investment policies and legal framework to be quite obsolete. The overall dynamic evolution of international trade and investment has poised challenges to most countries' legal system and practice on so many ways. Nigeria cannot be an isolated case in this regard.

These challenges and changes have caused policy makers and formulators of the regulatory legal framework to catch up with the emerging trend in Nigeria as it is in other places. In the course of this research, I shall examine International Investment laws and policies as they apply to some foreign countries, and also consider important changes that have taken place in both foreign and domestic jurisdictions as well as factors that guide international economic integration, such as WTO, Free Trade Zones, AGOA, ECOWAS, European Common Market, Trade Tariff, etc. A critical examination of the existing legal framework is important in this discourse with a view to determining its performance, the challenges it has encountered so far in promoting foreign investment in Nigeria.The responsibilities of government in creating an investment friendly environment will be highlighted in this research.

Since the basic issue between both developing and developed world economies is no longer the desirability or usefulness of promoting trade and investment across borders, the basic problems facing most states have been "methods capable of achieving specific

business objectives in the midst of a growing and ever expanding international economic order."[7]

1.2 STATEMENT OF RESEARCH PROBLEM

Any average scholar or practitioner of international economic law, or commerce, cannot dismiss the fact that a lot of the legal requirements regulating foreign investment in Nigeria are encouraging. The reoccurring question in the minds of scholars and indeed the average Nigerian, and the international community, is why there has not been any appreciable level of promotion of foreign investment in the Nigerian economy after more than fifty years of independence.

The existing legal framework from pre-colonial Nigeria has proved to be quite inadequate in surmounting the attendant socio-economic, political, legal and allied problems always associated with foreign investments in this globalized world economy. This scenario becomes more complex and complicated against the background that trade by barter has given way to a technological and much sought after economic pace of development, influenced mostly by present day modus operandi of international commerce. In view of the above obvious facts, the general concept of the legal framework regulating foreign investment in Nigeria has equally become complex in nature as well as its application.

Therefore the statement of research problem is:

1. Is the legal framework regulating foreign investment in Nigeria is adequate to attract and maintain the desired Foreign Investments?

[7] Shaw, C. (ed) Legal Problems in International Trade and Investment (New York: Oceana Publications, Inc. 1962) p. vii.

Under the above research question, the following questions will guide us in examining the adequacy or otherwise of the Legal Framework regulating foreign investment in Nigeria.

a. Does the legal framework conform to international standards and practice.
b. What are those factors that have inhibited foreign investment promotion and protection in Nigeria?
c. Have the policy drive of the previous and present administrations in Nigeria encouraged or deterred foreign investment development?
d. What are the necessary things to be done if the answer to some of these questions is not in the affirmative?
e. Is there any need for foreign investment in Nigeria?

1.3 AIM AND OBJECTIVES OF RESEARCH

The aim of this work is to critically examine the basic legal framework establishing, as well as, regulating foreign investments in Nigeria, vis-à-vis the problems of the promotion of foreign direct investments in Nigeria.

The objectives of this research are:

a. To critically analyze the basic legal framework establishing, as well as, regulating foreign investments in Nigeria.
b. To establish if the existing legal framework is adequate and conforms to international standards and practice.
c. To undertake an in-depth analysis of the various challenges and issues hampering the flow and progress of Foreign Direct Investments in the Nigerian economy.

d. To highlight some other relevant economic, social and political issues which have adversely affected the growth of Foreign Direct Investment in Nigeria.

1.4 RESEARCH METHODOLOGY

The methodology used in this research is Doctrinal. This will include the primary and secondary sources. The primary sources of materials to be utilized are:

Relevant legislative enactments (present and past)

a. Judicial decisions, rules and relevant pronouncements of both municipal and international courts/tribunals
b. Legislative and various conventions of United Nations Agencies.

The secondary sources are:

a. Relevant published textbooks on the subject matter
b. Articles, magazines and periodicals

1.5 JUSTIFICATION

The need for an elaborate, and all embracing legal framework for the promotion of foreign investment in Nigeria is already an over-due expectation. The reason for this is that as days roll by, the ever dynamic nature of international trade with its accompanying sophistication always has bearings on every-growing or developed economies. The Nigerian situation cannot be an exception because the world is now a global village.

A research project of this nature therefore becomes imperative most especially now that we have a democratic system of government where the positions of some of these laws could be freely canvassed for amendments or outright change where the need arises.

This research will adequately contribute significantly in giving an insight into the regulatory and legislative enactments on foreign investment law in Nigeria vis-a- vis International Investment Law and will be a comprehensive and single compendium for scholars, students, investors, and policy makers for easy reference. This work will contribute in scholarly efforts in x-raying the several legislations that relate to foreign investment laws and commerce in Nigeria with accompanying suggestions and solutions to some of these legislations where there are lacunas.

This work will also discuss the responsibilities of the Federal Government in terms of transparency and accountability in its policies of liberalization of companies or the privatization programme and the impact on Foreign Investment in Nigeria. This study will articulate the need for review of some of the existing regulatory and legislative organs of foreign direct investment in Nigeria so as to meet up with what is obtainable in larger developed economies of the world today.

1.6 SCOPE OF STUDY

Since the study of foreign investment is a subject matter that cuts across other disciplines like economics, law, political science, international relations, banking, etc. we shall for the purpose of this study be restricting ourselves mostly to the legal phenomenon of foreign investment needs.

This study will focus on the importance of having a detailed legal framework for promoting foreign direct investment in Nigeria. It will take a comprehensive look at the various legislative and institutional responses of Government in promoting Foreign Direct Investment in Nigeria since independence in 1960. It will also examine the issues and challenges faced so far; the responsibilities of government in ensuring best practices

in governance that will encourage Foreign Direct Investment in Nigeria and the performance of the various institutions towards ensuring that there should be Foreign Direct Investment in Nigeria. The research will also explore several major milestones in the history of International Investment law and Foreign Investment in Nigeria.

1.7 LITERATURE REVIEW

International Investment law enjoys growing practical as well as scholarly attention. With increasing number of multilateral and bilateral investment treaties, investment provisions in preferential trade agreements and investment treaty arbitrations, international law scholars, legal practitioners, civil society, investment law policy makers, international law organizations and investment treaty negotiators increasingly focus their interest on this field of International law. At the same time, many conceptual questions relating to international investment law remain insufficiently studied.

However the topic of this research encompasses other related disciplines apart from law. It is in this regard that attention would be paid to those other related disciplines in the course of this research.

Some examples of such related disciplines are:

(i) economics

(ii) political science (e.g. political economy)

(iii) international relations

(iv) history, etc.

While it is true that texts and materials abound in some of these interrelated disciplines apart from law, it is difficult to say so when such interrelated disciplines are merged

together with law. Suffice it to say also that in some of these areas where these materials abound, they have been very inadequate and so have not desirably addressed or tackled the problems of the promoting foreign direct investments in Nigeria as would have been expected.

The desirability of an urgent review of these existing literatures now becomes imperative and timely. It is obvious that some of these existing texts and materials have fallen short of recent municipal and international legislative overhauls that have been brought to bear on present day international commerce and investment needs.

This paucity of texts appears to be threatening the comfortable socio-economic equilibrium of Nigeria, its economies and to some extent even associated business partners. It is therefore, the intention that this research work would provide the missing links or lacuna in the area of promoting foreign investments in Nigeria and underscore the challenges to Foreign Direct Investment as well the achievements so far.

One of the authors that have written extensively on the subject of Foreign Investment is Professor George Schwanzenber, who in his book titled "Foreign Investments and International Law"[8] stated that:

> the status and protection of investments abroad are central and perennial, but are governed by the ever-changing themes of international economic law. In one way or another, these problems have concerned me for over forty years. My interest in them dates from the late twenties when I studied the impact of Soviet Union on international law and was surprised to find that this impact was considerably less than that of international law on former Soviet Union. When at the same time, I examined the legal aspects of the activities of Ivan Kreuger and his

[8] (London: Stevens & Sons Publishing Co Ltd. 1979) at p. 25.

> transnational watch empire; I was again confronted with the limitations imposed by international law on the discretion of the state parties to such government contracts.

One obvious factor in this book is the fact that the author concentrated his efforts on the developed economies and did not give any practical attention to third world economies of which Nigeria belongs. The insufficient nature of materials on this subject that reflects the framework for the promotion of foreign investment in Nigeria has provided a veritable ground for this research to be carried out.

Professor Ray August stated that:[9]

> the regulations governing foreign investments are commonly set out in "investment laws," and "investment codes." In socialist countries (such as the People's Republic of China and Vietnam) which only allow investments in form of joint ventures, the regulations are usually called "joint venture laws." The purpose of these laws is the erection of a legal framework that will attract and put to work foreign capital … While the form that investment regulations take arises from country to country and the underlying purpose of the regulations are generally the same worldwide. These include (a) promoting local productivity and technological development, (b) encouraging local participation, and (c) minimizing foreign competition in economic areas already well served by local businesses.

It is trite to say that there is no single framework that has proved to be all embracing without taking into considerations, the varied socio-economic factors of each state and its people.

Professor Sornarajah in his book titled "The International Law on Foreign Investment"[10] dwelt so much on this area of the law. In the book, there was no where the promotion and protection of foreign investments through legal framework was given a chapter. Although there were sporadic mention of the promotion and protection of foreign

[9] International Business Law (Text, Cases and Readings) New Jersey: Prentice-Hall Inc. 1993.
[10] (Cambridge: Grotius Publications, Cambridge University Press, 1994).

investments through the legal framework, this was not adequately tackled. A research work of this nature would be desirable so as to address the missing materials.

The works of Wolfgang Friedman[11] has equally contributed in no small measures in the area of foreign investment and international law. One basic problem of this great scholar's works in this perspective is the fact that recent legislative, investment and international trade codes have not being embodied into these works.

There have equally being some indigenous texts in Nigeria dealing with foreign investment laws and practice. The works of the learned Ajomo in "Regulation of Trade and Investment in an Era of Structural Adjustment: The African Experience"[12] and "New Dimensions in Nigerian Law"[13] are some of the materials that are readily available in respect of the subject matter of this research work. However these works are not all encompassing because they did not examine the legal framework regulating foreign investment in Nigeria.

Professor Osita Eze[14] is another Nigerian author that has equally written vastly on this area of the law specifically the area dealing with investment laws and transfer of technology. But just like the other texts or materials earlier on mentioned, the non-examination of the basic legal frameworks make these materials not to be comprehensive enough. But taking a look at the work under reference, it would be

[11] Multilateral Investment Insurance and Private Investment in the Third World (Frankfort: Institutfur Wirschafts-Forschuny, 1984). See also the works of Woster.
[12] Ajomo, M.A. et al (ed) Regulation of Trade and Investment in an Era of Structural Adjustment: New Dimensions in Law (Lagos: Nigerian Institute of Advanced Legal Studies, 1995).
[13] Ajomo, M.A. (ed) (Lagos: Nigerian Institute of Advanced Legal Studies, 1989).
[14] "Transfer of Technology to Developing Countries" in Aguda, T.A. (ed) New Trends in International Commercial Law (Lagos: Nigerian Institute of Advanced Legal Studies, 1986) pp. 81-92.

observed that a lot of changes have taken place within the country's socio-economic laws and policies.

Dr. Kachikwu's work titled "Nigeria Foreign Investments Law and Policy"[15] is another indigenous work in the area of foreign investments law and policy in Nigeria. This text was published in the year 1988 which is about twenty years to the date of this present research. Even though some basic legal frameworks were considered within the contemporary Nigerian context, the fact that several legislations have emerged after the publication of this work makes the work not to be comprehensive enough.

The work of Professor Olufemi[16] represents another scholarly contribution in this area of discussion. Just like the problems associated with most of the texts and materials referred to earlier, this work has not provided the nexus as far as normative and regulatory foreign investment policies and legal framework that contemporary Nigeria desires is concerned. These texts have not only being restrictive in dealing with the subject of this research work but also not comprehensive enough with up-to-date legislative enactments and foreign investment laws and practice.

In Adamu's (2004)[17] opinion, direct investment implies provision of capitals from a foreign nation in shares or any other equity, securities or corporate entities, which could be in form of foreign direct investment of the host nation. This work dwelt more on economic indices and did not make reference to the relevant laws that encourage foreign Direct Investment in Nigeria.

[15] (Lagos: Mikzek Law Publications, 1988).
[16] "Economy of Private Investment Policy in Nigeria". The Journal of Modern Studies (1972) Vol. 10, p. 46.
[17] Adamu I (2004). An Appraisal of the Legal Framework for Foreign Investment in Nigeria. Modern Practice J. Fin. Invest. Law, 8(1&2): 128–159.

Empirical results on the complex series of connection between Foreign Direct Investment and economic growth have been a recurring subject of debate. One of the earlier studies was Voivodas (1973),[18] who investigated the relationship between exports, foreign Capital Inflow and the rate of growth in domestic product. This work did not discuss the legal framework for the promotion of Foreign Direct Investment in Nigeria and focused more on economies of developed countries.

Blejer and Khan (1984),[19] in their empirical studies of foreign capital flow to developing countries, indicated that changes in output are the most important determinations of private foreign capital flow. However, Serven, (1992)[20], recognized the sensitive of investment to cyclical variations in output, suggesting that a short-term recession may have long-term effects by causing a deep investment slump that permanently traps the economy in a low – growth, low-investment equilibrium.

The above mentioned publications are not indigenous and so have not taken into consideration many socio-economic factors like governmental policies, new legislative or legal regime of Nigeria and other third world countries before arriving at some of their conclusions or proffering some of the solutions contained therein the said papers. The publication has equally not taken into consideration recent legislative enactments both within the municipal and international law framework and context.

[18]Voivodas, C.S., 1973. Exports, foreign capital and economic growth. J. Int. Econ., 3(1).
[19]Blejer, M.I. and M.S. Khan, 1984. Government policy and private investment in development countries IMF Staff Papers. 31 June, pp: 309-408.
[20]Serven, L. and A. Salimano, 1992. Private investment and macroeconomic adjustment: A Survey. World Bank Observer, 7(1).

Oyaide (1977)[21] study the role of direct foreign private investment (DFPI) in the economic development of Nigeria. Using indexes of dependence and development as parameters of Nigeria's economic dependence and development, he suggested that studies on the role of foreign investment in host countries should entail time series analysis of specific features of the host countries and of technology by which (DFPI) reveals it's most important effects as a means of delineating the need and proper use of foreign investment in economic growth. He concluded that DFPI caused both economic dependence and development. This work did not specifically mention the legal instruments that encourage economic vide Foreign Direct Investment.

Eke *et al*. (2003)[22] in their study used causality test to analyze the impact of FDI on economic growth in Nigeria. They investigated the causal test from foreign private investment to GDP and causality test from GDP to foreign private investment. The results indicate that causality runs in both directions. They concluded that foreign direct investment is relevant and also a significant determinant of real development in Nigeria. This work dwelt on the economic parameters for Foreign Direct Investment and did not discuss the instruments that provide the backbone for such growth.

In a survey of African countries Dupasquier, and Osakwe (2006)[23] identified poor corporate governance, unstable political and economic policies, weak infrastructure, unwelcoming regulatory environments and global competition for FDI flows as impediments standing in the way of attracting significant FDI flows. This corroborates

[21]Oyaide, W.G., 1977. The Role of Direct Foreign Investment: A case study of Nigeria, 1963-1973. United Press of America, Washington D.C.
[22]Eke, N.A., *et al*., 2003. Foreign Direct Investment and Economic Growth in Nigeria. A causality test. J. Econ. Soc. Stud,Vol:3.
[23] Dupasquier, C. & Osakwe, P.N. (2006). Foreign Direct Investment In Africa: Performance, Challenges, and Responsibilities. Journal of Asian Economics 17 241–260.

the findings of Jerome and Ogunkola (2004)[24] which assessed the magnitude, direction and prospect of FDI in Nigeria. The authors ascribed the low level of FDI in Nigeria to deficiency in the country's legal framework concerning corporate law, bankruptcy and labour law, in addition to institutional uncertainty. The above works did not elaborate on the legal framework that would address the problems militating against Foreign Direct Investment in Nigeria.

In his study of the determinants of FDI in Nigeria, Anyanwu (2011)[25] identified change in domestic investment, change in domestic output or market size, indigenization policy and change in openness of the economy as major determinants of the FDI. He further noted that the abrogation of the indigenization policy in 1995 encouraged FDI inflow into Nigerian and that effort must be made to raise the nation's economic growth so as to be able to attract more FDI. Much as this literature comprehensively attempted to x-ray the factors responsible for the growth of Foreign Direct Investment in Nigeria, it did not make explicit analysis of the role to be played by the legal framework in determining this economic growth.

This research work would provide those missing links in order to give a comprehensive outlook to the general legal framework with clear intent and purposes desired of being achieved in this research work.

[24] Anyanwu, J. C. (2011), Determinants of Foreign Direct Investment Inflows to Africa, 1980-2007, Working Paper Series N° 136, African Development Bank, Tunis, Tunisia.
[25] Anyanwu, J. C. (2011), Determinants of Foreign Direct Investment Inflows to Africa, 1980-2007, Working Paper Series N° 136, African Development Bank, Tunis, Tunisia.

1.8 ORGANISTIONAL LAYOUT

This thesis comprises of six chapters. Chapter one deals with the general introduction of the work and consists of background of the study, statement of research problems, objectives and scope of research, justification for the research, research methodology and literature review.

Chapter two deals with the definition and history of foreign investment in Nigeria and also an analysis of the Nigerian perspective on foreign investment. Chapter three deals with the scope and forms of foreign investments, and evaluation of the legal framework regulating foreign investment in Nigeria.

Chapter four deals with the sectoral analysis of foreign investment and appraisal of the privatisation programme and investment trends in Nigeria. While chapter five deals with the international legal perspective on foreign direct investment in Nigeria.

Chapter six deals with the conclusion, which includes the summary of the study, findings and recommendations on how promotion of foreign investment will be accelerated.

CHAPTER TWO

DEFINITION AND HISTORY OF FOREIGN INVESTMENT IN NIGERIA

2.1 MEANING AND DEFINITION OF FOREIGN INVESTMENT

It appears that there is no hard and fast rule in defining "foreign investment" either from the concept of municipal or international law. The term 'Foreign Direct Investment' (FDI) lends itself to different definitions depending on the context in which it is used. In the context of trans-national business investments carried out in foreign jurisdictions, it can be defined as *"an investment undertaken by an enterprise that is either wholly or partially foreign-owned"*.[1] In this sense therefore, FDI refers to the various forms of investments undertaken in a country by entities whose ownership, control or management are foreign to the jurisdiction in which the investments are undertaken. [2]

The reason for this among others is that, the concept of foreign investment is usually defined from the view point of the person making such a definition. This however does not go to say that there are no common features that have constantly come to be associated with such definitions, notwithstanding who is making them.

The encyclopedia of Public International Law[3]defines "foreign investment" as: a transfer of funds or materials which include, patents, trademarks, etc from one country (called the capital exporting country) to another country (called the host country) in return for a direct or indirect participation in the earnings of the enterprise.

The above two definitions appear to differ from the definition given by some authors and scholars of International Investment Law. According to Sornarajah:

[1]WID Country Profile; Nigeria, UNCTAD, http://unctad.org

[2] Syed Akhter, Foreign Direct Investment in Developing countries: The Openness Hypothesis and Policy Implications, The International Trade Journal, Vol. 7. (1993)

[3] 1980 Vol. 8 p. 246

> foreign investment involves the transfer of tangible or intangible assets from one country into another for the purpose of use in that country to generate wealth under the total or partial control of the owner of the assets.[4]

It appears from the above definitions that the first two definitions of foreign investment appear to be limiting it to only tangible properties or assets especially funds. The definitions did not take into consideration that intangible properties or assets like intellectual property rights especially patents and copyrights are part of intangible assets in foreign investment law and practice.

The third definition on the other hand restricts the definition to transfer of tangible or intangible assets for the purpose of wealth creation. The author also was of the view that such tangible and intangible assets should be contrasted with port folio investments in order to distinguish between direct foreign investments and port folio investments.

Since international co-operation in the area of economic development is on the increase between states, and also between sovereign states and nationals of other sovereign states, changes in national policies and often lead to outward search of investors and managers.[5]

For the purpose and intent of this research work, foreign investment can therefore be defined as: the provisions of capital from a foreign sovereign state in shares, equities, patent or trademarks, or securities which can be in form of either direct investment or indirect investment to the host state in order to secure income or profit from its utilization.

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[4]Sornarajah, M. The International Law on Foreign Investment (Cambridge: Cambridge University Press, 1994) at p. 4.

[5]Obilade, A.O. "The role of arbitration in international trade," paper presented at the National Workshop on the Law and Practice of International Trade. organized by the Department of Jurisprudence and International Law, Faculty of Law, University of Lagos, Lagos, 17th-19th July 1990 at p. 16.

2.2 HISTORICAL ORIGIN OF FOREIGN INVESTMENT

On the face of it, traditional investment is as old as mankind itself. On the global context, the historical development of foreign investment has to a large extent been dependent on remarkable changes and expansions in direct foreign investment. This in effect has a significant impact on both the patterns of economic growth of both individual enterprise and the national economies of investing and host states.[6]

Prior to the First World War, about 90% of the international capital movements were in portfolio investments.[7] This was through the acquisition of securities by individuals and institutions issued by foreign institutions without any control over participation in their management. This form of foreign investment naturally developed from international trade which has been with mankind since the inception of interstate relations.

The history of foreign investment mostly in the eighteenth and nineteenth centuries were largely bye products of colonial expansions which did not need any international law protection. Early development of foreign investments could be said to be in existence in places like, the Middle East, Africa, Asia and other parts of the world.

However, it is necessary to say that each of these areas developed peculiar laws and regulations which governed trade and investments between different states. The then Russian revolution and the spread of communism in Europe equally gave rise to the

[6]Dunning, J.H. Studies in International Investment (London: George Allen & Unwin Publishers, 1970) p. 1.
[7]Aderonke Adejugbe; "Foreign Direct Investment in Nigeria; overcoming legal and regulatory challenges to Foreign Direct Investments in Nigeria: is the Nigerian government doing enough? , (Independent) May 1, 2013.

acquisition of foreign property on the basis of the economic philosophy. It is trite therefore that foreign investment had existed mostly during the existence of empires. However, the existence of foreign investment became more pronounced after the dissolution of these empires. This became necessary after the imperial powers had broken the monopoly whereby they became exporters of capital to their former colonies and other demanding states.

Foreign Direct Investment began to assume a dominant position in the world economy only after 1914. The United States' investors, for example, increased direct international investment considerably during and after the First World War by investing in and acquiring the issued additional obligations or equities of parent companies, thereby gaining control of the foreign enterprises and forestalling the floating of additional foreign bonds.

The Keynesian revolution and economic situation of the inter-war years changed the complexion, though not the principles of the earlier theories. They merely introduced new approaches to deal with capital movements under paper standard (instead of gold), fixed exchange rates, and controls on trade of goods and capital. Despite these developments, a considerable amount of investment still assumed the portfolio form and theorists like Keynes[8] confined their analysis of foreign investment largely to movement in portfolio capital.

The world monetary collapse of 1930 which was earlier preceded by a dwindling emphasis on pursuit of interest rate, caused a profound change in the global thinking and

[8]Keynes, J.M. "Foreign Investment and the National Advantage". The "National Advantage" cited in Dunning, op. cit. p. 3.

attitude towards internal investment. The immediate consequence of the depression was to curtail the outflow of capital movement and reduce the value of those outstanding. Compared to the substantial net outflow of capital from leading capital exporting countries, between 1905 and 1914, and later between 1919 and 1929, there was a drastic drop in the later years which led to a net repatriation between 1929 and 1939.[9]

Notwithstanding this negative development, direct investment survived the depression and increased without any adverse control measure by the investing states.[10] By the year 1939, most of today's foreign investors comprising the multinational companies had established foreign subsidiaries although in small dimensions. For example, the United States and the United Kingdom firms like Lever, Singer, General Electric, and Nestle, owned sizeable foreign direct investments in manufacturing ventures in other countries.

After 1939, international investors became more astute and wisely avoided free international capital market and interest rates solely governed by market forces. Political reasons also made foreign investors more wary in dealing with foreign securities to the benefit of direct foreign investment. Today the great part of private foreign investment is in form of foreign activities of multinational corporations.

It is significant to note that the United Nation's Conference on Trade and Development (UNCTAD) in a study carried out in 1992 reported that overseas investment is now the province of Transnational Corporations (TNCs). With about 37,000 or thereabout, TNCs control more than 2 billion dollar worth of direct investments with an annual placement

[9] Adamu Ibrahim, op. cit pg 34.

[10] Lewis, C. America's State in International Investment (Washington: The Brookings Institute, Washington, 1938) p. 331.

in 1991 of $150 billion and held one-third of all private sector productive assets. Sales by TNCs outside their native countries totaled $5.5 trillion in 1992.[11]

Coupled to the above scenario is the emergence and expansion of other markets which include the Eurodollar and the Eurobond which equally increased investment capital mobility. Portfolio investment still accounts for 1/5 of all the international investments and its movement is still determined and measured by tools of international economics unlike flows in direct investment which are differently determined by the theory of growth.[12]

It is worthy to mention that foreign aid flow played and continues to play a good role in the history of foreign investment. After the Second World War (1945), public inter-governmental loans and donation (aid) became an important component of international capital movement. The United States having emerged the strongest and the richest capitalist country after the war instituted a bilateral aid programme to redistribute dollars which enabled other countries to buy United States' exports.[13]

Secondly, the aid was geared towards investment for the reconstruction and remobilization of Europe under the Marshall plan.[14] The other aim was to ensure that the United States has adequate advantage in terms of its military, economic and political activities. For example, the group of seven industrialized nations (G7) met in April 1993 to determine the amount of aid to be given to Russia after the collapse of the USSR. At

[11] Dunning, op. cit. p. 3.
[12] Dunning, op. cit. p. 4.
[13]Pomerance, M. "The U.S. and Self-determination: Perspective on the Wilsonian Conception (New York: American Journal of International Law, 1989) pp. 201-222 at p. 219.
[14] Under the Marshall Plan, investment and loans totaling over 4 billion U.S. Dollars were channeled into Western Europe between 1947 and 1952

that summit, the sum of U.S $28 billion was agreed upon as the money needed to rebuild the then USSR.

In the present global pattern of foreign investment, Japan is fast overtaking the United States and other European states as a state that is the leading exporter of foreign investment capital. This is also true of South East Asia where the United States-based multinationals were previously the largest investors followed by those of Britain and other European countries. Japan has taken over as the leading investor in many states of the region.[15]

2.3 THE NIGERIAN PERSPECTIVE OF FOREIGN INVESTMENT

The historical antecedent of foreign trade in Nigeria is basically linked to the country's trade relationships with other nations and merchants even before the 19th century. The misconceived notion of Nigeria being a sub-Saharan tropical African country inhabited solely by stagnant and subsistent farmers with little or no contact with other countries was just a misleading economic misnomer used by western imperialists for their own socio-economic goals. History has it that Nigeria had established an elaborate and extensive trading relationship with other African countries even before the advent of the Europeans. The Trans Saharan trade at the end of the 15th century had already established Kano city as the largest market in West Africa as at the 19th century, for example. It was after the trans-Saharan trade that negligible number of Europeans like the Portuguese started establishing economic contacts with the West Coast in the 15th century. In the 16th century, England, France and Holland subsequently joined the existing European groups.

[15] Sornarajah, M. op. cit. p. 17.

Though various reasons have often been availed as to why these Europeans came to Nigeria, suffice it to say that economic goals were the predominant and principal considerations of such advent at the Nigerian coastal waters. This is because, as at that particular period, the European and American economies were principally agrarian in nature. The urgent need for raw materials (human beings) to be supplied for the growth and sustenance of the economy of that time informed the advent to Nigeria and other African countries.[16] It was in view of the above scenarios that the basic "Commodities" that were exported to Europe and America then were cargoes of African human beings.

In the 19th century, Lagos became an important slave Port despite the negligible efforts of the British colonial masters to stem it.[17] The industrial revolution of the middle and later part of the 19th century in Europe later made the export in slaves not only unattractive but several religious and humanitarian groups had mounted severe pressure for its abolition. The need for an alternative source of trade and goods to be exported to Europe and America became imperative.

Europeans and North American industrialists were forced by the emerging scenario of this competitive system, to seek in less developed countries abroad, for opportunities to control raw material supplies, profitable markets, investment fields and avenue for the realization of surplus value.[18]

Several other European countries particularly British investors penetrated the coastal areas of Nigeria in the middle of the 19th century and as a result of their quest for the

[16] Adamu Ibrahim, op. cit pg 37
[17] Clark, K. E. & Carl, L. (eds) Growth and Development in the Nigerian Economy, (Michigan: Michigan State University Press 1970), P.172.
[18] Lennin, I.L., Imperialism: the Highest Stage of Capitalism, Collected Works, Vol. 22 (Moscow: Progress Publishers, 1994) p.262.

control of the resources and market, acute rivalry developed amongst them. Nigeria's proximity to the sea as well as her vast fertile land from the Delta up to the North as well as her favourable weather for the production of cash crops proved irresistible to the foreign investors and colonialists.

Though the economic rivalry between these countries continued unabated, the granting of a charter to the then Royal Niger Company (RNC) in 1886 which gave it the right over the land and minerals of Nigeria brought such rivalry to an end.[19]This charter to the Royal Niger Company (RNC) was subsequently revoked in 1899. However, before the revocation of the said charter, RNC had made some substantive investments in areas like provision of port facilities, roads, railways and improved seed and farm inputs. The company equally made extensive investment in the development of the Nigerian agrarian economy from consumer crop to cash crop production as well as the mineral base.

When the British government subsequently revoked the charter and took over the rights therein, she paid the RNC the sum of £150,000 plus half of the royalties obtained from its operating areas.[20] The said agreement was for a period of 99 years but was subsequently redeemed by the Nigerian government by a payment made to the United African Company (UAC), which was the heir apparent to (RNC).[21]

From the above analysis, it is pretty clear that in as much as it has been argued in some quarters that the European's invasion of Africa and Nigeria in particular were for

[19] Adamu Ibrahim, op. cit pg 34.
[20]Kachukwu, I. E., Nigerian Foreign Investment Law/Policy, (Lagos: Mikzek Law Publications, 1988) P.17
[21]Hailey, H. An African Survey (London: Oxford University Press 1985) P.387. See also Kachukwu, I. E., Nigerian Foreign Investment Law/Policy, (Lagos: Mikzek Law Publications, 1988) P.17

religious and humanitarian activities, their economic interests far outweigh in their orders of priorities. This is because the Europeans realized that without an elaborate economic base and control of the host nation's economy, both their religious/humanitarian activities as well as their economic expansionist intentions could have been greatly jeopardized.

2.4 FOREIGN INVESTMENT IN PRE-COLONIAL NIGERIA

With the exit of the RNC, the British colonial administration continued the economic conquest of Nigeria through some of its companies. This was made easier with the completion of the colonial war whereby a systematic process of attracting foreign investment into the colony in line with the need of the metropolitan Britain in areas of raw material, communication, and the market were put in place.[22] In order to achieve their targeted goals of economic conquest of Nigeria, the British colonial masters introduced three key economic policies, which fundamentally affected the economic development of Nigeria.

Firstly, there was the Colonial Land Policy, provided for under the Land and Native Rights Ordinance of 1910 and 1917.[23] By the above ordinance, the agricultural sector was restrictively "preserved" for the natives for agricultural production. In effect, before any foreigner could acquire land, it must be with the consent of the colonial masters.

The above scenario is, however, different from what was obtainable in East Africa for example where the white settlers were encouraged to settle and substantially invested in

[22] Ohikoshi, O. Foreign Investment in the Nigerian Economy: Problems and Prospects (Ibadan: Spectrum publishing Co. Ltd. 1992) P.21.
[23] Kachukwu, I. E., op.cit, Pg. 24

the agricultural sector. The resultant effect of this ordinance was that Nigerians were only encouraged and restricted to agricultural activities whereby they were encouraged to change from food crops to cash crops thus improving their production. Increase in yield was the ultimate intention, whereby the foreigners were in turn encouraged to invest and dominate trading and commercial activities in abundance. The Nigerian economy was basically an agrarian type as a result of the above development which adversely affected its economic development to the interest of only the colonial masters.

The second policy that was introduced by the colonialists was that of biological research for export crop. In this area, a good demonstration of an impressive foresight was witnessed through the efforts of the colonial masters. Some dividends were realized in some investments in the early 50s and 60s in form of improved and hybrid raw materials produced for export and for processing by indigenous local firms.[24] The introduction of marketing boards in place of indigenous trading firms was also another landmark of the economic policies of the British colonial masters. These boards were able to dictate the prices of commodities and capture excess revenue which the colonial masters channeled through the government of the day for the developmental purposes of mainly their home economy, and to a little extent, the Nigerian economy in a lopsided application of the dual mandate doctrine.[25]

One feature of the marketing Boards was, the almost non-existence of substantial revenue from other trading firms to the Nigerian economy.[26] This was because these marketing Boards hijacked the market situations to the extent that other firms could not

[24]Kachukwu, I. E., ibid
[25] Hancock, W. K. Survey of British Commonwealth Affairs (London: Oxford University Press 1960) P.54 See also Mcphee, A. The Economic Revolution in British West Africa, (Aberdeen. Routledge & Sons Press 1966), P.25.
[26] Ohikoshi, O., op.cit. Pg. 22.

invest in the processing of agricultural produce into manufactured goods.[27] This is one of the genesis of the almost total neglect of the agricultural sector of the Nigerian economy since little or no foreign investment was witnessed in this area.

The above development cannot be surprising to any scholar of economic history because historically, the development of any agricultural sector in any developing economy, by such country's colonial masters, has never been of any priority to only colonialists. This is because agriculture being one of the bed rocks of a nation's economic growth, when desired attention is given to it, the colonialists' foremost interest of commercial adventurism would ultimately be sacrificed on the alter of such agricultural development. In some little areas where foreign investments were made on agriculture, it had always been at the whims and caprices of the metropolitan British Home Office to the detriment of the general economic development of the agricultural sector of Nigerian economy.

An economic historian, Greepe Williams,[26] succinctly put it this way:

> clearly, the colonial development and investment policy from 1900 to 1940 was basically for maintenance of law and order, laissez faire, and foreign trade, originated with Britain as the principal trading partner. The colonial administration, supported by its monopoly capital, also took steps to ensure the commoditization of labour, the commercialization of land (although with strong control on alienation) reorientations of the peasant labour towards cash crops production, effective miniaturization of the economy, creation of national market large enough to serve the needs of foreign capital, establishment of basic infrastructure and systematic but uneven destruction of pre-colonial pattern of production and commerce.

[27] Adamu Ibrahim, op.cit pg. 35
[26] Nigerian Economy and Society (London: Rex Collins Ltd. 1968) P.109-112.

In another view, a political economist, Peter F. Drucker,[27] opined that in assessing transnational corporations and developing countries, four assumptions though rebuttable may be made as follows:

(a) the developing countries are important to the transnational corporations and a major source of sales, revenue, profits and growth for them often referred to as "corporate capitalism",

(b) foreign capital whether supplied by governments or by businesses, can supply the resources, and especially the capital resources required for economic development,

(c) the ability of the transnational company to integrate and allocate productive resources on a global basis and across national boundaries, and thus to substitute transnational for national economic considerations, subordinates the best national interest of the developing country to "global exploitation",

(d) the traditional 19th century form of corporate organizations, that is, the "parent company" with wholly owned "branches" abroad, is the form of organization for the 20th century transnational company.

No matter what assumption or theory that may be adopted by any scholar of economic history, the incontrovertible fact remains that in the process of foreign investment and "development", extractive industries inevitably have to go to a place where the basic materials or resources are available in form of petroleum, copper, ore, Bauxite, gold, tin, columbite etc. Whether these natural resources are found in either a developed or developing state is of little importance to most transnational corporations. Thus, the availability of petroleum resources, for example, have greatly contributed to the

[27] "Multinationals and Developing Countries: Myths and Realities" In Readings in International Political Economy (ed) Balaam, D.N. et al (New Jersey: Prentice Hall Inc. 1996) at P.315.

presence of transnational corporations like, Chevron, Agip, Total, Elf, Mobil, Texaco etc in the shores of Nigeria up till date.

However, it must be noted that modern day transnational corporations have distinguished themselves from colonial corporations. One of the salient features of modern day transnational corporation is its organizational structure and the speed with which it can exercise control over its network of world-wide subsidiaries which distinctly sets it apart from the old colonial corporations.

Another feature as argued by one writer is its capability of bearing rights and duties in positivist international law.[28] The theory of transnational corporations assuming rights and duties in positivist international law cannot presently be said to be absolutely tenable. This is because of the reality that it is as dominant a factor on the international economic scene as the nation state.

A significant development in this regard is that there are investment codes which seek to identify the duties which such transnational corporations owe to the host state and in an available term, create duties and rights towards such multi- national corporation owed by such host state. It would be observed here that if this form of code had been in existence in the colonial Nigeria, a great deal of the economic exploitations that went on then would reasonably have been averted to a minimal extent even if not in whole. This is so because transnational corporations have wielded tremendous powers in shaping the laws on foreign investment mostly to their own advantage and to the socio-economic detriment of their host states, through their ability in making new legal norms

[28]Sornarajah, M. The International Law on Foreign Investment (Cambridge: Cambridge University Press 1994), P.52.

independently. This is where private power can in some cases determine the making or formulation of norms, which regulate the principles of international law.

2.5 POST INDEPENDENCE ERA

Nigeria became an independent sovereign nation on 1st October 1960. Notwithstanding the independence, the investment climate and policy making still remained colonialist. One Nigerian author summed it up this way that:

> the investment climate in Nigeria at independence was marked by a clear control of the economy by foreign investors. The Europeans and Americans were at the top controlling the large industries. The Asians in the middle doing much of the wholesale and retail trading and the Nigerians at the bottom continuing in farming, petty and other rudimentary services.[29]

The above situation is as a result of several years of colonial rule and economic domination by Europeans within the nation's economic life. The way and manner the British colonial government divided the country under the Federal Constitution into regions further aggravated the issue of this dominance, whereby indigenous industries and managers were not encouraged nor even established in some quarters. Another Nigerian author stated it that:

> the political tinkering of Nigeria prior to independence also created the problems of national unity which still plagues the country today. After introducing the Federal Constitution, there was the difficulty of removing the individual's established allegiance to his kinsmen and region and transferring the same to impersonal state. It was thus agreed that independence should go together with economic prosperity and improved standard of living which would command the loyalty of the citizen to the state. To achieve this, plans needed to be formulated to diversify production from peasant agriculture, exclusive private enterprises and even unregulated foreign ownership. Government catalytic action became inevitable because

[29] Kachikwu, I.E. Nigeria Foreign Investment Law and Policy, (Lagos: Mizek law Publications 1988), at P.21.

> investment and economic growth could not occur spontaneously; hence the emergence of development planning billed to efficiently allocate the available resources into the various productive channels, to generate minimum level of development.[30]

By the post independence era, in Nigeria, there witnessed the promulgation of many laws in the country's economic life. Some of these legislations were intended to achieve economic independence and development which was a departure from the pre-independence era. Much as some of these laws were desirable at the periods under review, suffice it, however, to say on the other hand that its implementation was another problem. This is because no matter how beautiful such legislations may be, poor or improper implementation can on the other hand lead to economic dependence and domination.

The practice however was that the foreigners monopolized areas of trade which could have been left to the local people. The consumers' up-till-date is left with the inevitable choice of foreign or local goods and there was natural preference for goods produced by the technically superior foreign powers.[31] The introduction of some legislation like the Nigerian Enterprises Promotion Act [32] did not create the desired or anticipated investment climate to arrest the above scenario.

It did not adequately address the issue of foreign participation either because local participation did not develop or gave any appreciable growth to the nation's economy. This is because capital and technology largely depended on the foreign powers. Since capital and technology are key indices of any economic growth and development, the

[30] Olufemi, E. An Economic History of Nigeria 1860-1960 (London: Mathuen Co Ltd., 1973) p. 44. See also Dibor, C.J. op. cit. p. 41.
[31] Yerokun, O. "The Changing Investment Climate Through Law and Policy in Nigeria" in Okonkwo, C.O. (ed.) Contemporary Issues in Nigerian Law: Essays in Honour of Judge Bola Ajibola (Lagos: Nigerian Institute of Advanced Legal Studies, 1994) pp. 219-247 at p. 222.
[32] Cap. 303 Laws of the Federation of Nigeria 1990.

good intent behind the promulgation of this legislation was partly defeated. It must be stated that there was an amendment to the above legislation with another.[33]

Under this amendment, meaningful foreign participation was allowed and encouraged in the nation's economy. Even the nation's constitution to some larger degree encouraged foreign participation in order to create a free participating market economy unlike the previous pre-independence constitutions.

It is worthy to note that in the post-colonial era, the economy of the country was largely sustained by exportation of its agricultural products, whilst divesting majority of its resources to the oil and gas sector, upon the discovery of oil in the 1970s which attracted many foreign companies to tap into this resource.[34] Thus, investment in the economy was largely vested in production, exploration and refining of petro-chemicals, therefore, making Nigeria the largest oil producer within the Sub-Sahara region of Africa.[35]

However, at this point in time, the petroleum sector was largely localized.[36] This localization era saw the light of day as a result of the Nigerian Enterprise Promotion Decree of 1972 repealed by the Nigeria Enterprise Promotion Act of 1977, enacted in order to promote local participation in the Nigerian economy. It is in fact noteworthy

[33] Nigerian Enterprises Promotion (Issue of non-voting Equity Shares) Act Cap. 304, Laws of the Federation of Nigeria 1990.
[34] Sunday Akinmulegun, Foreign Direct Investment (FDI) Trends in Developing Nations: Nigeria Experience in a Globalization Era, 146-156 International Business And Management Vol. 4, No. 1, (2012).
[35] Marcia. E. Miller Et Al., **U.S. Trade and Investment With Sub-Saharan Africa**, 4th Annual Report (Dec. 2003), http://www.usitc.gov.
[36]Nigeria-Foreign Investment, Encyclopedia of the Nations , http://www.nationsencyclopedia.com.

that this era was characterized by Import Substitution Industries (ISI) in which the Government was largely involved.[37]

The establishment of Import Substitution Industries (ISI) was an economic policy by the Nigerian government that advocated replacing foreign imports with domestic production. ISI was therefore based on the premise that the country should reduce its foreign dependency through the local production of industrialized products. The ultimate aim of this policy was to ensure economic development and self-sufficiency through the creation of an internal market. ISI works by having the state lead economic development through nationalization, subsidization of vital industries such as the oil and gas industry in Nigeria.[38]

It is also pertinent to state that the First National Development Plan which took place between the period of 1962-1968 focused on limiting the independence of the Nigerian economy on foreign trade whilst the second National Development Plan which was between the period of 1970-1974 focused mainly on Government acquisition of resources at the level of production further restricted the extent of reliance of foreign goods for local consumptions.[39] These development plans therefore set the stage for government's indigenization policy which effectively curtailed foreign investments in the country for the protection of local production of goods and services.

[37] Developments and Reforms: Nigeria's Commercial Laws, Faculty Of Law Lagos State University, (1998).
[38] Peter Obaseki, Policies and Strategies for dealing with the Problems of Globalization; Globalization and Nigeria's Economic Development, 65-87, Seminar held at Nigeria Institute Of International Affairs, Lagos, (1999).
[39] Pius Okigbo, National Development Planning In Nigeria, Heinemann, (June, 1989)

After the 2nd National Development plan, the federal government set up an indigenisation program in which case, many foreign investments became indigenized under the Nigerian **Indigenization Decree of 1972.**[40] Under the program, the shares of these foreign companies were made available to both the private and public sector and the effect was that the economy was characterised by both private and Government owned enterprises.[41] In the meantime, some businesses were reserved exclusively for Nigerians such as road transportation, media and advertising, production of electronics, amongst others.

Subsequently, in 1977, another Indigenization Decree was enacted which expanded the indigenisation policy to include a wide array of manufacturing businesses.[42] These hostile policies served as a deterrent to FDI in the economy. In fact, according to the media, by implementing these policies "the government pursued a policy of progressive elimination of foreign dominance in terms of ownership and management."[43] As a result, many foreign companies were faced with the only option of entering into joint ventures with the local companies which were either owned by the indigenes or state-owned enterprises.

It is pertinent to note that until recent times, the oil sector was predominantly managed by 70% of Joint Ventures including Shell Petroleum, Exxon Mobil, Chevron, Total and Agip with the Federal government's ownership of about 60percent equity.[44]

[40] Lawrence Azubuike, Privatisation and Foreign Investments in Nigeria, Tulsa Journal of Comparative and International Law (2005).
[41] Lawrence Azubuike, Privatisation and Foreign Investments in Nigeria, op. cit
[42]Investment Policy Review: Nigeria, United Nations Conference On Trade and Development (Dec.2008), http://unctad.org.
[43] Muyiwa Akintunde, FDI Policy Environment And Economic Growth, (Feb. 12, 2013), http://www.businessdayonline.com.
[44] Alex Gboyega Et Al., Political Economy Of The Petroleum Sector In Nigeria (Aug. 2011), http://www-wds.worldbank.org

In actual fact, the 2nd Indigenisation Decree restricted FDIs in three major ways to wit:

i) Expanding the exclusive list of business activities reserved for Nigerians.

ii) Decreasing foreign participation in the businesses reserved for foreigners from 60 to 40 percent

iii) Creating an additional list in which foreign investment was restricted from 100 to 60 percent including pharmaceutical businesses, hotel and oil services.[45]

In this era, prices of oil had sky-rocketed and the government had sufficient funds to invest in infrastructures and social services, imports rose from 21 percent in the 1960s to 83 percent, without focusing on local manufacturing.[46] By the 1980s, there was a collapse in the price of oil and as a result Nigeria incurred a massive external debt which increased from $4.3 billion to $11.2 billion.[47]Nigeria's agricultural sector had declined such that it had begun to import food into the country rather than produce locally.

The local manufacturing level also declined drastically to about 2 percent per annum. This occurrence is described as the "Dutch Disease" which occurs when an increase in export adversely affects other economic activities as a result of poor management.[48]

[45]Investment Policy Review; Nigeria, United Nations Conference on Trade And Development, (2009), http://unctad.org

[46] *Poverty And Welfare In Nigeria,* World Bank, American Writing Corporation, http://www-wds.worldbank.org

[47] Nina Budina Et Al., Nigeria's Growth Record; Dutch Disease Or Debt Overhang, (Jun. 2007), http://siteresources.worldbank.org

[48] The term was coined in 1977 by *The Economist* to describe the decline of the manufacturing sector in the Netherlands (a country whose people are popularly referred to as "Dutch") after the discovery of a large natural gas field in 1959. See "***The Dutch Disease***" (November 26, 1977), *The Economist*, 82-83

Comparing Nigeria to other economies, the statistics show that judging by the average value added per worker on a daily basis; Nigeria has the third lowest productivity rate after Indonesia and India while Brazil, China and South Africa have relatively high productivity rates in comparison with the last three countries.[49] Upon a series of failed attempts to stabilize the economy, various sorts of policies and reforms were implemented between 1981 and 1988.

In 1995, the federal government while reading the financial budget announced the repeal of the **Exchange Control Act** and the **Nigeria Enterprise Promotion Decree** which had deterred foreign investment in the Nigerian capital market. [50] While repealing these laws, the **National Investment Promotion Decree (now the National Investment Promotion Act)** and the **Foreign Exchange (Monitoring and Miscellaneous Provisions) Act of 1995** were enacted.[51] The **National Investment Promotion Act** lifted majority of the restrictions which were previously placed on foreign investors in terms of the businesses in which they could participate, while the **Foreign Exchange Ac**t increased access to foreign exchange.[52]

At the return of a democratic government in 1999, the following policies were implemented:

i) The National Economic Empowerment Development Strategy (NEEDS)

ii) State Economic Empowerment and Development Strategies (SEEDS)

iii) Local Economic Empowerment and Development Strategies (LEEDS)

[49] Giuseppe Larossi Et Al., An Assessment of the Investment Climate in Nigeria, (2009), http://www-wds.worldbank.org

[50] Janet O. Adelegan, Foreign Direct Investment In Nigeria And Economic Growth In Nigeria, A Seemingly Unrelated Model , (2000),

[51]Giuseppe Larossi Et Al., op.cit

[52]Investment Policy Review; Nigeria, United Nations Conference on Trade And Development, (2009), http://unctad.org

These policies were geared at removing all vestiges of restrictions and challenges to foreign investments in Nigeria. NEEDS agenda in particular, focused on attracting foreign investment with particular emphasis on Africans in Diaspora.[53]

Upon implementation of these policies, there was a turnaround in the investment climate in Nigeria, as there were adequate incentives for foreign investments in the country which included tax allowances and rebates, better investment protection regulations and increased opening of key economic sectors to foreign investors without limitations.[54]

As part of the efforts of the government to promote FDI, the former president of the country, President Olusegun Obasanjo who took over power in 1999 consulted with **Multilateral Investment Guarantee Agency** (**MIGA**), a member of the World Bank Group, in order to assist the government in formulating strategies to attract FDI. The representatives of MIGA travelled to Nigeria in order to hold discussions with the Nigerian Investment Promotion Commission and also to conduct trainings to private-owned companies on how to attract foreign investment.[55] They also collaborated with the government in setting up an Investment Promotion Council which consisted of representatives of relevant government departments and MIGA.

More recent Governments have also taken various steps by intensifying more efforts to ensure the free flow of FDI in the country by opening the economy of the country to more foreign investments especially in the field of power generation, provision of telecommunication facilities and infrastructures in the oil and gas sector. It was recently

[53] Investment Policy Review Nigeria, UNCTAD, (2009), http://unctad.org
[54] Janet O. Adelegan, Foreign Direct Investment In Nigeria And Economic Growth In Nigeria, (2000)
[55]Multilateral Investment Guarantee Agency Annual Report, (2010), http://www.miga.org

reported that Nigeria received FDI in the year 2012, in the total sum of $6.8Billion, being an increase of 17.24 percent from the previous year.[56]

It is worthy of note however that despite efforts by the Government, the country's economy is still a far cry from what it aims to achieve in terms of economic growth through Foreign Direct Investment. Financial Analysts in a report made available to the press stated that despite of the reported increase in Foreign Direct Investment, the Foreign Direct Investment level remained " below par" due to factors such as "Nigeria's vulnerability to commodity price movements, insecurity and over-dependence on the oil and gas sector."[57]

[56] Ademola Alawiye, Foreign Direct Investment In Nigeria Tops $6.8 Billion, (Apr.2013), http://www.punchng.com
[57] Ademola Alawiye, ibid

CHAPTER THREE:

SCOPE AND FORMS OF FOREIGN INVESTMENTS AND EVALUATION OF THE LEGAL FRAMEWORK REGULATING FOREIGN INVESTMENT IN NIGERIA

3.1 INTRODUCTION

The scope and forms of foreign investment requirements in any nation, have always been associated with varying socio-economic policies and legal regime of such a country. Basically, any foreign investor may invest in any nation in either of these two broad categories of: foreign direct investment, or portfolio investment as the case may be. The situation in Nigeria cannot be different from what is obtainable globally.

We shall examine these two broad categories of investment from a global perspective, but more importantly as it relates to Nigeria.

3.2 PORTFOLIO INVESTMENT

Concept and Origin:

The origin of portfolio investment could be linked to the advent of international trade and investment in the new economic order. With the advent of growth and the ever-frequent movement of securities in international commerce as well as negotiable instruments, this gave way for the need for portfolio investment. In the case of most third world countries, the end of the Second World War greatly influenced the need for such investments in the new world economic order.

Portfolio investment therefore is, the acquisition of securities by a foreign investor within the host nation's domestic or local market. This in effect means that the movement of foreign currencies from the home country into an already established and existing business of the host country. Under portfolio investment, the foreign investor is

not interested in the managerial control of the companies or businesses, but rather, the returns made out of such investments, like dividends, capital gains, and diversification in his or their stocks acquired.

3.3 DIRECT FOREIGN INVESTMENT

Foreign Direct Investment on the other hand, may be broadly defined as:

> The establishment or acquisition of substantial ownership in a commercial enterprise in a foreign country, or an increase in the amount of an already existing investment abroad to achieve substantial ownership.[1]

In other words, direct foreign investment involves the acquisition of physical items, such as, machineries, plants, factories, buildings, etc. for use in production processes, which inevitably entails the participation of the foreign investor.[2]

Such enterprise whether foreign or national, may be a subsidiary of a parent company, but usually the foreign investor is interested in the control and management of the investment in the host country. One basic characteristics of direct foreign investment is that, such investments can either be wholly owned by the foreign investors or jointly owned as the case may be, with local or national companies or enterprises.

We intend in this work to discuss and appraise the scope and forms of such investments in Nigeria, with a view to determining how such investments have promoted foreign investments in general. In doing this, other investments like portfolio contracts, joint

[1]Wallace, D.C. Foreign Investment in the 1990s: A New Climate in the Third World, (Amsterdam: Martinus Nijhoff Publishers 1990) p. 150.
[2]Akoh, I.I. "Legal Framework and Requirements for Foreign Investment in the Nigerian Capital Market:, in Jimoh, A. (ed) Modern Practice Journal of Finance and Investment Law, MPJFIL Vol. 3, No. 2, Lagos (1999) pp. 288-311 at p. 288.

venture contracts, Turnkey contracts, transnational contracts, among several others, would be considered as the case may be.

3.4 JOINT VENTURE CONTRACTS

The concept of joint venture is not an entirely new phenomenon within international commerce. This is because foreign investment which is often associated with joint venture has to a large extent become inevitable whether viewed from the standpoint of either a developing or a developed economy. This position is equally shared by Ajomo, who stated that:

> in many developed countries, especially those of the west, the exportation of capital and technology for economic development is vested in Transnational Corporations (TNCs), as a major instrument of international investment, and in some cases in private hands. By the nature of their set up, TNCs are not charitable organizations. They specialize in oligopolistic industries producing sophisticated products made by capital intensive techniques and have a centralization of financial strategy which enables them to operate across different countries to minimize risk and tax payments and maximize profits.[3]

Since independence, successive governments in Nigeria have used divergent incentives to accelerate and promote foreign investment. The joint venture model is one among several other investment models that have been used or applied in this direction. In Nigeria the origin of the joint venture model of investment started with greater vigour with the "Indigenization Decree."[4] This Act was the first legislation to enable a Nigeria either solely or in joint ventures with foreigners, to own and manage economic or commercial activities in Nigeria whereby larger percentages of such ventures are owned by Nigerians.

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[3] "The Dimensions and Legal Framework of International Investment Agreements in Nigeria: The Joint Venture Model." In Ajomo, M.A. (ed) New Dimensions in Nigerian Law, Lagos: Nigerian Institute of advanced Legal Studies (1989) pp. 1-40 at p. 1.

[4] Nigerian Enterprises Promotion Act 1972 now repealed.

There has been the argument in some quarters that the third world countries appear to have considered the joint venture formula as an alternative to full economic control. This argument appears not to be fully holistic. This is because, in a situation where a particular country's economic survival is entrusted in the hands of foreigners or colonial masters, such a country to a large extent becomes an economic appendage to the foreign country.

It therefore means that the general economic policies and development of such a developing country would be tied to the whims and caprices of the colonial powers. The advantages stems from the fact that scarce capital shall be brought in by foreigners. No matter which direction that this may be considered from, joint ventures appear to be inevitable in the Nigerian context and indeed the world at large. The shortcomings of this arrangement do not in effect mean that there are no advantages obtainable therein.

3.4.1 Definition of Joint Venture

The word "joint venture" has been viewed from many perspectives depending on who is making the definition. From the view point of international commerce, it is the channel or vehicle through which transnational corporations without substantially sacrificing their financial or long term interests, export or transfer their technology, capital, shares, and dividends in association with a host foreign nation or private individual in varying degrees, in sharing of control, decision making and profit maximization.

The **Black's Law Dictionary**,[5] defines "joint venture" as:

> a legal entity in the nature of partnership engaged in the joint prosecution of a particular transaction for mutual profit. An association of persons jointly undertaking some commercial enterprise. It requires a community of interests in the performance of the subject matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profits and losses.

Some basic lacuna is glaringly observable in the above definition of joint venture moreso when looked at from the point of view of international commerce. The major underlining principle in the above definition is that of a joint prosecution of a project for the purpose of making profit. However, in international commerce where joint venture is involved, application and involvement of capital mostly from the transnational corporation is a basic or principal consideration. The payment for such in form of shares could be made either in cash, machinery, equipment, land, tangible assets, industrial properties such as patent, trademarks, trade names, licences, technical data and assistance as well as know-how.[6] Some of these indices were not reflected in the above definitions.

Since the legal framework of some host countries may appear not to be conducive to the financial interests of some transnational corporations, some of these transnational corporations, have most often, adopted some contractual relationships with such host countries, without sacrificing their veiled financial interests on the altar of such agreements. This tendency has become obvious because, the organization of any business is in most cases, governed by the creation of the municipal laws of such a nation, which in some cases may be operated internationally.

[5] 6th Ed., (St. Paul, Minn West Publishing Company, 1990) p. 479
[6] Ajomo M.A. Op. cit. at p. 9

In joint venture agreements therefore, as a general rule, home states regulate the parent companies, and the host states regulate the subordinates. Some instances abound, where home states are able to regulate foreign subordinates with extraterritorial laws, and the host states may, regulate the parents by piercing the fictional veil that separates the subordinates from their parents.

However, it is not in all cases that all transnational corporations enter into a joint venture agreement with the host states. For example, in 1984, in Colombo, the General Motors refused to enter into any joint venture agreement with the developing countries. It is necessary also to look at the international regulation of some of these multinational enterprises where joint venture agreements are involved. For the purpose of the regulation of some of these ventures, some International Organizations like the World Trade Organization, Organization for Economic Cooperation and Development, the International Labour Organization, and the International Chamber of Commerce are accompanying regulations which multinationals voluntarily comply with as a code of behaviour in international commerce.[7]

In the opinion of M.A. Ajomo:[8] the joint venture basically emerges from one or other of these three propulsive elements:

(i) the national entrepreneur partner demonstrating to the foreign partner the viability of a particular investment opportunity,

(ii) reversibly, the foreign firm, finding a suitable national partner to exploit an attractive resource or market situation,

[7]August, R. International Business Law: Text, Cases, and Readings. (New Jersey: Prentice Inc. 1993) p. 165.

[8]"The Dimensions and Legal Framework of International Investment Agreements in Nigeria: The Joint Venture Model." In Ajomo, M.A. (ed), New Dimensions in Nigerian Law, Lagos: (Nigerian Institute of Advanced Legal Studies 1989) pp. 1-40 at p. 10.

(iii) the business and corporate policies of a particular foreign firm in relation to the licensing of its technology.

From all indications, in as much as the quest for greater economic development on the part of the developing host nations, and maximization of capital and profit on the part of the foreign partner, is the major concern on both sides, certain basic legal mechanism or framework is still required to regulate joint venture contract agreements. That is to say, even though the parties may have the legal right to choose who should be the host nation or foreign partner, the existing legal requirements within both countries, to a large extent, and governmental control and regulation through legislation and policy, cannot be ruled out in many joint venture contract agreements. The possibility of observing the regulatory framework of a third party nation in some cases may even arise as the case may be.

In this regard, Ajomo further opined that:

> governments especially in developing countries, intervene positively to ensure equilibrium in the dealings between the foreign partner and the local partner and the host country where the government itself is not the local partner. Government intervention is manifested by the influence it exercises in approving, what is in its view:
> (i) appropriate business objectives, which can be achieved through laws relating to the establishment of industries,
> (ii) appropriate technology and resources through laws relating to licensing of technology and appropriate partnership relationships....[9]

It therefore means that much as the desires of both the foreign and the local partners, many have been defined or ascertained by both partners in such a venture, governmental interest or influence through the instrumentality of the law is brought to bear on such a business venture. The question that immediately comes to mind is whether

[9] Ajomo, M.A. op. cit. p. 10

governmental interference or influence through legislation and policy has not inhibited the promotion and protection of foreign investment through the joint venture system.

The above question may not necessarily have a straightforward “Yes” or “No” answer. The reason for this is that in the entire world over, legislative or legal mechanisms have often checked and counter balanced the types and forms of trade relationship each country embarks upon. What is advisable here is that the implore of the participating nations (in this case the foreigners most especially) is not often felt or taken into consideration before some of these legal regulatory mechanisms are either enacted or amended when the need arises.

To allow a situation on the other hand whereby only the participating partners or nations determine the legal framework for the purpose of any business venture, would not only make the entire economic system more cumbersome than presently it is, but also the ever increasing incidences of trade or commercial dynamism would lead to a point whereby it will either be difficult or almost impossible to have an elaborate legal framework for the promotion and protection of foreign investment in Nigeria.

Suffice it to say that, the type of partnership that is contemplated above is, the corporate joint venture where the parties enter into an agreement to incorporate a company through which they will carry out their business objectives. It is pertinent at this juncture to state that, the joint venture though originally brought about by Scots' Law, has

presently been modernized and modified thereby enjoying the appellate of "American Contribution to Large Scale Projects" in International Economic Law.[10]

It is instructive that if there are more than twenty persons who are desirous of having a joint venture enterprise, the limitation imposed by law has meant an interference or influence of the government through legislation. The rationale for such limitation of the number of participating partners to twenty (20) only has not been showed to either be a stimulant to greater economic gains nor has it been showed that lesser number of people cannot provide a greater economic development and trade in general when the number of the participating partners is reduced from the statutory number of twenty (20).

In the above position, it stands to reason that even if the admission of the 21st partner would have made a greater difference in such enterprise, the limitations imposed by law cannot allow that. One then questions the desirability or rationale in imposing a specific number of persons when lesser numbers could as well achieve either the same or greater objectives. In the Socialist states, like China for example, joint venture with the state equity is usually compelled by law. This is because the joint venture agreements or businesses have been progressively liberalized where by only wholly owned subsidiaries are permitted in certain exceptional circumstances.[11]

Basically, it can be said that there appear to be no legislation or law that prohibits foreigners from establishing any joint venture agreement or contract among them to be regulated by the domestic law of Nigeria. This is because joint venture agreements are mostly regulated by the law of the host states except in some exceptional instances

[10]Sornarajah, M. The International Law on Foreign Investment, (Cambridge: Cambridge University Press 1994) p. 116.
[11] Sornarajah, M. op. cit. p. 117.

whereby it is specifically provided for that a different joint venture agreement other than the host's domestic laws should regulate the agreement.

3.5 TYPES OF JOINT VENTURES

It is true to say that there is no broad or definite type of joint venture agreement that must be followed in any foreign investment. This is so because, the intent and purpose of every agreement or venture, to some extent, determines the variation to be adopted or applied by the parties involved. Prominently, in all or many joint venture agreements or contracts, the broad categories of equity joint venture and contractual joint venture have always featured. We shall therefore examine and classify these two broad categories of joint ventures, with a view to distinguishing them from each other.

3.5.1 Equity Joint Venture

In the equity joint venture, the partners in the venture enter into an agreement to form or incorporate a company under which they can achieve their common purpose and objectives as the case may be. It is mandatory for any equity joint venture agreement, to be registered under the CAMA. The registration or incorporation of such joint venture agreements, go with it, the legal dividends that accrue to any incorporated company. That is to say that such joint venture can sue and be sued as a legal entity.

The question however that comes to the mind of the average reader is, what would be the position of such a joint venture if it carries on business without registration or incorporation as required by Section 19(1) of CAMA? In the decision of the Nigerian Supreme Court in the case of **Anyaegbuwan v.Osaka:**[12]an unincorporated association

[12] 2001 SCNQR 406.

does not legally exist and must of necessity act through its appointed representation. On the other hand, a corporate entity i.e. an association that has been incorporated, has legal personality. It can sue and be sued in its corporate name. It can and will enter into any agreement in its corporate name, …

It should be noted here that, hitherto before the promulgation of CAMA, under the then Companies Act of 1968, a foreign company that is not registered or incorporated under the said Act, was prohibited from carrying on business in Nigeria particularly under Section 370. The combined effect of that was that such a company could neither sue nor be sued in that name. The courts had opportunities to interpret Section 370 of the Act[13] in some decided cases. One of such cases is the decision in **WEMA Bank v. N.N.S.L.**[14] It is however necessary here to examine the provisions of Section 370 of the said Act which stated that:

> every foreign company within paragraph (b) of Section 268 of the Decree shall give notice in writing of its intention to the registrar, and as soon thereafter as may be, the foreign company shall take all steps necessary to obtain incorporation as a separate entity in Nigeria for the purpose aforesaid, but until so incorporated, the foreign company shall not have a place of business in Nigeria for any purpose other than the receipt of notices and other documents, as matter preliminary to incorporation under this Decree.

The above position fortunately is not the position of the law presently. In the **WEMA Bank** case, the appellant, a German firm was represented in Nigeria, by another incorporated company. There was a suit in Nigeria whereby the representative company of the German firm sued the Nigerian National Shipping Line Limited (NNSL) applying for among other things, an injunction restraining the NNSL from reshipping some goods

[13] Companies Act 1968.
[14] (1976) 2 FRCR 133.

that had already arrived Nigeria back to the foreign country where they were brought from.

However, there are some exceptions for example, where there is a foreign company that is specifically involved in a particular project in the country. Such a project may be building or construction of a stadium for example, or any other project as the case may be. In such a situation, such company does not necessarily need to register in that category.

The German firm applied to the court to be joined as a party to the action. The Court of Appeal held that, although foreign companies not incorporated in Nigeria are juristic persons, under the laws which they are incorporated, nevertheless, such companies lack the power to sue and to be sued in their own names and therefore, the German company could not be joined into the action.[15]

The decision of the Court of Appeal in the above case was based on the provisions of Section 370(1) of the then 1968 Companies Act which stated that:

S. 370(1) Every foreign company within paragraph (b) of Section 368 of this Decree shall give notice in writing of its intention to the registrar, and as soon thereafter as may be, the foreign company shall take all steps necessary to obtain incorporation as a separate entity in Nigeria for the purpose aforesaid, but until so incorporated the foreign company shall not have a place of business in Nigeria for any purpose other than the

[15]Ali, O.Y. "Right of action of Unincorporated Foreign Companies in Nigeria Courts", in Jimoh A. (ed) Modern Practice Journal of Finance and Investment Law, (Lagos: Economic Law Publishers, 2000) MPJFIL Vol. 4 No. 1, pp. 166 at p. 162.

receipt of notices and other documents, as matter preliminary to incorporation under this Decree.

(2) Steps to be taken under this Decree to become incorporated in Nigeria shall not include any invitation to subscribe for shares or otherwise howsoever on the basis of a prospectus without the prior approval of the Commissioner; but save to that extent, all other provisions of this Decree as to formation shall apply with any necessary modifications.

Suffice it therefore to say that this presently is not the position of the law under the Companies and Allied Matters Act (CAMA) 1990. Section 60 of CAMA in particular provides in specific terms that:

for the avoidance of doubt, it is hereby declared that -

(a) same as provided in Sections 55, 56, 57 and 58 of this Act, nothing in this Act shall be construed as authorizing, the disregard by any exempted foreign company or any enactment of rule of law, and

(b) nothing in this chapter shall be construed as affecting the rights or liability of a foreign company to sue or be sued in its name or in the name of its agent.

This provision of CAMA was given a judicial interpretation by the Court of Appeal in the case of **Ritz & Wkg v. Techno Ltd.**[16] The facts of the Techno Case is that, the appellant company is a company not registered under CAMA but under the German Law from where it operates. The respondent company on the other hand is a company registered in Nigeria under the Companies and Allied Matters Act 1990 (CAMA) and is

[16] (1999) 4 NWLR (Pt. 598)

operating in Nigeria. The Nigerian company borrowed some machineries and working equipment from the German company which was used during a trade fair in Kaduna. After several attempts to recover the monetary value and some of the goods without success, the German company sued before the High Court of Justice in Minna.

The Court held inter alia that:

> although foreign companies not incorporated in Nigeria are juristic persons under the laws under which they are incorporated, nevertheless, such companies have the power to sue and be sued in their own names and therefore the German company could be joined into the action.

We observe here that on a comparative analysis, the decision in the NNSL case must have been as a result of non inclusion of a provision similar to that which is obtainable under Section 60 of the CAMA. Some of the reasons among others, for such liberal interpretation of the laws in this regard, is to stimulate and promote international commerce and political relations. This is because, for any meaningful foreign investment to be achieved, there must be such liberalization and governmental policy of free trade between states. Nigeria on the other hand, cannot be an island in this regard. This line of reasoning has equally removed the legal absurdity that existed in the 1968 Companies Act, under which a foreign company cannot sue nor be sued in Nigerian courts until it is incorporated under the said Act.[17]

Foreign investment in the form of joint ventures, at some initial stages, may take the form of sole proprietorship which subsequently could be incorporated under CAMA. A situation whereby the law inhibits such company's ability to sue or be sued in the Nigerian courts, would amount to some negative signals to the promotion and protection of foreign investment in Nigeria.

[17] Ali, O.Y. op. cit. p. 166.

The above decision and interpretation of the law is indeed a welcomed development. This is because situations abound where such companies may be trying to stabilize their existence and operations before finding a favourable partner in investment. To hold therefore that during this period, their rights if violated cannot be entertained by a court of law, because it is not yet registered under CAMA, would be stretching the law too far and thus inimical to the promotion and protection of foreign investment in Nigeria.

3.5.2 Contractual Joint Venture

According to Professor Ajomo,[18]

> under the contractual joint venture, there is no equity participation. Rather, a transnational and a local corporation (public or private) forma consortium to carry out a particular type of activity, without creating an entity with corporate identity of its own as in the case of equity joint venture. Instead, by virtue of a contractual arrangement between the parties, each party has a direct undivided working interest in the common enterprise.

From the foregoing, unlike the equity joint venture, the contractual joint ventures are those category of agreements or ventures where the parties are basically joined together for the sole purpose of actualising a particular commercial concern rather than such ventures being a perpetual entity with succession in law. Principally, these types of ventures are more profound in service contract related enterprises.

The contractual joint venture arrangement affords the participating partners ample opportunities to relate some of either the host nation's legislative framework or that of the foreign nation. The basic idea here is that the venture is basically of a contractual

[18]Ajomo, M.A. (ed) New Dimensions in Nigerian Law, "International Investment Agreements in Nigeria: The Joint Venture Model.

nature. Like in all contracts, there must be the clear expression or indication of the point at which there is the meeting of the two minds.

Certain protective clauses are also common in these types of venture. The reason behind this is that, each partner is at liberty to either accept or refuse any other clause included in such a contract. These clauses must also not be against public policy, and the repugnancy doctrine. That is to say that in a situation whereby all the participating partners have agreed to certain clauses within the said agreement, the legislative framework of the host nations can on the other hand, be brought to bear on both the parties in this venture and the enterprise in its entirety.

3.6 THE OPERATIONS OF JOINT VENTURE ENTERPRISES IN NIGERIA

The operation of joint venture enterprises in Nigeria has enjoyed some level of legislative dynamism most especially in recent times. This position is different from what was obtainable in the late 80s when these legislations were a bit restrictive to joint venture agreements. Notwithstanding the level of such legislative dynamism, Nigeria is yet to experience a situation whereby, an indepth analysis of this mode of economic inter-relationship is given the academic or scholarship research that it deserves.

Though the sources of these legislations have been discussed in our previous discussions, one common feature to all of them with regards to foreign joint venture agreements is that, all the legislations have not adequately addressed the issue of foreign control of most of the investments particularly by the Transnational Corporations. It has often been observed in some cases that while the domestic legal framework of the host countries is supposed to a larger extent control and regulate joint venture or foreign

investment, many of these municipal legislations have often given way to the control of such enterprises to the Transnational Corporations.

This area of our law needs to be further re-examined. Many reasons might have contributed to the emergence of these transnational corporations and the present phenomenon. One of this is that, the adventures of the transnationals into the newer worlds were dictated by a mixture of reasons, i.e. need for cheaper raw materials to ensure survival, reduce production cost, create comparative advantage, and the need to acquire the needed global status and political leverage that went with it.[19]

With the coming into effect of the NIPC Act, which does not restrict foreign participation in the economy, with the exception of areas of defence, and a few others, the incidence of such foreign control appear to have been widened. The only solution to this may be to enact a legislation that would adequately address these issues.

The Nigerian government on the other hand has been making additional efforts with a view to fostering foreign investors' confidence in investing in the country's ailing economy as far back as 1962. Some of these efforts are by entering into bilateral investment promotion and protection agreements (IPPAs) with countries that have businesses with Nigeria.

The aims and objectives of the IPPA is to:

(a) guarantee the safety and protection of the investments of the contracting parties against the unforseeable events like war, revolution, expropriation or nationalisation as the case may be,

[19]Kachikwu, E.I. "Corporate Control by Law in Nigeria as a Test Case", Business and Property Law Journal, (Lagos: Gravitas Publishers, 1989), Vol. 2, No. 6, pp. 75-82 at p. 75.

(b) guarantee the foreign investors interest in the transfer of dividends, profits and other related incomes that are bye products of such an investment.

To this end, Nigeria has concluded and signed IPPAs with continues like: (i) France (ii) United Kingdom (iii) Netherlands (iv) Romania (v) Switzerland (vi) Spain (vii) North Korea (viii) South Korea (ix) Turnkey (x) Germany (xi) Egypt (xii) Italy and (xiii) South Africa. Negotiations with countries like the United States of America, Belgium, Sweden, and the Russian Federation are at various stages of conclusion apart from the previous ones. The government in repealing the Nigerian Enterprises Promotion Act of 1972 (as amended in 1977 and 1989) and promulgating the Nigerian Investment Promotion Act of 1995, has liberalized the ownership structure of businesses in Nigeria. The implication of this is that, foreigners can now own 100% shares in some company as opposed to the earlier arrangement of 60%-40% in favour of Nigeria.

The above position has immensely encouraged joint venture business agreements between Nigerians and other foreign partners. Equally on the global level for example, Nigeria is a party to two multilateral conventions pertaining to the protection of intangible properties, namely, the International Convention for Protection of Industrial Property, and the Universal Copyright Convention. It was as a result of the ratification of these conventions that a company like the Peugeot Automobile Nigeria (PAN), the then Volkswagen of Nigeria Limited (VON), Total Nigeria Plc, Mobil Unlimited, ANAMCO and a host of other companies or enterprises, had a legal foundation and legislative framework to start operating in Nigeria till today.[20]

[20] Adamu Ibrahim, op.cit. pg 45

3.7 NIGERIAN INVESTMENT PROMOTION COMMISSION ACT

Following the general apathy shown by foreign investors in investing in Nigeria's economy during the Military regimes particularly after the annulment of general election held in June 12, 1993 and widely declared to be free and fair; the administration of Gen. Sani Abacha however responded to this declining trend in foreign investments by repealing all laws considered as obstacles to foreign investment.

Some of these laws that were repealed include:

(a) the exchange control (anti-sabotage) Act 1984[21]

(b) Nigerian enterprises promotion Act[22]

(c) the exchange control Act.[23]

The above legislations were repealed and replaced by the following:

(a) Nigerian Investment Promotion Commission Act[24] and

(b) Foreign Exchange (Monitoring and Miscellaneous Provisions) Act.[25]

The above legislations were aimed at promoting foreign investment flow into Nigeria which was prevented or hampered largely by the negative effects of the regulatory policies and other problems which adversely affected the investment climate. Sections 1 and 2 of the Nigerian Investment Promotion Commission Act established the commission as a corporate body with perpetual succession and a common seal that may sue and be sued in its corporate name with a governing council responsible for the discharge of the functions of the commission.

[21] Decree No. 7 of 1984. See LFN 2004
[22] No. 54 of 1989, reproduced as Cap. 303, Laws of the Federation 1990. See LFN 2004
[23] No. 16 of 1962, reproduced as Cap. 113 Laws of the Federation 1990. See LFN 2004
[24] Decree No. 11 of 1995. See LFN 2004
[25] Decree No. 16 of 1995. See LFN 2004

This legislation is the organic law which presently regulates foreign investment in Nigeria. The basic functions of this commission according to Section 4 of the law establishing it is among others:

(a) to encourage, promote, and co-ordinate investment in the Nigerian economy,

(b) to act as an agency of the Federal Government to co-ordinate and monitor all investment ,promotion activities to which the legislation applies,

(c) to initiate and support measures which shall enhance the investment climate in Nigeria for both Nigerian and non-Nigerian investors,

(d) to promote investments in and outside Nigeria through effective promotional means,

(e) to collect, collate, analyze and disseminate information about investment opportunities and sources of investment capital, and advise on request, the availability, choice or suitability of partners in joint venture projects,

(f) to identify specific projects and invite interested investors for participation in those projects,

(g) to initiate, organize and participate in promotional activities, such as exhibitions, conferences and seminars for the stimulation of investments,

(h) to maintain liaison between investors and ministries, government departments and agencies, institutional lenders and other authorities concerned with investments,

(i) to provide and disseminate up to date information on incentives available to investors,

(j) to assist incoming and existing investors by providing support services,

(k) to evaluate the impact of the commission in investments in Nigeria and recommend appropriate measures, and

(l) to advise the Federal Government on policy matters, including fiscal measures designed to promote the industrialization of Nigeria or the general development of the economy.

This legislation provides the framework for encouraging foreign investors to invest in Nigeria by providing a deregulated and de-bureaucratized atmosphere for investment. It permits a non-Nigerian who may wish to invest and participate in the operation of any enterprise in Nigeria to do so except in areas that pertain to petroleum enterprise and to the negative list as defined under Section 32 of the Act i.e. production of arms, ammunition, dealing in narcotic drugs and military apparels, which are areas that are also prohibited to Nigerian investors.[26]

One interesting aspect of the functions of this commission according to the Act is the ability of a foreign investor to freely transfer any funds in respect of any investment unconditionally to any foreign state through any authorized dealer bank in free convertible currencies. The above provision was lacking in the earlier legislations.

Promotion of foreign investment was further encouraged by the Act by way of the commission assisting any foreign entrepreneur or investor to obtain expatriate quota, business permits, etc. without the usual administrative bottlenecks that hitherto characterized the system and foreign investments in the previous legislations. Unlike the previous legislations regulating foreign investment, foreign investment under the present legislation has been widened to accommodate the emerging needs and aspirations of most multinational and national corporations.

[26]Akoh, I.I. "Legal Framework and Requirement for Foreign Investment in the Nigerian Capital Market", Jimoh, A.A. (ed.) In Modern Practice Journal of Investment Law (Lagos: Law & Economic Development Publishers, 1999) pp. 288-311 at p. 291.

Section 19(1) of the Act specifically provides that:

> an enterprise in which foreign participation is permitted under Section 17 of this Act shall not commence business except it is incorporated or registered under the Companies and Allied Matters Act 1990.

Section 19(2) further stipulates that:

> subject to this Act, nothing in this Act shall be construed as precluding any enterprise to which this Act applies from obtaining such licence, lease, permit, or any approval as may be required for the establishment or operation of the enterprise.

Provisions for incorporation of foreign companies are made in part II, Chapter 3 of the Companies and Allied Mattes Act 1990. Under Section 54(1), it provides that:

> subject to Sections 56 to 59of 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 document or processes in Nigeria for any purpose other than the receipt of notices and other documents, as matters preliminary to incorporation under this Act.

Subsection (2) declares as void any act of the company in contravention of the above provision with the exceptions of:

(a) any foreign company which before the commencement of the Act was granted exemption from compliance with part X of the Companies Act 1968

(b) any foreign company exempted under any treaty to which Nigeria is a party.

Penalties apply against any foreign company which fails to comply with the requirements of section 54 of the Act. However, a foreign company may apply to the

National Council of Ministers of Nigeria for exemption if that foreign company belongs to one of the following categories:[27]

(a) foreign companies (other than those specified in paragraph (d) of Section 56(1) invited to Nigeria by or with the approval of the Federal Government to execute any specified individual project,

(b) foreign companies which are in Nigeria for the execution of specific individual loan project on behalf of a donor country or international organization,

(c) foreign government owned companies engaged solely in export promotion activities, and

(d) engineering consultants and technical experts engaged on an individual specialist project under contract with any of the government in the Federation or any of their agencies or with any other body or person, where such contract has been approved by the Federal Government.

Another fundamental aspect of this legislation which distinguished it from previous legislations was the provision of guarantees against expropriation. This is provided under Section 25 of the Act which provides inter alia that:

(a) no enterprise shall be nationalized or expropriated by any Government of the Federation, and

(b) no person who owns, whether wholly or impart, the capital of any enterprise shall be compelled by law to surrender his interest in the capital to any other person.

[27] S. 56(1) CAMA.

Moreover, there shall be no acquisition of an enterprise by the Federal Government unless the acquisition is in the national interest or for a public purpose and under a law which makes provisions for:[28]

(a) payment of fair and adequate compensation, and

(b) a right of access to the courts for the determination of the investor's interest or right and the amount of compensation to which he is entitled.

Although the question of nationalization or expropriation of foreign investment is one that is wrapped in controversy, suffice it to say that it is equally enshrined under Section 44(1) of the 1999 Constitution of the Federal Republic of Nigeria.

While international law generally recognizes the rights of a state to nationalize foreign private property as an expression of sovereignty, there is wide spread disagreement as to the existence of an international obligation to pay compensation or even the formula to be adopted in computing compensation where the principle of payment is accepted. Expropriation or nationalization is the taking of private property by a state.

The right of states to expropriate foreign property is universally recognized, as is its analogy in municipal laws, the eminent domain. Western countries treat expropriation much as they treat eminent domain, that is, it is proper so long as it is done for a legitimate public purpose and if the state pays prompt adequate, and effective compensation. Some controversies have existed over whether the public purpose element is really required. In the case of **Anglo-Iranian Oil Co Case**,[29] Libya nationalized British petroleum's property, assets, and rights in a subsidiary operating in

[28] S. 25(2).
[29] 1994 ILR Vol. 53, p. 297 or United Kingdom v. Iran Case.

Libya but did not nationalize property belonging to other foreign oil companies. Libya was seeking to retaliate against the United Kingdom (which then owned a substantial part of BP) for the UK's refusal to help a Libyan ally in, the Persian Gulf prevent Iran from occupying certain islands the ally claimed.

The tribunal held inter alia that:

> it is clear that nationalization of the property of foreigners even if not unlawful on the other ground, becomes an unlawful confiscation unless the provision is made for compensation which is adequate, prompt and effective.

This same principle was applied in the case of **Texaco Overseas Petroleum Co & California Asiatic Oil Co. v. The Libyan Arab Republic**.[30] There have been further controversies as to what "adequate" compensation should entail. In the **Chorzow Factory Case**,[31] the tribunal held that: "by adequate compensation is meant "the value of the undertaking at the moment of dispossession, plus interest to the day of the judgement".

Another area or provision of the Act which has liberalized and promoted foreign investment is that dealing with settlement of disputes. The Investment Promotion Commission Act adopted arbitration as the mode of resolution of disputes arising between an investor and any Government of the Federation in respect of an enterprise. The option of arbitration becomes important when all efforts through mutual discussion to reach an amicable settlement proveabortive.[32]

[30] 1979 ILR Vol. 53, p. 389.
[31] 1928 PCIJR, Series A No. 17, p. 47.
[32] Azinge, E. op. cit. p. 233. See also S. 26 of the Act.

Arbitration is international if the parties to the arbitration agreement have their places of business in different countries or one of the following places:

place of arbitration, or place where the substantial part of the obligation is to be performed, or place where the subject matter of the dispute is closely connected is situated outside the country in which the parties have their place of business, or the parties expressly agreed that the subject matter of the arbitration agreement relates to more than one country or the parties, despite the nature of the contract, expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration.[33]

Section 26(2) of the Act further stated that any dispute between an investor and any government of the federation in respect of an enterprise to which the Act applies which is not amicably settled through mutual discussions may be submitted at the option of the aggrieved party to arbitration as follows:

(a) in the case of a Nigerian investor, in accordance with the rules of procedure for arbitration as specified under the Arbitration and Conciliation Act 1988, or

(b) in the case of a foreign investor, within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of which the investor is a national are parties, or

(c) in accordance with any other national or international machinery for the settlement of investment disputes agreed on by the parties.

[33]Idornigie, P.O. "The Legal Regime of International Commercial Arbitration". Unpublished Ph.D. Thesis Submitted to the Faculty of Law, University of Jos, 2002 p. 2. See also S. 57(2) of the Arbitration Act No. 11 of 1988 Cap. Laws of the Federal Republic of Nigeria 1990.

Since most foreign investments especially Multinational Corporation operates through investment agreements, the possibilities of violation of some of these agreements, treaties etc. in the day to day running of these corporations often arise. This as a result brings conflict and not profit which is the desired result of the shareholders of such companies. The inclusion of the arbitration and dispute settlement clause in the Nigerian Investment Promotion Commission Act, is a welcome development.

One author puts it thus:

> shareholders are rarely interested in the number of conflicts or disputes that have been settled by their companies, but they seriously mind the amount of money spent on disputing or settling disputes. Such a paradoxical attitude is understandable. Companies are formed to make profits and disputes hardly generate profits. But conflict has been generally acknowledged to be intrinsic to corporate organizational life. This later fact explains why most corporate Organizations spend much time and resources in developing effective methods and procedures for processing and dealing with diverse forms of internal conflicts.[34]

It is in this regard that the Arbitration clause of the Act, that such conflict management techniques like negotiation, reference to established organs like Arbitration Tribunals, International Centre for the Settlement of Investment Disputes (ICSID) and other allied organizations which Nigeria belongs to have become inevitable in the settlement of various investment disputes.

The application of similar types of clauses like it is contained under the Nigerian Act was adopted by the Ad Hoc Arbitration Tribunal of The Hague in the 123 case of

[34]Kargbo, S. "Commercial Arbitration and Settlement of Corporate Disputes." Jimoh, A.A. (ed) in Modern Practice Journal of Finance and Investment Law (Lagos: Law & Economic Publishers, 1999) pp. 209-229 at p. 209.

Kuwait V. American Independent Oil Company.[35] It was equally applied in the case of **Wintershall A.G. V. Qatar**.[36]

In this case, the Government of Qatar entered into an "exploration and production sharing agreement" with Wintershall A.G. International Ocean Resources Inc et al. The agreement granted the claimants in this arbitration the exclusive right to explore, drill and produce petroleum in a defined area offshore of Qatar which was referred to as "the contract area" for a period of 3 years beginning from June 18, 1973. After the commencement of the said agreement, the claimants did not discover petroleum in a commercial quantity within the "contract area" and thus sought for an alternative area where they felt natural gas could be explored in commercial quantity. There was disagreement in this regard which led to the claimant going to the arbitration tribunal for settlement.

The tribunal held that the spirit and letter of the investment agreement was bidding on the parties concerned and thus a ground norm of the contract. Also under this legislation unlike previous ones, there is provision for incentives for special investment into the country for the purposes of promoting identified or specified major investments into the country. In this regard, the Commission in consultation with the appropriate government agencies shall negotiate or provide specified incentive motivators for the promotion of foreign investment as the Commission may deem it fit in the circumstances.

The Commission may also issue guidelines and procedures which specify priority areas of investment and prescribe applicable incentives and benefits which are in conformity

[35] (1982) Ad. Hoc. Arbitration Tribunal. International Law Materials, Vol. 21, p. 976.
[36] (1989) Ad Hoc Arbitration Tribunal, International Legal Materials, Vol. 28, p. 795.

with government policy and such guidelines shall be signified under the hand of the Chairman of the Commission.[37]

3.8 THE INVESTMENT AND SECURITIES ACT[38]

The investment and securities Act was one of the legislations that were promulgated by the General Abdulsalam Abubakar's military regime before a hand over to a civilian government on 29th May 1999. The commencement date of this law is 26th May 1999. By virtue of Section 1 of this Act, a body corporate with perpetual succession and a common seal to be known and called "the Securities and Exchange Commission" was established. Under the law establishing it, this commission can sue and be sued. The Commission is charged with the following functions among others according to Section 8 of the enabling Act:

(a) regulate investments and securities business in Nigeria as defined in the enabling Act,

(b) register and regulate securities, exchanges, trade points, futures, options and derivatives exchanges, commodity exchanges, and any other recognized investment exchange,

(c) register securities to be offered for subscription or sale to the public,

(d) render assistance in all aspects including funding as may be deemed necessary to promoters and investors wishing to establish securities exchanges and capital trade points,

(e) prepare adequate guidelines and organize training programmes and disseminate information necessary for the establishment of securities exchanges and capital trade points,

[37] Ss. 22 & 23.
[38] No. 45, 1999. See LFN 2004

(f) register and regulate corporate and individual capital market operators as defined in Section 30 of the Act. Section 30 went further to define "capital market operators" to include, a securities dealer, a stockbroker, sub-broker, jobber, share transfer agent, banker to an issue, trustee of a trust deed, registrar to an issue, merchant, banker, issuing houses, underwriter, portfolio manager, investment adviser and such other capital market intermediaries as may be licensed by the commission in accordance with the regulations made under the Act,

(g) register and regulate the workings of venture capital funds and collective investments schemes including mutual funds,

(h) facilitate the linking of all markets in securities through modern communication and data processing facilities in order to foster efficiency, enhance competition and increase the information available to brokers, dealers and investors,

(i) keep and maintain separate registers of foreign direct investments and foreign portfolio investments,

(j) act as a regulatory apex organization for the Nigerian capital market including the promotion and registration of self-regulatory organizations and capital market trade associations to which it may delegate its powers, etc.

A landmark objective achieved by this legislation is the provision for and establishment of an investors protection under Section 149 of the Act which shall consist of:

(a) all money paid to the securities exchange or capital trade point by member companies in accordance with the provisions of the part of the act to which it relates,

(b) the interest and profits from time to time, accruing from the investment of the investors protection fund,

(c) all money paid to the investors protection fund by a securities exchange or capital trade point,

(d) all moneys recovered by or on behalf of the securities exchange or capital trade point in the exercise of any right of action conferred by the relevant part of the enabling Act,

(e) all moneys paid by an insurer pursuant to a contract of insurance or indemnity entered into by the Board, and

(f) all other moneys lawfully paid into the investors protection fund.

One particular feature of this legislation with the aim of promoting investment in the country is the fact that such monies are to be kept in separate bank accounts in Nigeria pending when the investor application for such moneys is made in accordance to the enabling provisions of the Act. As to which such moneys in the investors protection fund shall be for, it shall consist of such amount as may by regulation be approved by the commission from time to time, to be paid to the credit of the investors protection fund on the establishment of a securities exchange or capital point under the enabling Act.

In encouraging corporate organizations in investing in the country's economy, under Section 159 of the Act, an investors protection fund shall be held and applied for the purpose of compensating persons who suffer pecuniary loss from any defalcation committed by a member company or any of its directors, or employees in relation to any money or other property which was entrusted or received by a member company or any of its directors or employees whether before or after the commencement of the Act in the course of or in connection with the business of that company.

This has not been the practice before the promulgation of this Act. Equally, under Section 161(2) of the Act, a claim for compensation from an investors protection fund in respect of a defalcation shall be made in writing to the Board of the Commission with six months after the claimant became aware of the defalcation and any claim which is not made shall be barred unless the commission otherwise determines. The same commission equally has powers pursuant to Section 162 of the Act to settle any claims for compensation from an investor's protection fund at any time after the commission of the defalcation in respect of which the claim arose. Also no moneys or other properties belonging to a securities exchange or capital trade point, other than the investors protection fund shall be available for the payment of any claim under the part of the Act to which it relates whether such claim is allowed by the commission or is made the subject of an order of the tribunal.

Another innovation contained in this legislation is the establishment of the investments and securities tribunal under Section 224(1) which shall consist of nine persons to be known as "Market Assessors" who will be appointed by the Minister and one of whom could be the Chairman therein.

3.9 FOREIGN EXCHANGE (MONITORING AND MISCELLANEOUS PROVISIONS) ACT[39]

For any multinational corporation to fully operate in the Nigerian market, it must operate through the foreign exchange market. The Foreign Exchange (Monitoring and Miscellaneous Provisions) Act was promulgated with a view of having an autonomous foreign exchange market which provides guidelines in the dealings of the foreign exchange market. This Act was made on 15th July 1995 but was deemed to have come

[39] No. 17 of 1995 (See LFN, 2004)

into force on 16th January 1995. Section 38 of this Act repealed the following enactments:

(a) the exchange control (anti-sabotage) Decree 1984[40]

(b) the foreign currency (Domiciliary Account) Decree 1985[41]

(c) the Second-tie Foreign Exchange Market Decree 1986[42]

However, the section preserved any document made or anything whatsoever done under the repealed enactments without limiting the provisions of the interpretation Act.

In achieving the promotion of foreign as well as local investments in the Nigerian economy, this legislation authorizes the operation of the foreign currency domiciliary account which authorizes or allows any person whether in Nigeria or overseas, whether resident in Nigeria or not, whether a Nigerian citizen or not, totrade in and invest in the securities traded in the Nigerian capital market or by private placement in Nigeria.[43]

Equally, under this legislation, any foreign investor may invest freely in Nigeria and the dividends under such investment can as well be freely repatriated to the foreign country. Under the legislation, foreign loans can equally be serviced and remitted to the foreign banks as well as when the total proceeds after taxes have been deducted in the case of any final sale or liquidation of such companies.

[40]Decree No. 7 of 1984, reproduced as Cap. 114 Laws of the Federation of Nigeria 1990 (See LFN, 2004).
[41]Decree No. 18 of 1985, reproduced as Cap. 515 Laws of the Federation of Nigeria 1990 (See LFN, 2004).
[42]Decree No. 23 of 1986, reproduced as Cap. 405 Laws of the Federation of Nigeria 1990 (See LFN, 2004).
[43] Akoh, I.I. Ibid. at p. 294.

All of the above mentioned factors can be done without reference to the Federal Ministry of Finance as was the practice in previous legislations. The power to issue guidelines to regulate the procedures for transactions in the market and for such other matters as may be deemed appropriate for the effective operation of the market is vested on the Central Bank of Nigeria subject to the provisions of the Act.

Transactions in the market are transacted through the usual money market instruments which are:

(a) foreign bank note

(b) foreign coins

(c) travellers' cheques

(d) bank drafts

(e) mail or telegraphic transfer, and

(f) such other money market instruments as the Central Bank may from time to time determine.

Another basic feature of this legislation is that no investor executing any transaction in the capital market is required to disclose the sources of any imported foreign currency except such disclosure is a requirement of any enactment or law.

In this regard therefore, under Section 3(2) of the Act, no foreign currency imported pursuant to the Act shall be liable to seizure or forfeiture or to suffer any form of expropriation by the Federal or State Government. The section further states that foreign currency from the following sources may be sold in the market:

(a) foreign currency domiciliary accounts maintained in authorised Banks in Nigeria,

(b) foreign currency held or imported by –

(i) Nigerian citizens returning home from any other place outside Nigeria,

(ii) Foreign nationals resident in Nigeria,

(c) agency commission, professional fees and other forms of invisible earnings

(d) non oil export proceeds earned by exporters of Nigerian commodities,

(e) foreign currency held by Nigerian citizens resident in Nigeria,

(f) foreign currency imported or held by foreign embassies, High Commissions and international organisations from external sources,

(g) foreign currency held in external accounts by individuals, bodies corporate and unincorporated, commission agents, professional bodies, insurance companies and other similar bodies,

(h) foreign currency imported by tourists into Nigeria,

(i) foreign currency provided by the Central Bank of Nigeria,

(j) foreign currency imported for direct investment in Nigeria, and

(k) foreign currency from such other sources as the Minister may, from time to time specify by order published in the gazette.

Under the legislation aforementioned, any foreign currency purchased from the capital market in Nigeria may be repatriated from the country to any other country without any prohibition. The exportation or importation of the Nigeria currency "Naira" is however prohibited under the Act. This can be understandablefrom the view point that if the nation's currency is not so prohibited from being exported and imported, the Nigerian economy and investment climate would be jeopardized.

However, the importation or exportation of the Naira could be done only under the permission of the Central Bank of Nigeria through its guidelines. Equally, a person, whether resident in or outside Nigeria, or a citizen of Nigeria or not, may deal in, invest in, acquire or dispose of, create or transfer any interest in securities and other money market instruments whether denominated in foreign currencies in Nigeria or not. Also a person may invest in securities traded in the Nigerian capital market or by private placements in Nigeria.[44]

The Foreign Exchange (Monitoring and Miscellaneous Provisions) Act has equally provided for penalties for violating the provisions of this legislation. In this regard under Section 31 of the Act for example, where an offence is committed by a corporate body, anybody or person who happens to be a director, proprietor, manager, secretary or any similar managerial position is deemed to beguilty of and punishable of the said offence as at the time of its commission unless he or she can prove that his or her consent, knowledge or connivance was not available to the act complained of having acted under such reasonable diligence as ought to have been exercised having regard to the nature of his or her functions in that capacity.

3.10 COMPANIES AND ALLIED MATTERS ACT[45]

In all forms of human endeavour, there has always been the need for adequate safeguards against possible harm, loss or damage to man occasioned by his ever-increasing ambition to better his lot. By a sheer combination of socioeconomic and legal engineering the concept of corporate entity evolves under a company, which as a legal person becomes a major participant in the field of commerce, separate and in addition to

[44] S. 26(1) & (2) of the Act.
[45] Cap. 59 Laws of the Federation of Nigeria 1990 (See LFN, 2004).

its individual members and others. Attempts have therefore been made, through legislations and judicial decisions in various jurisdictions, to provide adequate protection to those who invest in the company against the titanic incidences of the corporate phenomenon.[46] The Companies and Allied Matters Act has provided a legal framework for investors and their protection.

Under the Act the acquisition of shares and where the company does not issue shares, status of membership, of a company confers as the investor several rights and liabilities in such a company. These rights of the investors could be derived from a statute, the memorandum and articles of association of such investing company, or from general law and equity. The Supreme Court of Nigeria recognized and gave judicial pronouncements on the issue of an investor's rights by virtue of his shareholding position in a company in the case of **Kotoye v. Saraki**.[47] Just like the Act confers on the investors some rights, there are also some liabilities attached therein. An investor's liability is determined, at first instance by the type of company in which he has invested his resources i.e. whether the company is limited by shares, guarantee or unlimited.

Where the company is limited by shares, the liability of the investor is limited to the amount unpaid on his shares which may be called up at any time whether or not the company is in the process of being wound up.[48] Where the company is limited by guarantee, the liability of an investor is limited to the sum which he has entered into an

[46]Raimi, A.L. "Protection of Investors under the Companies and Allied Matters Act, 1990". In Jimoh, A.A. (ed) Modern Practice Journal of Finance and Investment Law (Lagos: Learned Publishments).
[47] (1994) 7 NWLR (Pt. 357) 41 at 467.
[48] See S. 21(1) (a) and S. 133 CAMA.

undertaking to contribute to the assets of the company in the event of its being wound up.[49]

The basis of the rights and liabilities of an investor in the memorandum and articles of association of a company is contained in Section 41(1) of the CAMA which provides that:

> subject to the provisions of this Act, the memorandum and articles when registered, shall have the effect of a contract under seal between the company and its members and officers and between the members and officers themselves whereby they agree to observe and perform the provisions of the memorandum and articles as altered from time to time in so far as they relate to the company members or officers as such.

This provision seeks to lay to rest the hitherto existing controversy on the construction of Section 16 of the 1968 Act[50] on whether an officer (or a member in his capacity as an officer) can enforce the contract contained in the memorandum and articles of the company. By inclusion of officers among the contracting parties in the memorandum and articles of a company, it has become obvious that such contracts are enforceable by and against an officer.

Suffice it to say however, that much as CAMA has made provisions for investors of a company, there are equally numerous provisions contained in the CAMA disqualifying certain categories of persons from becoming investors in a company. For example, Sections 20 and 80 of the CAMA, 1990 contain provisions disqualifying certain persons from becoming members of a company.

[49] See S. 21(1) (b) CAMA.
[50] Similar provision is contained in S. 20 UK CA 1948, re-enacted as S. 14 UK CA 1985.

By the combined effect of these sections, the following persons are disqualified from joining in the formation of a company or becoming its members:

(a) a person who is less than 18 years except two or more qualified persons are already members as such,

(b) a lunatic who has been so found by a court in Nigeria or elsewhere,

(c) an undischarged bankrupt,

(d) a corporate body in liquidation,

(e) a person disqualified under Section 254 of the CAMA 1990 from being a director,

(f) an alien or a foreign company unless the provisions of all enactments relating to the aliens or foreign companies are duly complied with.[51]

It is important to state that there are other areas whereby the Companies and Allied Matters Act 1990 have made tremendous provisions in promoting and protecting various investments. One of these areas is that relating to pre-incorporation contracts. Under Section 72(1) of CAMA, it provides that:

> any contract or other transactions purporting to be entered into by the company or by any person on behalf of the company prior to its formation may be ratified by the company after its formation and thereupon, the company shall become bound by and entitled to the benefit thereof as if it has been in existence at the date of such contract a other transaction and had been party thereto.

Subsection 2 further provides that:

> prior to ratification by the company the person who purported to act with the name of or on behalf of the company shall, in the absence of express agreement to the

[51] Raimi, A.L. Ibid., p. 28.

> contrary, be personally bound by the contract or other transactions and entitled to the benefit thereof.

The above position of the law is a clear departure from the repealed Nigerian Companies Act of 1968 which did not specifically provide for pre-incorporation contracts thereby leaving our law at the mercy of the still rigid English position. To further ensure that investors could expand their chosen areas of business as the need may arise, CAMA in promoting investments has a provision whereby a company's memorandum and articles of association could be lawfully altered.

However, there are accompanying restrictions in this regard. These restrictions are provided under Section 44(1) of CAMA 1990. The Companies and Allied Matters Act 1990 has equally provided for the protection of investors through the Corporate Affairs Commission. By Section 314 of CAMA 1990, the Corporate Affairs Commission may make appointment of inspectors to investigate the affairs of a company on the application of a specified number of members or the company itself. By Section 315(2) of the Act, the commission may make such an appointment if it appears to it that there are circumstances suggesting that:

a. the company's affairs are being or have been conducted with intent to defraud its creditors or the creditors of any other person or in a manner which is unfairly prejudicial to some part of its members, or
b. any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial, or that the company was formed for any fraudulent or unlawful purpose, or
c. persons concerned with the company's formation or the management of its affairs have in connection therein been guilty of fraud misfeasance or other misconduct towards it or towards its members, or

d. the company's members have not been given all the information with respect to its affairs which they might reasonably expect.

3.11 THE BANKS AND OTHER FINANCIAL INSTITUTIONS ACT (BOFIA)[52]

Banks and financial institutions no doubt constitute the engine room of economic growth in modern economy, through their ability to; inter alia channel savings into investments. As such, banks and financial institutions play a unique role in an economy, a role which is crucial to both economic and indeed political stability. The stability of the financial system is therefore considered paramount and must be safeguarded by legislation and regulation. [53] Therefore the stability of the banking sector is important to the promotion of foreign investment in Nigeria.

The BOFIA became necessary as a result of increasing sophistication in national and international commerce. The previous legislation, i.e. the Banking Act of 1969 had proved in effective in addressing emerging national and international demands of modern day banking services. The liberalization and deregulation of the company's economy on the other hand, equally contributed to the need for the promulgation of the Act.

Basically, the Act is divided into three parts, i.e. (i) while Part I deals with banks generally, (ii) Part II deals with other related financial institutions, (iii) while the Part III deals with other miscellaneous and related matters.

[52] Cap. 61 Laws of the Federation of Nigeria 1991 (See LFN, 2004).
[53] "Legal Framework for Banks and Financial Institutions in Nigeria". Adeniji, O.A. Lawyers' Bi-Annual Journal (Lagos: Federal Ministry of Justice, 1993) pp. 48-61 at p. 48

Suffice it to say that the 1991 Act was further amended by the 1998 Act. The BOFIA provides the regulatory framework for the establishment and management of banks and other related financial institutions. Section 2(1) of the1991 Act provides inter alia that:

> no person shall carry on any banking business in Nigeria except it is a company duly incorporated in Nigeria and hold a valid banking licence issued under this Act.

As amended by the BOFIA (Amendment) Act 1998, subsection (2) provides:

> any person who transacts banking business without a valid licence under this Act is guilty of an offence and liable on conviction for a term of imprisonment not exceeding 10 years or a fine not exceedingN2,000,000.00 or both such imprisonment and fine.

One commendable aspect of the legislation is the provisions of Section 21(1) and (2). Under the said provision, a bank may also hold or acquire share capital of any business subject to the approval of the Central Bank of Nigeria (CBN). This provision will provide a situation whereby investment opportunities would be available to small and medium scale enterprises in Nigeria. Above all, it would enhance the availability of some fund from the banking sector which would generally encourage the growth and development of local industries and foster indigenous entrepreneurship in Nigeria.

CHAPTER FOUR:

SECTORIAL ANALYSIS OF FOREIGN INVESTMENTAND APPRAISAL OF THE PRIVATISATION PROGRAMME AND INVESTMENT TRENDS IN NIGERIA

4.1 INTRODUCTION

The concept of sectorial analysis and forms of foreign investment in Nigeria is informed by the need to appropriately dissent the various forms of foreign investment in Nigeria. By the sectorial analysis of these forms of foreign investment we mean, such sectors like, the Petroleum Industry, Science and Technology, Health, Agriculture, Education, Engineering, Manufacturing and a host of other related sectors.

4.2 THE PETROLEUM INDUSTRY

Exploration of oil in Nigeria commenced in 1908 and was halted upon the commencement of World War 1. The exploration continued in 1937 and was again halted during World War 2. Crude oil was only discovered by Shell Petroleum in the Niger-Delta region of the country in 1956 after exploring for over 50 years. Since then, Nigeria has remained an oil-rich nation and its estimated daily production in 2001 was about 2 billion barrels per day. According to the *Oil and Gas Journal*, Nigeria was said to have an estimated oil reserve of37.2 barrels at the end of 2011.[1]

Foreign Direct Investment has had a major impact on the oil sector with the extension of foreign capital and technology in exploration and extraction of oil, making Nigeria the highest producer of oil in Africa.[2] In the downstream sector on the other hand, as the refineries are currently managed by the government, majority of which do not function

[1]Nigeria: Analysis, U.S. Energy Information Administration, (Oct.16, 2012),
[2]Investment Policy Review; Nigeria, United Nations Conference on Trade and Development, (2009), http://unctad.org

properly due to poor maintenance amidst other factors,[3]Nigeria relies heavily on foreign refining of its crude products which are then imported back into the country for domestic consumption. One of the main causes of this is the absence of significant FDIs in the oil sector and as a result, Nigeria imports refined petroleum products which alone constitute about 21 percent of its total imports.[4]

In the opinion of M.A. Ajomo:[5]

> In Nigeria, nowhere has joint venture, as a mode of participation in equity and control of a transnational enterprise been employed as much as in the petroleum industry. Indeed, in that sector it is now the explicit policy of the Federal Government to insist on joint venture participation with any transnational investor.

Before considering the issue of joint venture agreements in the petroleum industry, it is vital to consider one of the principal legislations in that regard i.e. the Petroleum Act.[6] A general preview of this legislation indicates that the major statute that governs or regulates petroleum activities in Nigeria are rather on crude oil and petroleum products. One area which this legislation and other enabling statutes have not adequately addressed is that of Natural Gas.

The following legislations however have provided for the utilisation of gas in Nigeria:[7]

(a) the oil and gas pipelines Regulations Act 1995 (See LFN, 2004),

(b) Nigerian LNG (Fiscal Incentives, Guarantees and Assurances) (Amendment) Act No. 113 of 1993 (See LFN, 2004),

(c) the Associated Gas Re-injection Act (Cap 26) Laws of the Federation 1990 (See LFN, 2004).

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[3] Ademola Alawiye, FDI In Nigeria Tops 6.8Billion, (Apr, 2013), http://www.punchng.com

[4] Adamu Ibrahim op. cit, pg 145

[5] Ibid. p. 17.

[6] Cap. 50 Laws of the Federation of Nigeria 1990. See LFN 2004

[7]Oshineye, A. "The Petroleum Industry in Nigeria: An Overview", Modern Practice Journal of Finance and Investment, Lagos: Learned Publishments Ltd. Vol. 4, 2000 pp. 325-344 at p. 342.

From the foregoing, while the Petroleum Act may be said to have not adequately covered the area of natural gas, this obvious omission has been covered by other legislations as above. However, whether these legislations have adequately covered the Natural Gas sector is another argument altogether.

Though the first legislation relating to exploration of oil in Nigeria was the Mineral Oils Ordinance of 1914, historical revelations have it that a German company known as the Nigerian Bitumen Corporation in 1908 first undertook the exploration of mineral oils in the territory that is presently known as Nigeria.[8] The body that was responsible for policy formulation and the determination of relationships with foreign oil investors was the Nigerian National Oil Corporation (NNOC).[9] By virtue of another legislation,[10] NNOC was replaced with the Nigerian National Petroleum Corporation (NNPC) as the main regulatory body on behalf of the Federal Government.

One basic fact still remains that, there have been various forms of agreements which have regulated the legal relationships with Nigeria since the 1950s before the discovery of oil in commercial quantity in Oloibiri Rivers State in 1957. The forms and methodology applied in respect of oil exploration agreements with the international oil companies (IOCs) started having different faces with the advent of more sophisticated technology and diversification in international or global commerce.

[8] Ibid, p. 325.
[9] This was established by Act No. 18, 1971. See LFN 2004
[10] Act No. 33 of 1977, see also Yalaju, J. "Joint Operating Agreements in Nigeria Petroleum Industry", Modern Practice Journal of Finance and Investment Law, Lagos: Learned Publishments Limited, Vol. 4, 2000, p. 147.

In the opinion of Omorogbe, Y. :[11]

> the Nigerian Government's participation in the oil sector are in three forms - traditional joint venture, production sharing contract (PSC) and Risk Service Contract.

We shall consider each of these forms of ventures.

4.2.1 Production Sharing Contract

The production sharing contract is an investment scenario whereby the owner of the leases agrees, based on some legal mechanisms, that would regulate and govern the contractual relationship between him and the international oil company to share the production processes. Under this agreement, the procedures, production mechanisms, and issues of joint ownership of properties are articulated upon whereby a definite operational agreement is arrived at by all parties concerned.

One area that has often led to some divergent legal opinions is what in the context of a production sharing contract (PSC) is to be defined as "joint property". In this regard, scholars of international commerce have articulated on this many at times.

For example, the **Black's Law Dictionary**[12] defines "property" as:

> that which is peculiar or proper to any person, that which belongs exclusively to one. In the strict legal sense, an aggregate of rights which are guaranteed and protected by the government. The term is said to extend to every species of valuable right and interest more specifically, ownership, the unrestricted and exclusive right to a thing, the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it.

[11]Omorogbe, Y. "The Legal Framework for the Production of Petroleum in Nigeria", Journal of Energy and Natural Resources Law, No. 4 (1987) p. 273

[12] 6th ed. Centennial ed (1981-1991) St. Paul Minn. West Publishing Company, o, 479.

Some authors on the other hand have the opinion that the term "joint property" under the (PSC) agreements include expenditures for practically all activities and services of the oil company, e.g. salaries, staff housing schemes, pensions, gratuities etc.[13] been able to demarcate the necessary boundaries between tangible and intangible properties. Coupled with the above controversy is the desirability to categorize whether such properties are moveable or immoveable.

There is the desire to separate such joint properties and categorize them either under, shares, machinery or equipment, land, intangible assets or industrial property such as patents, trademarks, trade names, licences, technical data and assistance, technological know-how etc.[14] It is submitted that this demarcation though desirable are at times a matter of nomenclature.

4.2.2 Joint Venture Agreement

The Black's Law Dictionary defines “joint venture” as:

> a legal entity in the nature of partnership engaged in the joint prosecution of a particular transaction for mutual profit. An association of persons jointly undertaking some commercial enterprise. It requires a community of interest in the performance of the subject matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses.

The above definition may be seen from the view point of the partners in the joint venture agreement. This is so because the concept and definition of joint venture agreement within the contemplation of the host nation and the foreign investor's country may have some slight changes as far as joint venture is concerned. This is because joint

[13] Omorogbe Y. Ibid. p. 273, and Yalaju J. Ibid, p. 148.
[14] Ajomo, M.A. Ibid, p. 9.

venture agreements are encouraged by the municipal legislations of the host country as well as the foreign country with a view to further develop each country's economy. From the view point of most third world countries, joint venture agreements have often been regarded as channels for obtaining the much sought about transfer of technology in today's global competitive international commerce.

In the opinion of Professor M.A. Ajomo:[15] the rationale for the joint venture relationship varies with the promoters' perspectives. From a host government's point of view, participation in the equity of a project has generally been seen as away of achieving three objectives:

(a) an increase in the fiscal take from the project,

(b) the exercise of some control in key areas of decision-making,

(c) access to corporate know-how, with a corresponding ability to monitor investor performance more effectively.

Since joint venture agreements have dominated the Nigeria oil or petroleum industry, some of the reasons for this development is that, for a foreign importer of capital and technology into any economy to be reasonably protected in the face of political, or economic risks as well as expropriation, joint ventures with host entrepreneurs become inevitable. With a great zeal and expectation of the maximization of profits on the part of the joint venture partners, and the desire of transfer of technology and greater economic development; the Federal Government of Nigeria has in turn promulgated receptive legislations to encourage a free promotion of foreign investments in the oil sector. Some examples of these legislations are:

[15] Ibid, p. 9.

(a) the Petroleum (Amendment) Act No. 23 of 1996,

(b) the NNPC Act 1990,

(c) Pre-shipment Inspection of Exports Act 1996.

The promulgation of these laws has to a great extent promoted investments in the oil sector.

4.2.3 (c) Risk Service Contract

The participation of the Nigerian government in any joint operation agreement under this category is normally done through the NNPC. Under the Risk Service Contract, there is normally an unambiguous provision in the contract to the effect that each participating partner must have an unalloyed interest in the leases, and the equity participation of each partner determines the sharing formula in the venture. In this regard, a joint operation agreement (JOA) is always required under the Risk Service Contract.

In the opinion of some authors:[16] a JOA is needed in all cases where petroleum licence is held by two or more persons since the licence does not concern itself with the sharing of rights and obligations under the licence as between the licencees. The licence confers rights jointly upon the persons to whom it is granted and defines them as "the licencees," the obligations under the licence are joint and several.

A licence in this regard is the legal authorization of usage from the office of the Petroleum Ministry in exploration of oil and other related petroleum products. These licenses are: Oil Exploration Licence (OEL), Oil Prospecting Licence (OPL) and Oil

[16]Taylor MPG et al "The Joint Operating Agreement, Oil and Gas", (London, Longman Publishers, 1993), p. 63.

Mining Lease (OML). In this context, while the (OEL) confers on the licensee the right to carry out aerial and surface geological and geophysical surveys excluding drilling below 300 feat, the license is issued for one year and may be renewed for another (one) year.[17] Under the (OPL), its period of operation is five years even though with an option of renewal. This type of licence gives the operator the absolute right to explore and dispose of any mineral or petroleum product discovered under such a licence as may be granted under such licence and exclusively to the owner of such a licence.

Under the (OML) on the other hand, it confers on the lease the exclusive right to search for, win, work, carry away and dispose of all petroleum products discovered and won in the leases operations subject to the term of the lease.[18]

4.3 SCIENCE AND TECHNOLOGY SECTOR

Undoubtedly the growth and development of any given country is to a large extent dependent on its science and technology acquisition and distribution. It is against this backdrop that successive governments in Nigeria have variously pursued the policy of technology development and acquisition over a long period of time to stimulate the socioeconomic growth of the nation. At the global level,[19] one of the institutional bodies for the development of technology in international commerce is, the United Nations Conference on Trade and Development (UNCTAD). This body was founded in 1964 as an organ of the General Assembly whose functions among other things is to encourage and monitor the application and development of technology among developing and developed economies of the world.

[17] Yalaju, J. Ibid, p. 149.
[18] Yalaju, J. Ibid, p. 150. See also Momdu M, "The Duration of Oil Leases in Nigeria", Journal of Energy and Natural Resources Law, 5 No. 4 (1987) pp. 277-299 at p. 279.
[19] Omorogbe, Y. "The Legal Framework and Policy for Technology Development in Nigeria", African Journal of International and Comparative Law, London: 1998, p. 171 at p. 156.

However, it could be observed that, the level of its impact on the Nigerian economy has not been much compared to other developed world economies. Some of the reasons for this is that the United Nations as a world body is itself more directed towards developed economies than third world or developing economies. Technology has been a strong indices for the development of any nation. In this regard therefore, the economic super powers are better disposed to its development more within their own economies than the developing economies.

At the regional level, attempts have also been made to foster greater economic development through the acquisition of modern technology by the evolution of various economic policies. As a result of the desire to improve on its technology, acquisition, Nigeria, including other African countries have often designed and adopted various economic policies, and investment mechanisms aimed at achieving industrialization through foreign investment.

How effective these policies have been is a different subject matter to be discussed later on another sub-topic. Notwithstanding the above position, the concept and definition of "technology" itself has often been a subject that has been defined from various points of view depending on the very perspective that the writer is looking at the subject matter.

The International Code of Conduct on Transfer of Technology defines it as being,[20] systematic knowledge for the manufacture of a product for the application of a process or for the rendering of a service, and does not extend to the transaction involving a mere sale or mere lease of goods.

[20] Act of 5th June, 1985. See also Omorogbe, Y. Ibid, p. 157.

The above definition with all intents and purposes appears to be more restricted to the puristic scholar. This is because of its inability to portray the socio-economic and political factors on technological innovations. Professor Osita Eze on the other hand has defined technology as "the systematic application of knowledge or the production of goods and provision of services for the achievement of perceived socio-economic and political objects within the framework of a given socioeconomic system."[21]

Within the context of the Nigerian National Policy on Science and Technology, it is defined as:

> the way of doing things through the application of knowledge derived from the systematic investigation, of natural forces and materials. It leads to the development of processes and devices indispensable to the stable enhancement of the quality of life and to the human labour.[22]

The general analysis from the above definition is that technology can only to some reasonable extent be viewed as a systematic process of knowledge acquisition aimed at further enhancing the living standard of the people in a given socioeconomic body policy. Prior to the establishment of the Federal Ministry of Science and Technology in Nigeria, various governmental agencies have in the past shouldered the responsibility of policy formulation and implementation towards technology acquisition and utilization in Nigeria.

But the national policy on science and technology was more pronounced in the early 80s and more specifically, in 1986 when a "blue print on science and technology was

[21]"Transfer of Technology to Developing Countries", Nigerian Institute of Advanced Legal Studies (NIALS) Lagos, 1986 at p. 11.
[22]National Policy on Science and Technology, Federal Ministry of Science and Technology, 1986 at p.

formulated". One important phraseology associated with technology is the more often referred to "transfer of technology". Transfer of technology has more often been associated with foreign investments within the Nigerian socio-economic context and perhaps other developed or developing economies. This transfer can be said to take place when a technology is developed and essentially applied by one organization and utilized for production purposes and effectively applied by another organization.[23]

It means therefore that what is more sought for in the real sense of it is transfer of technology rather than technology itself. This is so because any form of technology that has not been transferred from the donor state to the donee, would not be said to have fulfilled the desired objectives of foreign investment in any state economy.

But the transfer of technology per se is not as simplistic as it may sound. In this regard, successive governments have tried to lay down serious governmental and economic policies towards this end. The bitter truth, notwithstanding these policies 159 and incentives is that, the desired impact of these much talked about technological transfer is yet to be felt considerably by the average Nigerian. A casual perusal of the Vienna Programme of Action which was adopted by the United Nations Conference on Science and Technology Development (UNCSTD) in 1979 for example, recommended that each developing country should formulate a policy on transfer and acquisition of technology as part of its national policy for scientific and technological development.[24] The promulgation of the National Office of Industrial Property Act[25] was what laid the first foundation of the focal point for technology policy in Nigeria as a whole.

[23] Omorogbe, Y. Ibid, p. 157.
[24] Omorogbe, Y. Ibid, p. 158. See also the Lagos Plan of Action, 1980.
[25] Laws of the Federation of Nigeria, 1990.

Having looked at some of the legislative framework for the acquisition and development of technology within the Nigerian nation, it is necessary for us to review some of the areas where these technological transfers have been applied. This is because the need to assess the application of the technological policies is necessary so as to compare it with what is obtainable in other countries, like Korea for example. In the case of Korea, one writer stated that:[26]

> the rapid growth of the Korean economy has attracted the attention of the world. One of the major issues in the world economy has been how Korea, lacking in capital and technology, could have sustained a high economic growth rate for almost three decades. Such reasons as high productivity of labour, good work ethics, excellent planning and executing of economic policies by government and effective utilization of foreign capital and export-oriented development policy significantly contributed to the high growth rate of the Korean economy.

The above position cannot be said of the Nigerian economy and other projects that have been linked with transfer of technology. The Steel Rolling Companies in the country where the much talked about transfer of technology has been much expected, is a disappointment. The companies in Osogbo, Katsina, Ajaokuta, and Jos are neither fully sold, privatised or not fully operational whereby its production capacity could be positively felt in the nation's economy. The economic growth of the country is decimally below average when compared to other developing economies that have such structures on ground.

Successive changes in economic policies and its executions have also contributed in no small measure in arresting economic and technological growth. Utilisation of foreign

[26]Kim Won T. "Direct Foreign Investment and Technology Transfer: A Case Study of Korea", Ajomo, M.A. et al (ed), Regulation of Trade and Investment in an Era of Structural Adjustment: The African Experience (NIALS) Lagos, 1995, pp. 157-173 at p. 157

capital cannot be said to be religiously applied with a view to enhancing development and encouraging export-orientedness of the country's economy. The end result of this phenomenon is the country's emerging image as a glorified dumping ground for obsolete technologies, products and services that do not do the country any good nor its citizens.

4.4 OTHER RELATED SECTORS

The effects of foreign investments have equally been noticeable in other sectors of the Nigerian economy. Some of these sectors are: Health, Agriculture, Telecommunications, Manufacturing, Education, Engineering, etc. Though all of the above mentioned sectors are very relevant with each sector deserving an elaborate discussion on its own, we shall however discuss the communications, Agriculture and Power sectors. This is as a result of the great impact these sectors have on any nation moreso as it relates to international trade and commerce globally.

4.4.1 Telecommunications

The telecommunications in Nigeria is one industry which has grossly being effective to the socio-economic growth of the country. This level of ineffectiveness has seriously affected the inflow of direct foreign investment and foreign capital in the development of the country's economy. The above shortcoming of the sector coupled with recent government economic policy has made the telecommunication industry to be listed among organizations or parastatals to be privatized or commercialized in the ongoing privatization and commercialization policy of the Federal Government of Nigeria. To achieve this objective, the National Council on Privatization, which is the government organ charged with the privatization of targeted governmental parastatals, has sent a

draft bill through the Federal Executive Council to the National Assembly for approval. If the draft bill is passed into law, the intention is to privatize M-TEL and NITEL which are the major government telecommunication organs.

The said Act is intended to repeal the Nigerian Communications Commission Act of 1992, and to further amend the wireless Telegraphy Act of 1966 with a view to proposing or establishing a new legislation for independent Commissioner organizations. The primary object of the said Act is to create and provide a regulatory framework for the Nigerian telecommunication industry and all matters related thereto in the public interest and for that purpose.[27]

As regards the scope of this Act, it applies to:

(a) the establishment and operation of telecommunications systems in Nigeria,

(b) the provision of telecommunications services, and

(c) the use of radio frequencies (other than broadcasting) for civil purposes only.

The Act on the other hand, does not apply to such establishment, operations, provision or use for military, state security or law enforcement purposes. It is against the background of the Telecommunications Act of 2000 that the NITEL was privatized whereby licenses where granted to private core investors under the Global System for Mobile communications (GSM) operation services.

Global System for Mobile (GSM) was launched in Nigeria in 2001 with licences issued to 3 Telecommunication companies, of which 2 are foreign companies i.e. MTN and

[27] See the Draft Bill by the National Council on Privatisation 2000, p. 6.

Econet Wireless. Within 2 years of penetrating the market both foreign companies had built a customer base of over 2million subscribers.

These companies have on the other hand gone into joint venture or GSM pacts with foreign partners with a view to actualizing their business dreams. On the part of NITEL for example, it went into a GSM pact with another foreign firm MSI Inc as its foreign partner. MTN Nigerian Telecommunications Ltd. also has its foreign partners from South Africa. Though the GSM system has fully taken off in Nigeria, one great expectation of the people is that the presence of foreign partners in the telecommunications industry would further expand the frontiers of local and international commerce. This is so because the global economy and all the developed economies became great as a result of developed telecommunication systems. Nigeria cannot be an exception to this world phenomenon if we are to measure up with other developed economies.

According to Dr. Eugene Juwah, the Vice-Chairman of the Nigerian Communication Commission: the telecommunication sector has attracted Foreign Direct Investment to the economy in the past eleven years in the estimated sum of $25billion..[28]

According to the Nigerian Communication Commission, MTN's share of the mobile market was 41.2percent as at June 2009, even though its position has fluctuated back and forth since then.[29] Furthermore, Dubai based telecommunication company, Etisalat, joined the market in 2009 and it has recently announced that it now has about

[28] Everest Amaefule, Telecoms Sector Attracted $25 Billion In 14Years, (Mar. 18, 2013), http://www.punchng.com

[29]Determination on Dominance in Selected Communications Market In Nigeria, Nigeria Telecommunication Commission, (2010)

15millionsubscribers in the country. [30]By and large, prior to the influx of GSM into Nigeria, the telecommunication sector was in a terrible state, but with the advent of "mobile telephony", communication has become a lot easier and more effective.

4.4.2 Agriculture

The importance of the agricultural sector of Nigeria to its economy cannot be over-emphasised. "….the country's expanses of arable land make agriculture and agro-processing viable and attractive."[31] The country is generally divided into three agricultural zones with the Northern part of Nigeria found to have the highest potential for crop production. The major characteristics of farming in this area include the low cost of living, small-scale farming and privately-owned irrigation systems.[32]

It is however pertinent to state that less than 50% of Nigeria's agricultural resource is being put into productive use and even then, cultivation in majority of these areas are carried out by rural individual farmers who lack the requisite technological know-how and tools to enable them yield maximum productivity.[33] Nigeria has been described as the largest producer of cassava, yam and cowpea in the Sub-Saharan part of Africa yet it still lacks food and the poverty level is alarming.[34]

Unfortunately, agriculture on which the Nigerian economy previously relied prior to discovering oil was practically neglected and has now deteriorated

[30] Ottoabasi Abasiekong, Etisalat Subscriber Base Hits 15Million, (Jan. 2013), http://businessnews.com.ng/2013/01/16/etisalat-subscriber-base-hits-15-million
[31] Ademola Alawiye, FDI In Nigeria Tops 6.8Billion, (Apr, 2013), http://www.punchng.com
[32]Nigeria Strategy For Agricultural Growth, West Africa Department Agriculture Operations Division, (Dec. 27, 1989)
[33] Manyong V.M. Et Al., Agriculture in Nigeria; Identifying Opportunities for Increased Commercialization, (2005)
[34]Rural Poverty In Nigeria, International Fund for Agricultural Development,

drastically.[35]However the production and exportation of agricultural products are observed to be very low in recent times with no signs of improvement.[36]

According to Dr. Suresh Kumar:"Nigeria needs scientific technology and investors to make up the difference between demand and supply".[37]

The agricultural sector is no doubt a viable investment opportunity as the country enjoys a favourable climate which enhances its capability to produce various crops desired by the global economy which range from cocoa, palm-oil, cassava, sugar cane, amongst others.[38]

With increased focus on diversifying the Nigerian economy to non-oil and gas sectors, the country now also focuses on the agricultural sector. According to the current Minister of Agriculture and Rural Development, the sector in the past year was able to attract an approximate sum of $8billion in foreign investment.[39] The government is currently implementing various policies in an effort to improve and encourage investment in this sector. However, just like many other sectors of the economy, the dearth of foreign investment in this sector is quite overwhelming.

4.4.3 Power Sector

According Benjamin Ezra Diki the Director General of Bureau of Public Enterprises (BPE);[40] by 1999, the Nigerian electric power sector reached, perhaps, its lowest point in its 100 years history with the following statistics:

[35] Doing Business In Nigeria, World Bank, (2009)
[36]Nigeria Economic Performance Assessment, United States Agency for International Development, (Feb. 2006)
[37] Suresh Kumar, India's Investment In Nigeria's Agricultural Sector, (Jul. 2010)
[38] Kenneth Obi, Business And Investment Opportunities In Nigeria, (Feb. 3, 2013),
[39] David Abellegah, Agricultural Sector Has Attracted $8Billion In The Last One Year, (Dec. 17, 2012)
[40] Lecture titled : The Federal Government Privatization and Economic Reform Programme, June 24, 2014

a. Of the 79 generation units in the country, only 19 units were operational.
b. Average daily generation was 1,750 MW.
c. No new electric power infrastructure was built between 1989-1999. The newest plant was completed in 1990 and the last transmission line built in 1987.
d. An estimated 90 million people were without access to grid electricity.
e. Accurate and reliable estimates of industry losses were unavailable, but were believed to be in excess of 50%.

The state of Nigeria's power sector is to say the least, frustrating and almost nonexistent to the average Nigerian. It is also common knowledge that to survive as a business owner, it is imperative to own a generating set of your own to provide you with electricity as electricity supply is completely unreliable. Since 2001, Nigeria has been generating only about 3000mega watts per day. World Bank Investment Assessment Climate of 2001 reports that 97percent of Nigerians own or share a generator.[41]

Although the government has made efforts to rehabilitate this industry and this has been an issue of top priority for the government for many years, but until now there were no concrete sign of Foreign Direct Investment in the Power sector as it were being managed by the government. The government has however decided to shift this sector into private hands and efforts have been made to improve the efficiency of the distribution, generation and transmission network of the sector. The reforms in the sector are geared towards providing people with the basic and affordable infrastructures to enable them create employment for themselves.

[41] *Investment Policy Review: Nigeria*, United Nations Conference On Trade And Development, (2009)

The Nigeria Government drive to revitalize the Power sector started with the Power Sector Policy, 2001, which is aimed at ensuring steady electricity supply by creating a conducive investment environment for private sector investment and managerial expertise. An investor friendly Power Sector Reform Act enacted in 2005 and this initiated a credible Foreign Direct Investment position and effectively break the monopoly in the Power Sector by introducing a competitive electricity market.

In line with the Power Sector reforms, the Power Holding Company of Nigeria (PHCN) was unbundled into six generating companies; eleven distribution companies & one Transmission Company. Subsequently eighteen (18) successor companies were corporatized and assets, liabilities and employees of PHCN transferred to the successor companies. The Nigeria Government took a further step aimed at Privatization and concession of the Successor Companies. The Nigeria Electricity Regulatory Commission (NERC) was established in 2006 to regulate the activities of investors in the Power sector.

4.5 DEFINITION AND CONCEPT OF PRIVATISATION

Section 14 of the Privatisation and Commercialisation Act[42] defines "privatisation" as:

> the relinquishment of part of all the equity and offer interest held by the federal government or its agencies in enterprises whether wholly or partly owned by the federal government.

In the opinion of Honourable Justice M.I. Uwais (former Chief Justice of the Federation) "privatization" means

> transfer from public ownership to private ownership. It involves divestment by the state of its interest in public

[42] Cap 369 Laws of the Federation of Nigeria 1990

> enterprises and the transfer of such interest to private ownership.[43]

A former President succinctly stated the privatisation policy at the inauguration of NCP on 28th August, 2008, as thus:

> **"**Privatisation permits governments to concentrate resources on core functions and responsibilities of governance, promoting markets to work efficiently, with provision of adequate security and basic infrastructure, as well as ensuring access to key services like education, health and environmental protection"[44]

The most outstanding word in all the above definitions appear to be "transfer of interests in enterprises", equity from the public (state owned) to private (individually owned) enterprises.

The International Finance Corporation (IFC) (a global privatization project of the World Bank) equally adopts a working definition of privatization as any transfer of ownership or control from public to private sector"[45] and went further to observe that:

> painful economic realities are forcing many developing countries to reshape their economic policies. Operating under tight fiscal constraints, governments are recognizing that they can no longer afford to put enormous amounts of capital into inefficient state industries. As a result, many governments are reforming the regulatory framework to encourage private sector involvement in providing infrastructure services, and a growing number of state enterprises are being privatized.

From the historical perspective developing countries have often relied mostly on public owned enterprises as the pivotal force of developing their economies. Recent revelations have however shown that the above scenario cannot be sustained continually due to some obvious reasons that government returns or profits on such enterprises at times

[43]Uwais, M.I. "Privatization of public enterprises special remarks" Law & Business Quarterly (Lagos EVL Publications Ltd. 2003). P. 60 – 63 PP. 60.

[44] President Umaru Musa Yar adua on the occasion of inauguration of National Council on Privatization, Presidential Villa Abuja, 28th August 2008

[45]IFC's Experience Base, Lessens of Experience Series "Principles & Practice". The World Bank Washington D.C. 1995 p. 3 see also Igwe, J.U.K. Business-Government Relation in Nigeria (Policies, Laws & Institutional Framework) (Lagos: Law Development Research Publication Ltd 2000) p. 260.

appear to cripple the economy of the state thus the inevitability of the privatization policy.

It is in this regard that privatization has grown globally with varied and wider conceptualization. According to Ramanadham:[46]

> the concept of privatization is infact wider. It is to be understood, not merely in the structural sense of who owns an enterprise, but in the substantive sense of how far the operations of an enterprise are brought within the discipline of market forces… it denotes marketization or bringing the enterprises under the disciplines of the market. There can be three options of policy: Ownership changes, organizational changes and operational changes… the second and third often go under the name of public enterprises reform or performance improvement and may be considered as a second order version of privatization.

The concept of privatization within the contemporary Nigerian context vis-àvis the legal instrument, i.e. the Privatization and Commercialization Act[47] appears to be dwelling more on the issue of structural ownership rather than its organizational or operational structure. In this regard, what obtains here is the outright sale of an enterprise or public utility where by government's equity or shares are transferred to private hand thereby divesting or totally denationalizing such interests or equity from the government as initial owners.

In an ownership measure structural privatization policy, such ownership could either be fully sold or partially sold, or may even be by outright liquidation. In this regard, it goes to say that the privatization of the management of such enterprises or the discipline of such enterprises are not seriously looked into or taken into consideration. Issues like the

[46]Ramanadham, V.V. (ed) *Privatization in Developing Countries* (London & New York: Routledge 1993).
[47]Cap 369, Laws of the Federation of Nigeria 1990. See LFN 2004

privatization of the management or the discipline of any of such enterprises are wholly left to the new ownership structure.

It could be true that on a general note that there appear to be a large increase in research and adaptation of privatization as an economic policy in recent times. However, the empirical knowledge of privatization programme in Africa in general and particularly in Nigeria is grossly inadequate. For example, there has not been adequate information or knowledge as to the technical efficiencies of some of these privatization programmes in Nigeria. The average Nigerian is not fully aware of the profitability, productiveness, efficiency and some data analysis in this privatization programmes.

It is trite that Nigeria's public enterprise sector is about the largest in sub-Saharan Africa both in levels of absolute numbers of enterprises and their contribution to the Gross Domestic product of the country. This is so because since independence or even right from the colonial era, public enterprises have assumed increasing diverse and strategic developmental roles in the Nigerian economy. This was accentuated during the oil boom of the 1970s and the 1980s when successive military regimes, buoyed by economic nationalism and massive oil windfalls developed a large public enterprise sector covering a broad spectrum of economic activities.

These covered large basic industries, manufacturing, agriculture, services, public utilities and infrastructure. They included telecommunications, power, steel, petrochemicals, fertilizer, vehicle assembly, banks, insurance and hotels.[48] Hitherto, government and the general public's attention had not been paid on many of these state

[48]Afeikhema, J. "Technical efficiency in some privatized enterprises in Nigeria" – Eighth Annual Conference on Econometric Modelling for Africa. Stellenbosch University, South Africa. 1–4 July 2003 at P.5 – 6.

owned enterprises until after the 1981 economic recession that forced oil prices which used to be, the major area attracting government attention and policy drive economic to be crumbling. The huge losses recorded by these state owned enterprises against the large expenditures by the government coupled with the near non-existent or epileptic services rendered to the public forced government to look inwards towards the privatisation of these enterprises.

In the opinion of another author,[49] in developed economies such as the United Kingdom and the United States of America, the trend is for government to "hands off" most of the utilities and the basic infrastructure for the development by the private sector as commercial ventures, and only reserves to itself the regulation of their operations to ensure public interest. This then enables government to concentrate on other matters such as economic planning, defence, foreign police etc.

It is observed that the above writer's view and comparison is not obtainable in Nigeria despite certain historical antecedents both countries share. Also in some developing economics such as Philippines, and Thailand, there is a gradual shift and involvement of the private sector in the provision of infrastructural facilities. It is therefore no longer tenable to insist that the responsibility of providing facilities must rest with government alone. This worldwide economic phenomenon was further discussed by the same author to the effect that private sector participation and involvement in the provision and management of public enterprises creates the necessary competition and desire for profit maximization. The overall effect of this is a better economic growth.

[49]Igwe, J.U.K., Business-Government-Relationship in Nigeria (Lagos: Law Development, Research, Publication Ltd 2000) P. 262 –263.

In 1984, the first transfer of a public monopoly occurred in the United Kingdom with the sale of 52% of British Telecom. At that time, it was the largest equity offering ever made valued at £3.9 billion and thus gave a great impetus to privatisation the world over. This was followed by the sale of the British Gas in 1986.

The privatization programme is a key aspect of Government's Economic Reform programme as enshrined in the Federal Government of Nigeria Transformation Agenda. It is designed to:

a. Diversify the economy;
b. Strengthen the private sector as Nigeria's engine of growth and economic driver;
c. Assist in restructuring the public sector in a manner that will effect a new synergy between a leaner and more efficient government and a revitalised, efficient and service oriented private sector;
d. Ensure government concentrates resources on core functions and responsibilities of governance;

Among the suggested reasons for Privatization in Nigeria include:

a. To improve efficiency and reduce waste in the public sector;
b. Modernize technology in our industries;
c. Dismantle monopolies and service arrogance;
d. Reduce debt burden and fiscal deficits;
e. Resolve massive/perennial pension gaps;
f. Promote transparency in corporate governance, and
g. Attract Foreign Direct Investments.

The Privatization Policy Objectives is attainable through the Promotion of competition; enthronement of sound corporate Governance in public and private sector, and Institutionalization of social accountability and efficient use of public resources.

4.6 THE LEGAL FRAMEWORK AND REGULATORY LEGISLATION CONSIDERED

The General Ibrahim Badamosi Babangida administration in July 1988 formally promulgated the Privatisation Decree No. 25 which set the ball rolling whereby a total of 111 enterprises were slated for full or partial privatisation. Some 35 others were for outright commercialisation.

However the basic legal framework for the second phase of the privatization programme of the Federal Government of Nigeria is the Public Enterprises (Privatisation and Commercialisation Act) 1999 which was promulgated by the General Abdulsalami Abubakar's administration before the handed over to a democratically elected government of the Chief Olusegun Obasanjo's. This legislation established what is referred to as the National Council on Privatisation (NCP) with accompanying functions under Sections 9(11) of the Act.

The Composition of the Council were as follows:

(a) the Chief of General Staff as Chairman (which presently is the office of the Vice President Federal Republic of Nigeria),

(b) the Minister of Finance as Vice Chairman,

(c) the Attorney-General of the Federation and Minister of Justice,

(d) the Minister of Industries,

(e) the Secretary to the Government of the Federation,

(f) the Governor of the Central Bank of Nigeria,

(g) the Chief Economic Adviser to the President,

(h) four other members to be appointed by the President,

(i) the Director-General of the Bureau of Public Enterprises.

Equally notwithstanding the provisions of sub-section 2 of the above section, any supervising Minister of any given or affected public enterprise can be invited and co-opted as a member of the Council for the duration of the privatization exercise under such Minister.

The functions of the above Council include inter alia:

1. the approval and formulation of the regulatory legal framework to be adopted in such privatization exercise,
2. the determination or otherwise of the desirability of placing any of the shares of such public enterprises as either public or private,
3. formulation and approval of the general policies of the privatization exercise,
4. ascertain the economic, political or social objectives and implications of the privatization exercise,
5. updating the President and Commander-in-Chief of periodic activities of the privatization exercise,
6. determine the period any privatization exercise could be carried out,
7. approval of the budget for the activities of the Council and the auditing of its accounts,
8. performance of such incidental functions or activities that may be related to the privatization exercise,

9. a general review of the privatization exercise against social economic realities of the economy of the country,
10. general supervision of the Bureau of public enterprises.

Also under Section 5 of the Act, the functions of the Bureau of Public Enterprises are outlined to include the following among other things:

1. The execution and implementation of the policy guidelines of the National Council on Privatisation (NCP),
2. General supervision of the issuance of shares and other instruments in respect of any public enterprise that would be privatized,
3. Appointment and recommendation of requisite consultants, advisers, investment bankers, solicitors, stockbrokers, accountants and other professionals for the privatization exercise,
4. Playing of advisory roles to the government on the general capital restructuring of any public enterprise,
5. Recommendation of such public enterprises to be privatized to the NCP.

Section 14 of the Act makes provisions for the functions of the Bureau in respect of commercialization to include the following among other things:

1. The implementation of the Council's policy on commercialization,
2. To ensure that public enterprises are managed in accordance with sound commercial principles and prudent financial practices,
3. Ensure that the Board and management of each commercialized enterprise and the Government of the Federation keep to the terms and conditions of the

performance Agreements, if any between the public enterprises concerned and the Government of the Federation,

4. The acquisition, holding and management of any movable or unmovable property subject to the overall supervision of the NCP,
5. Ensure the success of the commercialization exercise and monitor on a continuous basis for such period as may be considered necessary for the operations of the public enterprises after commercialization.

4.7 CHALLENGES TO FOREIGN INVESTMENTS IN NIGERIA

Notwithstanding the vast array of resources which is Nigeria is endowed with, the level at which the country has been able to attract Foreign Direct Investment is abysmally low. The legal framework has more often than been inadequate to address some of the challenges and provide an investment climate for Foreign Direct Investment. The following are factors which are commonly identified as those which constitute the major problems with which Foreign Investors are confronted:

1. Inadequate infrastructure
2. Corruption
3. Unstable regulatory framework and disregard for the rule of law
4. Insecurity and Terrorism
5. Custom issues
6. Administrative and bureaucratic bottlenecks

The challenges shall be discussed as follows:

4.7.1 Inadequate Infrastructure

Nigeria's lack of adequate infrastructure ranges from power supply to good roads and other means of transportation and communication. Nigeria's rail network for example is

poorly managed and barely utilized because of its mal-functionality. As a result, investors are forced to travel across the country via roads, which take more time and are also not in very good condition. Cost of maintenance of vehicles is also very high due to the poor road conditions.[50] This has no doubt raised the cost of doing business as a negative implication for investors.

Furthermore, as afore mentioned, the energy sector is in a very poor state. The cost of generating electricity for businesses is grossly expensive. In 2012, MTN declared that it spent over $5Million every month as cost of running diesel to power its business.[51] This is one sector about which Nigerians have lamented from day to day without any improvement whatsoever as power failure is the order of the day. It has also been noted that foreign investors have shied away from investing in this sector due to instability in price of oil and gas in the country.[52] Lack of such a basic infrastructure discourages businesses and increases the cost of doing business.

4.7.2 Corruption

Research shows that corruption generally creates an adverse effect on Foreign Direct Investment (FDI) by making it less attractive to investors.[53] Nigeria ranks 139 alongside Nepal, Pakistan and Kenya out of 176 countries and scores 27 out of 100 in the Corruption Perception Index in the public sector of all countries across the globe.[54]

Nigeria has been battling with corruption of its public officials for so many years. Upon becoming the President of Nigeria in 1999, President Olusegun Obasanjo set up the

[50]Investment Policy Review Nigeria, (United Nations Conference on Trade and Development, (2009),
[51] Adeola Yusuf, Nigeria's Expensive Darkness, (Mar. 2012),
[52] Layi Adeloye, Unstable Gas Price Scares Investors From Power Projects, (May 16, 2012), http://www.punchng.com
[53] Ade Akinlabi Et Al., Corruption, FDI and Economic Growth in Nigeria, Journal of Research in International Business Management, 281 (Nov.2011), Citing Shleifer &Visny, Corruption, Quarterly Journal of Economics. (1993)
[54]Corruption Perception Index, Transparency International, (2012), available at http://www.transparency.org

Independent Corrupt Practices Commission and later on, the Economic and Financial Crimes Commission, in a bid to fight corruption. Although a few persons have been successfully prosecuted by these commissions for financial crimes, their integrity and competence have been questioned both by Nigerians and the foreign community.

Due to Nigeria's corruption level, foreign investors such as the United States and other parties to the OECD Anti-Bribery Convention adopt anti-bribery laws, including the U.S. Foreign Corrupt Practices Act (FCPA). For example, a high-profile FCPA case which involved the bribery of Nigerian officials by a US multinational company, led to a record fine by the US Department of Justice against the Company.[55]

One recent occurrence in the country with regards to corruption which has raised eyebrows both locally and internationally, is the presidential pardon granted to a corrupt government official, Diepreye Alamayeiseigha, former Governor of Bayelsa State, who was charged with money laundering in 2007. According to Akere Muna, The Vice Chairman of Transparency International, **"**This decision undermines anti-corruption efforts in Nigeria and encourages impunity. If the government is serious about uprooting public corruption, sanctions against those who betray the public trust should be strengthened, not relaxed,"[56]

4.7.3 Unstable and inadequate regulatory framework and disregard for the rule of law

Two pertinent issues which may arise in this aspect are the justice system, and the inadequacy of the laws in place. The ability of the courts to adjudicate on matters of

[55]Investment Climate Statement, Nigeria, U.S. Dept. of State, (2013), http://www.state.gov
[56]Transparency International Calls On Nigeria President To Rescind Controversial Pardon Of Corrupt Official, Transparency International, (Mar. 2013),

commercial dispute without partiality and timeously is a cause for concern for many investors. According to a World Bank Survey carried out in 2002, over 60 percent of investors are dissatisfied with the judicial system and its outcomes.[57]

According to the Economist Intelligence Unit:[58]

> "the Judicial system is still deeply undermined by corruption and hugely underfunded, resulting in poor administration and long delays in the hearing of cases. Contractual agreements are recognized, but trials can last more than two years, and the appeals process can drag on for more than four years."

The statement of the EIU above is a stack reality of the situation in Nigeria and is pervasive in almost all sectors of the country's economy. In some instances, cases last up to 10years even at the trial court before proceeding to the appellate court. Furthermore, in terms of instability of regulations, the Petroleum Industry Bill, which has been in consideration since 2007 upon recommendations of a committee set up by the President to reform the Oil and gas sector, and which has since been proposed before the National Assembly has been faced with a lot of controversies and has not been passed into law till date. Due to the delays in passage of the Bill into law, the execution of two (2) major investment projects by the Shell Petroleum Development Corporation,(SPDC) worth $30Billion have also been delayed.[59] The Managing Director of SPDC noted that the company was waiting for the investment climate to be right before executing same.[58]

[57] Investment Policy Review, United Nations Conference on Trade and Development, (2009), Citing, World Business Environment Survey, World Bank, (2000),
[58]Index of Economic Freedom :Nigeria, (2006),
[59]Olusola Bello, Uncertain Business Environment; PIB Stall $30Billion Shell Investment, (Feb. 2013), http://www.businessdayonline.com
[58] Olusola Bello, op. cit

Furthermore, one failing aspect of the Nigerian legal system is the porousness of the Intellectual Property Laws. Nigeria's current intellectual property laws are the **Trade Marks Act** and the **Patent and Designs Act.**[59] One major issue with which the Trademarks and patents registry are being confronted is that just like many government agencies, they are under-funded, registrations are carried out manually and as a result, the level of productivity is extremely low.[60]

Registrations which should ordinarily take 6months can sometimes take several years while at the same time, due to incompetence, the applications are not properly assessed before they are granted.[61] Lack of adequate funding, illiteracy and inadequate technology are part of the problems surrounding Intellectual Property Laws in Nigeria. Moreover, enforcement of the law with regards to dealing with intellectual property rights is extremely weak.

According to the Chairman of Longman, Emmanuel Ejewere:authors and producers in the entertainment industry have lost over 80billion naira to counterfeiting.[62]
Nigeria alone, accounts for 80percent of the world's pirated CDs across the globe.

4.7.4 Custom Issues and Tariff Policies

The custom policy in terms of clearing of imported goods constitutes major obstacles to foreign traders. The country still places a ban on a long list of items which the World

[59] Trade Marks Act, Cap T7, Laws of Federation of Nigeria (2004) ; Patents and Designs Act, Cap P2 Laws of Federation of Nigeria (2004).
[60] Anthony Akinlo, Foreign Direct Investment and Economic Growth in Sub-Saharan Africa, International Review of Economics and Business (2003).
[61] Investment Policy Review; Nigeria, United Nations Conference on Trade and Development, (2009), http://unctad.org
[62] K.M. Waziri, Intellectual Property Piracy and Counterfeiting in Nigeria, 4 Journal of Politics and Law, (2011)

Trade Organization has repeatedly sought to eliminate.[63] Furthermore, illegal levies on imported goods are often issued at the ports and this increases the cost of importation. Another issue is the delays experienced at the ports in the process of clearing the imported goods some of which are caused by disputes between Nigerian agencies over the interpretation of customs regulations, and frequent changes in customs guidelines.[64] Importers often complain about irregularities in application of clearance procedures lengthy clearance procedures, high costs of clearing, and corruption.

The documentation process is also very burdensome on investors, requiring completion of different forms with various custom agencies.[65] In addition, the Nigerian Government in 2006 abolished the pre-shipment inspection scheme, which was replaced by the destination inspection scheme.[66] In a bid to mitigate the negative effect of delays resulting in clearing goods, the government has recently implemented a 48 hour cargo clearance policy at the ports. The test of time will determine how effective this policy will be.

Furthermore, the Government in 2012, in a bid to reduce the bureaucratic procedures at the ports, ordered that the number of agencies operating at the port be reduced while specifically ordering that some agencies seize operations and that ports operate 24hours a day.[67] However, it has been observed that many of these agencies have one way or the other snuck back to the ports and also, the ports authorities hardly work beyond 5pm.[68]

[63] Trade Policy Reviews; Nigeria, World Trade Organisation, (Jun. 1998), http://www.wto.org
[64] Trade Summary, Nigeria, USTR, (2010), http://www.ustr.gov
[65] Investment Policy Review; Nigeria, United Nations Conference on Trade and Development, (2009)
[66] Import Guidelines, Nigeria's Shippers Council, http://shipperscouncil.com
[67] Rasheed Bisiriyu, Importers Security Agencies Frustrate 24hours Port Operation, (Dec. 15, 2012), http://www.punchng.com
[68] Bassey Uwatt, Globalization and Economic Growth: The African Experience, The Nigerian Economic Society, 129-158, (2004)

4.7.5 Security and Safety

Kidnappings and terrorist attacks remain a threat to the security of the nation as a whole. The spate of these terrorist attacks by way of bombings and random killings by an Islamic sect popularly known as Boko Haram, particularly in the Northern part of Nigeria has been on the increase. Economic analysts state that the failure of the Government to curtail these terrorist acts will prevent the capital inflows as expected in the economy.[69] Experts have also observed that the northern part of Nigeria appears to be the least attractive area to foreign investors.[70] Constant bombings and reckless killings occur in the cities of Kaduna, Maiduguri, Damaturu, Bauchi, Jos, Kano, and other parts of the north, almost on a daily basis.

One major incident by these terrorists was the attacks against the United Nations Building in the Capital State of Nigeria, FCT Abuja, which claimed lives and left many injured. Also, kidnappings in the Niger-Delta region of Nigeria appear to be the order of the day. The militants in the area often kidnap the foreign oil workers in exchange for a ransom and nobody is ever prosecuted for these kidnappings.

Unfortunately, these attacks remain a threat both to foreign investors and the locals. The Head of Department of Political Science and International relations Prof. Solomon Akinseye stated in an interview that:

> it is a shame that our country is going down in terms of security of lives and property. No right thinking investor

[69] Anthony Osae-Brown Et Al., Bombings Insecurity Frustrates FDI in Nigeria, (Aug. 29, 2011). http://www.businessdayonline.com

[70] Allwell Okpi., Insecurity Negates FG's Call for Foreign Investors, (Jun. 24, 2012), http://www.punchng.com

> that is aware of the situation would want to come to Nigeria to invest……[71]

At this point, although the government has made efforts to curtail the militant actions in the Niger Delta, security remains a cause for concern and efforts are ongoing to eradicate the terrorist activities of Boko Haram terrorist.

4.7.6 Administrative Bottlenecks

The procedure for foreign investors to get their business running alone is quite cumbersome. Having to obtain series of business permits, carry out different registration procedures and what not can be very time consuming, especially in a country where most public officials are lazy and incompetent at doing their jobs. Lack of proper communication, sensitization, and improper documentation leads to delays in the required registration process in order to kick-start a business.

Unofficial fees are often requested by these officers in order to "facilitate" the registration processes, otherwise the job might take several months to be done. Investors have often complained about how tedious it is to obtain business permits and so on.

4.7.7 Land Acquisition

The Land Use Act vests ownership in land and all things attached thereto, in the state to be held in trust for the benefit of all Nigerians.[72] To acquire interest in land, the State Government issues a Statutory right of Occupancy which vests interest in the purchaser

[71] Bassey Uwatt, *Globalization and Economic Growth: The African Experience,* The Nigerian Economic Society, 129-158, (2004).
[72] Section 1, Land Use Act, Chapter 202, Laws of the Federation of Nigeria (1990)

for a fixed term.[73] Therefore, interest in land is not permanent as it usually reverts to the Government upon the expiration of the Statutory Right of Occupancy. Under this Act, a person who has been granted Statutory Right [74]and who intends to convey his interest in property to another must seek the Consent of the State Governor for such conveyance to be lawful. This process is usually very cumbersome, extremely expensive and time consuming.

At a conference which was organized by the Ministry of Trade and Investment sometime in 2011, it was noted that the current provisions of the Land Use Act deters foreign investment in the country and it was advised that the Federal Government revisit and review the current laws, whilst the state governments should put measures in place to ensure the speedy process of obtaining a Governor's consent. [75] It is noteworthy that with regards to registration of title in property, Nigeria was ranked No 182 out of 184 countries in the World Bank's Ease of Doing Business Report for 2012. [76] This emphasizes the difficulty which investors face with acquisition of land in Nigeria.

[73] Section 8, Land Use Act, Chapter 202, Laws of the Federation of Nigeria (1990)
[74] Sections 21 & 22, Land Use Act, Chapter 202, Laws Of The Federation Of Nigeria (1990)
[75] Franklin Ali, *Commissioners Warn Land Use Act Threatening Foreign Investment*, (Sept. 22, 2011), http://www.vanguardngr.com
[76]*Doing Business Report*, World Bank, (2012), http://www.doingbusiness.org

CHAPTER FIVE

INTERNATIONAL LEGAL PERSPECTIVE ON THE PROMOTION OF FOREIGN DIRECT INVESTMENT IN NIGERIA

5.1 INTRODUCTION

The Chambers Twentieth Century Dictionary[1] defines a "treaty" as a contract or an agreement under international law between two or more states or some other subjects of international law possessed of treaty making capacity. It explains further that in such a situation, the private rights of a citizen under such a treaty are not affected unless the same has been ratified by the home government after it has been embodied into the state's law.

Ab initio, the word "treaty" was derived from the Latin word "tractus" which means, "binding agreement between two or more states". Today, most of the customary rules that once governed treaties are now contained in the Vienna Convention on the Laws of Treaties. The Vienna Convention came into force on the 27th January 1980 and fifty countries of the world have ratified it including the United Kingdom and Russia, among others.[2] Treaties are legally binding on the contracting and agreeing state. Article 2(1)(a) of the Vienna Convention for example, states that:

> "treaty" means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or two or more related instruments and whatever its particular designation … To avoid complexity, this definition excludes certain agreements, including oral promises, unilateral promises, agreements relating to international organizations, agreements governed by

[1] Op. cit. 174.
[2] August, R. International Business Law: Text, Cases and Readings (New Jersey: Prentice Hall Inc. 1993 at P.8).

> municipal laws, and agreements that were not intended to create a legal relationship.[3]

Notwithstanding, the aforementioned, there are basically other bilateral and multilateral agreements which regulate foreign investment agreements or relationships. These are also applicable to Nigeria and other states. We shall examine these other forms of agreements and their applications within the context of international law and foreign investment promotion in Nigeria.

5.2 BILATERAL INVESTMENT TREATIES

The most important element in the international legal order for the protection of FDI are Bilateral Investment Treaties (BITs). Those are international agreements between two states regulating the protection of foreign investment. Bilateral Investment Treaties (BITs) are international legal instruments under which each party reciprocally agrees to accord the investment of the other party certain rights and to refrain from imposing a number of the mere common political obstacles to foreign investment. They are usually made between a developed capital exporting and a developing capital importing country.[4]BITs are the successors of "Friends Commerce and Navigation" (FCN) that commonly determined the basis of Foreign Direct Investment before the Second World War. However FCN treaties proved not to be specific enough to serve the purpose of an effective protection of FDI.

The first BIT has been concluded between Germany and Pakistan in 1959. The praxis of the conclusion of BITs developed worldwide in a slow mode, but accelerated notably

[3] August, R. op. cit. P.8

[4]Ellis, C. N. "Foreign Direct Investment and International Capital Flow to the Third World – US Policy Considerations" In Wallace, C. D. (ed) Foreign Direct Investment in the 1990s (New York: Stevenson, 1996, P.22)

between 1990 and 2000, parallel to the "explosion" of the worldwide FDI volume. Nowadays, there are more than 2500 BITs in place worldwide. Germany is in one of the leading positions, having ratified more than 120 BITs. BITs are typically concluded between an industrialized state on the one hand and a transition economy or a developing state on the other hand. But in the last years, the number of BITs that have been agreed upon solely among transition economies or developing states has risen notably.

Under these treaties and agreements, such issues like prohibition of expropriation, accessibility to the sea ports and trade centres, powers and duties of each trading state, are usually spelt out in clear terms. One common feature of these treaties is the desire to protect the trader or merchant rather than industrial investors as is the case nowadays. For instance, the decade long negotiation embarked upon by the United Nations Commission on Transnational Corporations (UNCTC) to fashion a universal code of conduct for TNCs merely produced considerable agreements on standards but left unsolved such issues as government treatment of investments.

The United States of America believed that given the lack of progress in three formal negotiating rounds and subsequently at an informal roundtable on the code of investment, held in Montrieux, Switzerland in 1996, postulated further negotiations on the code until there is clear evidence that major outstanding issues can be resolved and a smother international trading environment created.[5]

[5]Alan, K. "Prepared statement of the Hon. Alan Keyes, Asst. Sec. Of State for International Organisation Affairs" contained in Review of the UN Code of Conduct for Transnational Corporations, Hearing before the Subcommittee on Human Rights and International Organizations of the Committee on Foreign Affairs. House of Representatives, 1987, pp. 8-9b.

Apart from the above issues many other contending issues have often given rise to questions as to what the content of a typical bilateral agreement should be. It is a fact that bilateral investment treaties have become popular in the last few decades in international commerce. Treaties among other things, deal with the protection of investments and covering other related issues.

Treaties oblige the parties involved to observe certain legal guarantees whichinclude:[6]

a. Standards for treatment of foreign investors
b. Protection against nationalism
c. Employment of Foreigners
d. Dispute resolution mechanism
e. Taxation

5.2.1 Standards for Treatment of Foreign Investors

Under this agreement, the standard of treatment meted out to the investor by the host state is normally determined. It may be a contingent or a non-contingentstandard. A contingent standard is such treatment which takes into consideration other domestic regulatory legislations which particularly provide for non-discrimination, and equality of treatment given to such investors apart from the content of the bilateral investment agreement itself. The objective of this is to ensure that there is a level playing ground for both the foreign investor and the host state. The non-contingent standard comprises of independent application of rules and regulatory legislations wherever applicable when the need arises without reference to the treatment given to others.

[6] Dibor, C. J. op. cit. at P.121

An example of the contingent standard in the international and municipal practices of states in this regard is the "National and Most Favoured National Treatment" (MFN). In the United States' FNC 1954 Treaty with Germany, "national treatment" was defined under Article XXV as:

> the treatment accorded within the territories of a party upon the terms no less favourable than the treatment accorded therein, in like situations to nationals, products, vessels or other objects as the case may be, of such a party.[7]

Similarly, "most favoured nation treatment" was defined as:

> the treatment accorded within the territories of a party upon terms no less favourable than the treatment accorded, in the like situations nationals, companies, products, vessels or other objects as the case may be, by any third country.[8]

From the foregoing, it is a cardinal principle of international law and practice that, in bilateral investment agreements, there must be an acceptable national standard of care as well as an international standard of care.

5.2.2 Protection against Nationalisation

Nationalisation or expropriation is the act of taking or confiscating the private property of a foreign party by the host state. This practice or principle has generated a lot of controversies among different writers whereby many have condemned the practice while others have advocated for same. Professor Ray August[9] is one of those writers who have written extensively on this area where he stated that:

[7]U.S. Treaties and other International Agreements vol. III Parts 2. P.2047. See also Dibor, C. J. op. cit.at P.122.
[8] U.S. Treaties and other International Agreements, op. cit.
[9] International Business Law, Text, Cases and Readings (New Jersey: Prentice Hall Inc. 1993) at P.70.

> the right of states to expropriate foreign properties is universally recognised, as is its analogy in municipal laws, the right of eminent domain. Western countries treat expropriation much as they treat eminent domain, that is, it is proper, so long as it is done for a legitimate public purpose and if the state pays prompt, adequate and effective compensation. Some controversies exists over whether the public purpose element is really required. Some argue that it is, while other argue that it should be expressed only as a requirement not to discriminate against a particular class of foreigners.

Whatever side of the argument that may be considered, it is clear that nationalisation of foreign properties even if it is not unlawful in some respect becomes an unlawful act in bilateral investment agreements. More so, when such practice was neither contemplated nor being part of the agreement that binds both parties.

The above scenario therefore gives rise to the desire to have protection agreements against nationalisation within any bilateral investment agreement. For example, under Section 25(1) (a) & (b) of the Nigerian Investment Promotion Commission Act,[10] it provides, among other things, that no enterprise shall be nationalised or expropriated by any government of the Federation and that no person shall be compelled by law to surrender his interests in the capital of any investment to any other person. It is more comfortable, therefore, when such parties voluntarily and willingly acquiesce to the acquisition of such properties in their respective agreements where commonly agreed terms and conditions could be applicable and acceptable to all the parties involved. To do otherwise would frustrate the desire to promote free flow of foreign investments by some states. Nationalisation is also counterproductive to developing capital importing states.

[10] No.16 of 1996.

5.2.3 Employment of Foreigners

One other fundamental issue that is normally contained in most bilateral investment agreements is the issue of the employment of foreigners or aliens. In most cases, such bilateral agreements provide for the category and number of foreigners or aliens that may be required in such foreign investment. The legal guarantee usually spells out these issues as well as the level of involvement of such foreigners. This has become inevitable as a result of the fact that some foreign investors may want to bring in their own expertise and if these issues are not clearly spelt out, there are tendencies of conflicts arising from such bilateral investment agreements. Be that as it may, it is desirable that the employments of these foreigners are streamlined with a view to encouraging greater technological transfer from the capital exporting to the capital importing states.

5.2.4 Dispute Resolution Mechanism

Most Bilateral Investment Agreements often contain provisions whereby the parties involved could resolve some disputes arising from such investments by recourse to such bodies like the World Bank's International Centre for Settlement of Investment Disputes (ICSID). Article 1(2) of the ICSID Convention of 1965 provides that the purpose of the centre shall be to provide facilities for conciliation and arbitration of investment disputes between contracting states and nationals of other contracting states in accordance with the provisions of the Convention. Of all the different forms of Alternative Dispute Resolution (ADR) mechanisms, Arbitration is the most developed and more often utilised by parties to disputes.

In Nigeria, the law governing arbitration is contained in the **Arbitration and Conciliation Act**,[11] and this enactment is modern, comprehensive and based almost

[11] Cap 19, Laws of the Federation of Nigeria, 1990.

substantially on the UNCITRAL Model Law on international commercial Arbitration and its rules.[12]

5.2.5 Taxation

Taxation in the context of Bilateral Investment Agreement is most often restricted to the issue of double taxation among other accompanying issues therein. For example, Article 7 of the International Chamber of Commerce (ICC) code provides for national treatment of foreign investors in matters of taxation, while Article 8 recommends the conclusion of bilateral treaties with the prevention of double taxation. Taxation schemes are usually created for three basic purposes.

One is to raise revenue for government, a second is to encourage, regulate or restrict local or foreign investment and a third is to protect consumers or local producers. The rationale most commonly used for adopting or changing a particular tax scheme is to improve revenue.[13] Most Bilateral Investment Agreements have always avoided the issue of double taxation. This is because taxation is one element which states have used in either attracting or driving away potential investors. It is to this regard that many states give large tax incentives to encourage inflow of capital and foreign investment.

Since the primary aim of most investors is profit maximization, few or no state would want to invest in countries whose tax systems are not favourable to profit accumulation. Where there is any element of double taxation, foreign investors would be reluctant to invest in such projects and states. To seek for a tax relief which has not been exempted

[12]See Ogungbe, M.O. et al "Alternative Dispute Resolution and its Relevance in Criminal Matters" In Jimoh A. A. (ed) Modern Practice Journal of Finance and Investment Law (Lagos: Learned Publishment Ltd, 2002) vol.6 at P.361

[13] August R. op. cit. at P.665.

from the bilateral agreement is also what the courts in many cases have been reluctant or unwilling to do in many cases. This issue of double taxation was considered in the Nigerian case of **Reiss & Company Nigeria Ltd v. Federal Board of Inland Revenue**.[14]

Reiss & Co (Nig) Ltd, was a joint stock company incorporated in Nigeria. Handelsvereening Reiss & Co (Amsterdam) was a private limited liability company incorporated in the Netherlands and a holder of 55 percent of the shares in Reiss & Co Nigeria Ltd.

The Nigerian subsidiary served as an agent for the Dutch parent company introducing Nigerian customers and forwarding orders for goods to be purchased by those customers from the parent company. By an unwritten agreement, the Nigerian subsidiary was entitled to half of the profit (i.e. 7% of the sale price of such goods ordered) and accepted by the parent company as payment for its services. The Nigerian company is made to pay tax on this profit by the Board of Inland Revenue, while same tax deductions are equally made in Netherlands by the Dutch Tax Authorities. The appellant in this case is complaining against double taxation and has sought judicial intervention.

The appellant court held among other things, that the appellants in this case, (the Nigerian company) are entitled to a refund of any tax assessed and paid on the agency commission in excess of the 7% commission due to them by the agreement. This, the court stated, was because the national tax systems are based on:

a. the nationality of the taxpayer;

[14] (1977) ALR (Commercial Law Series, Vol. p.209.

b. the residence of the taxpayer;

c. the source of the taxpayer's income; or

d. on some combination of these variables.

Since there was a bilateral agreement that forbids double taxation, the appellants ought not to have been so taxed. The problem of double taxation often arises where taxpayers earn income in two or more countries, but in most cases, modern bilateral investment agreements contain the exemption system for relieving of dual taxation whereby such incomes are taxed in one state and exempted from taxation in another. Commonly, an exemption system exempts income, which had been taxed in a host state from further taxation in the home state. Apart from the above exemption clause, there is equally what is called the "**credit system**". The credit system allows the tax paid in one state to be used as a credit against taxpayer's liability in another state. The credit will be in the form of a direct credit for overseas branch or form of an indirect credit for a foreign subsidiary.[15]

5.3 THE ROLE OF MULTILATERAL INVESTMENT GUARANTEE AGENCY (MIGA)

Unlike the bilateral investment agreement scheme which started in the1920's and 30's, the Multilateral Investment Guarantee Agency (MIGA) started much later. The most elaborate and operational multilateral investment protection programme was witnessed in 1988 when the convention establishing the Multilateral Investment Guarantee Agency (MIGA) was fully ratified. The (MIGA) is a World Bank Agency which has many developing countries including Nigeria as signatories. Its charter does not contain commitment by states, not to expropriate or repudiate contracts, but rather seeks to inhibit such actions that could discourage foreign investment flow. Under the

[15] August. R. op. cit. at P.705

multilateral arrangement, an investor, in order to qualify for MIGA protection or guarantee, must be a national of a member country of the organization or, in the case of a corporate investor, either be incorporated and have its principal place of business in a member country or have the majority of its capital owned by nationals of member countries.[16]

Under the MIGA, there is dual protection to both the national of the capital exporting state and that of the host state if the transferred assets are coming from abroad. Under Article 12 of the convention the investments which are eligible for protection under MIGA initially includes equity investments and equity type loans i.e. loans and loan guarantees by equity holders in the investment project with maturities of 3 years or more. In addition to these types of risks, protection may in future be extended to other non-commercial risks like acts of terrorists directed at the investor, kidnapping or politically motivated strikes. The obvious advantage of MIGA scheme is that not only will it compensate an aggrieved investor and be subrogated to his position; MIGA is also prepared to accept payment of the claim in dispute in the local currency of the host state.[17]

5.4 THE ROLE OF THE WORLD TRADE ORGANISATION (WTO) AND THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)

5.4.1 GATT

The globalization of international trade as a result of the repudiation of protectionist domestic legislations in most developing and developed states has promoted the free exchange of goods and services across many countries. In the opinion of the learned

[16] Dibor, C.J. Ibid at P. 126

[17] Guertin, D.C "A Programme leading to an International Agreement on Foreign Direct Investment. "in Wallace, C.D (ed) Foreign Direct Investment in the 1990s (New York Pathfinders Publishers 1990 at p 258).

Professor Worlfgang Hein, this has not only strengthened the cord of global integration, it has also proven the theology and artificial of frontier boundaries which have continued to fall like pack of cards in a new world denominated by integration, regionalism, free trade and customs union of various sorts and dimensions.[18] The resultant effect of this is the continuous growth of international trade for the past fifty years and above. The nations fighting Germany, Italy, and Japan allied themselves as the United Nations, and in 1943, they called for the creation of a permanent international organization to replace the League of Nations. In 1944, at a conference at Brethon Woods, New Hampslive, the Articles of Agreement of the International Monetary Fund (IMF) were adopted, and plans were laid for the creation of both an International Bank for Reconstruction and Development (IBRD) and an International Trade Organization (ITO).[19]

Rather than creating an international trade organization, the developed market economy countries entered into an accord called the General Agreement on Tariffs and Trade (GATT) in Geneva in 1947 which came into being at the beginning of January 1948. Generally speaking, GATT rules define the manner in which international trade relations are conducted between member states.

The most fundamental rule or principle of the GATT is that of free flow and non discrimination in international trade among member states. This principle is further given a concrete emphasis and known as the "most favoured nation rule "(MFN) and the

[18] "The New World Order and the End of the Nation State", Vol 48, Law and State – A biannual Collection of Recent German Contributions. pp. 35–52 at p.50.
[19] August, R op. cit. at p. 309.

national treatment rule. Under Article 1 paragraph 1 of the agreement, it provides inter alia that:

> …. any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall, be accorded immediately an unconditional treatment to the product originating in or destined for the territories of all other parties.

The above rule may appear to be all embracing from the wordings of the agreement. Suffice it how ever to say that there are certain, exceptions to this general rule to the effect that:

a) The maintenance of preferences existing at the time the GATT came into effect is exempted.[20]
b) The use of measures to counter dumping and subsidization is equally exempted.[21]
c) The creation of custom unions and free trade areas are further exempted.[22]
d) Restrictions to protect public health, safety, welfare and national security are equally exempted.[23]

From the wordings of the above agreement it is obvious that in as much as the issue of trade liberalisation and promotion is encouraged by such organs like GATT, the concept of a developing or a developed economy in other to protect and promote the economies of developing countries cannot be said to be achieved if the contents of this agreement are to be implemented to the later. Under the South – south preference, developing

[20] Article 1 section 2
[21] Articles VI
[22] Article xxiv sections 8
[23] Article xx and xxi

countries are allowed to exchange tariff preferences among themselves without extending same to developed countries.

Under the multi – fibre arrangement, it permits restriction of textile materials contrary to the GATT agreements, on most favoured nation rules. This became necessary as a result of the rapid growth of cotton textiles imports in the 1950s to the United States of America by Japan. Although the MFAs are administered by the GATT, they are not part of the general agreement. Under the general agreement, each contracting party is required to provide MFN treatment to all other parties and to limit in the creation of imports only if the increase is seriously injuring the local market.

Under the MFAs on the other hand, limitations may be imposed through bilateral negotiations and if importing country's market is disrupted, import restrictions can be unilaterally imposed.[24] Notwithstanding the desirability of an agreement like GATT in the regulation of international trade, it is obvious that the agreement does not cover certain trade barriers. This is because many international trade relationships are not covered by GATT. The absence of such agreements in relations to trade in services for example, informed the resolve of having the General Agreements on Trade in service (GATS) which is the result of the Uruguay Round Negotiation of 1986 –1993.

5.4.1 World Trade Organisation (WTO)

The World Trade Organization is an organ that is established to provide a forum for trade negotiations, handling of trade disputes and monitoring of national trade policies. It also provides technical assistance and training for developing countries and co–

[24] Akpo, R. op. cit. at p. 550

operation with other international organizations.[25] It provides the common institutional framework for the conduct of international trade among its members. Nigeria is a member of the World Trade Organization.[26]

Foreign investment in Nigeria is yet to meet the desired expectations of the generality of the people. The WTO Committee on trade and development in its report recognized that there were different rates of growth exhibited by developing countries. There were members of the committee who believed that this was due primarily to the domestic policies of the different countries. Other members, while recognizing the importance of domestic policies, were of the opinion that this was not the sole reason for divergent performances and that trade barriers had played more significant roles.[27]

The fact that the WTO has not adequately contributed in raising the living standards of developing countries cannot be far-fetched. There has been the argument in some quarters that certain inhibitions within the domestic area of some of these developing countries like in adequacy of roads, rail, air transport facilities, telecommunications, power supply, political stability, lack of legal and regulatory framework amongst many other things as some of the reasons why the WTO'S efforts in raising the standard of living in these developing countries are not felt as they should have been.

5.5 SETTLEMENT OF INVESTMENT DISPUTES

The free flow of trade and investment globally, has brought along with it a strengthened accord of economic integration and trade liberalization. Where state domestic

[25]See www.vsto. Organs
[26] August, R. ibid at p.317
[27]Journal of World Trade JWT, 6 December, 1997.

protectionism has almost completely collapsed. This development is further strengthened by the emergence of the world trade organization (WTO). The fluidity and internationalism of capital, trade and investment as currently restructured under the WTO apparatuses, bequeath on the world an increasing vertical and horizontal trade and investment collaboration and redistributors relations exploring the entire world as a monolithic market.[28]

One of the resultant effect of this restructured economic integration is the inevitable accompanying trade dispute, that go along with it. Whenever men are engaged in any form of interrelationship, differences and disputes are bound to arise.

Disputes of this nature can be settled in either of the following ways:

a. through diplomacy
b. through international tribunal or courts.
c. through municipal courts.

5.5.1 Settlement of Disputes through Diplomacy

Diplomacy can be defined as the process of reconciling parties to an international disagreement by way of mediation, negotiation, conciliation and at times inquiries. Negotiations between states are most commonly conducted on an ad hoc basis. Sometime, however, the procedure is more formal whereby they are carried out through existing diplomatic channels or security meetings.

[28]Giardina, A. & Zampetti, A. "Settling Competitions Related Disputes – the Arbitration Alternative in the WTO Framework".

Mediation on the other hand involves the use of a third party who transmits and interprets the proposals of the principal parties and sometimes, advances independent proposals using his good offices. When such a person presents a formal investigation and proposal which must be acceptable to both parties, then we would be said to be involved in conciliation.[29]

One example of settlement of disputes through diplomacy is in the **Rainbow Warrior Case**.[30]

5.5.2 Settlement of Disputes Through International Tribunals

In the event that the use of diplomacy in settling disputes fail, recourse is often had to tribunals or courts to adjudicate. If a dispute is between states or Intergovernmental Organizations (IGOS), they may be able to take their case to an international tribunal such as the International Court of Justice, or barring this, to Arbitration if the dispute is between private persons or between a private person and a state, or between a private person and an IGO. The dispute will normally end up in arbitration or in a municipal court. Under Article 33(1) of the United Nation's Charter.

It is provided that:

> the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all seek a solution by negotiation, inquiry, mediation, conciliation, arbitration and judicial settlement, resort to regional agencies or arrangements or other peaceful means of their own choice.

Dispute can only be taken to the International Court of Justice after the use of diplomacy has failed. The United Nations Charter creating the International Court of Justice

[29] See August A. Ibid. p. 93
[30] International Court of Justice Reports of Judgments. Advisory Opinions Orders, Vol 74, (1987) p. 241.

stipulates that all member states of the United Nations are automatic members of the International Court of Justice. This blanket membership of every member of the UN is something that deserves careful examination.

By making every member state an automatic member of the ICJ, gives the impression that the member states have no choice to either agree or otherwise. This sweeping provision of automatic membership is not a feature that encourages transnational trade and commerce where individual players would want to have different choices and methodology in settling of business dispute. The situation becomes more complex whereby only one of the states or party is an automatic member of the ICJ even though the statute provides for non-members to either agree or disagree in respect of the decisions of the ICJ. For example, Article 1 of the Security Council's Resolution 9 of 1946 provides that:

The International Court of Justice shall be open to a state which is not a party to the statute of the International Court of Justice upon the following conditions namely that:

(a) such a state shall previously have deposited with the Registrar of the court a declaration by which it accepts the jurisdiction of the court in accordance with the Charter of the United Nations, and with the terms and subject to the conditions of the statute and the Rules of the court.

(b) It undertakes to comply in good faith with the decisions of the court and to accept all the obligations of a member of the United Nations under Article 94 of the Charter.

A situation whereby one state is an automatic member of the ICJ and so cannot disagree with the decision of the ICJ, and another where one is not an automatic member thus

with liberty to either agree or disagree with the decisions of the ICJ is not healthy for an all embracing global economic integration and development.

5.5.3 Settlement of Disputes through Municipal Courts

Situations often arises where international investment dispute are settled in municipal court even though the rules of international law appear to have united the powers of municipal courts over certain international disputes whether court or criminal. Most states have often resorted to municipal courts in settling investment disputes because there are municipal legislations regulating some of the issues involved among many other things. Nigerian Courts for example have always recognized the right of every person whether human or corporate in the determination of their rights or obligations.[31]

Under section 36 of the 1999 constitution of the Federal Republic of Nigeria, it is provided among other things that in the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and in partiality. This provision gives the right to any foreign investor to Nigeria courts to seek for redress. The above principle of law was applied by the Nigerian Supreme court in the case of **Wild Field Supply Centre Ltd. Vs. Joseph Lloyd Johnson**.[32]

Equally section 272(1) & (2) of the same constitution provides that the High Courts shall have jurisdiction in investment disputes which section went further to provide that:

[31] Obeya Memorial Case (1989)3 NWLR (Part 60) p.325 at p. 349
[32] (1987) 2 NWLR (Pt. 58) p. 625

> subject to this constitution and in addition to such other jurisdiction as may be conferred upon it by law, the High Court of a state shall have jurisdiction to hear and determine any civil proceedings involving or relating to any penalty, forfeiture punishment, or other liability in respect of an offence committed by any person.

This is in recognition of the fact that under the rules of international law, a state may not take up a claim on behalf of its national against a foreign state unless he has exhausted the local remedies available to him under the municipal law of such a foreign state. The reason for this is that states are enjoined not to take steps that would create interstate frictions over issues that could have been otherwise resolved.[33]

Similarly by virtue of the provisions of section 251 (1) of the same constitution, the federal High court has been granted exclusive jurisdiction in such disputes as taxation of companies and other bodies established or carrying on business in Nigeria. Areas like customs and excise duties, export duties, banking and other financial institutions as well as the provisions of the companies and Allied matters Act.[34] Other areas covered under this legislation are copyright, patent & designs trademarks, commercial & industrial monopolies, admiralty etc.

Section 25(2) of the Nigeria investment promotion commission Act[35] provides that in the remote possibility of acquisition of an enterprise by the Federal Government, such acquisition must be in national interest and for public purposes and most importantly must be under a law which provided for access to the courts for the determination of investors interest or rights and the amount of compensation to which he is entitled to.

[33] Diber, C.J. Op. Cit. at p.133
[34] CAMA 1990
[35] No 16 of 1995

Nigerian courts in the settlement of investment disputes apply Nigerian laws and legislations where the transaction in question or the dispute to be determined takes place wholly in Nigeria with all the elements solely Nigerian. Where the transaction is international, general principles of international law apply with a sparing application of some municipal laws. This position has given rise to the question of the type of law that is applicable to a particular situation or dispute and the parties involved.

However, in determining which choice of law that can be applicable in the determination of investment disputes, the following must be taken into consideration:

(a) The existence or otherwise of any statutory or international conventions applicable to the parties and the subject matter of such a dispute.
(b) The existence or otherwise of any expressed choice of law by the contracting parties in their contract.
(c) The lex situs of the subject matter of the dispute. Under this principle, where the subject matter of the dispute is an unmovable or fixed asset, the presumption is that the law of the place where the subject matter is located should apply.
(d) The existence or otherwise of the law of flag. This is applicable in contracts of carriage of goods and actions against a ship or a carrier.
(e) Where there is no expressed choice of law by the parties to the dispute, the law of the state which is mostly connected to the subject matter is pressured to be the applicable law.

5.5.4 Arbitration Alternative

Arbitration is another mechanism for investment dispute resolution in international commerce. The use of arbitration is increasingly been sought for in place of the usual recourse to litigation in most judicial systems. Arbitration is relatively a developing area

of law in Nigeria and the terms and practices of the law of arbitration are fast becoming more technical and tortuous in nature. Even judges who under estimate the enormity of the subject, most times stumble into serious errors of law or mistakes in the interpretation of relevant statutes that come to play in the terrain.[36]

One question that has always begged for answer is what is Arbitration? Arbitration is that process of determining or resolving disputes between not less than two parties by persons (arbitrators) appointed or agreed upon by the parties to such a dispute without resorting to traditional litigations in courts.

Arbitration is therefore part and parcel of the Nigerian legal system under the Arbitration and Conciliation Act:[37] Section 57(1) of the Act defines "Arbitration" as: Commercial arbitration whether or not administered by a permanent arbitral institution.

The above definition given by the Nigerian Act appear to be a bit restrictive to commercial activities only which in actual fact is not the essence of arbitration because other non commercial issues have also enjoyed the application of arbitration rules and procedures in resolving them. The definition given by the Hallsbury Laws of England[38] appear to be more embracing than the Nigerian Act.

The Hallbury laws definition defines "arbitration" as:

> the reference of a dispute, a difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person other than a court of competent jurisdiction.

[36]Umenkwe, M.N. "Re-judicial Review of Domestic Arbitral Awards- some suggestions: A rejoinder" M Jimoh A. (ed) Journal of Finance and Investment Law (Lagos: Learned Publishment Ltd. 2002), pp. 339–375 at p. 339 .

[37] Cap 19 LFRN 1990

[38] 3rd edition Vol 2 paragraph 2 p.2

The Hand book of Arbitration Practice[39] defines "Arbitration" as:

> Where two or more persons agree that a dispute or potential dispute between them should be decided in a legally binding way by one or more impartial persons in a judicial manner that is upon evidence put before him or them, the agreement is called an Arbitration Agreement or submission to arbitration. When after a dispute has arisen, it is put before such person or persons for decision, the procedure is called arbitration and the decision when made is called an award.

Generally, there cannot be any arbitration between the parties if there is no agreement between them to refer the decision of their differences to more or one arbitrators. By virtue of section 1(a) of the Arbitration Act agreement between the parties shall be in a written form signed by the parties concerned and contained in a document. The reason for the above requirement cannot be farfetched because when such an agreement is in a permanent written form, the intentions of the parties can easily be ascertained and it forecloses avenues for last minute retrieval or change of mind on the part of any of the contracting parties. Where there is no mutual agreement between the parties to arbitrate any decision reached therein it cannot be binding on the parties. See the case of **Chidi Ekwueme v. SaniZakari**.[40]

Be that as it may, arbitration has enjoyed a global acceptance that some of its advantages have been summarized as:[41]

(a) it is quicker, time saving in principles.

(b) different parties are at liberty to choose their arbitrators.

(c) the cost involved in arbitration is usually lesser when compared to litigation where many professionals may be involved.

[39] 3rd edition, Vol 2 page 2 paragraph 2
[40] (1972) 2 ECSLR p. 631
[41] Umenkwe, M.N. Op. Cit. at p. 341

(d) different experts depending on the issue or area involved are always available to any individual party.

(e) the fear by foreign investors that in the case of a dispute a judge of the host state may give judgment against them is eliminated since they have the opportunity of choosing any arbitrator even from their country of origin.

(f) under arbitration, both parties may even decide to choose a neutral state different from either of the parties to determine their arbitration.

(g) there is more privacy in arbitration than in litigation which is an open proceeding to members of the public.

(h) In most cases, the awards given are those that parties had earlier on agreed and contemplated about in the past unlike litigation where by the parties do not have any say as to the quantity or quality of awards made and which in most cases is only in favour of one of the parties to the dispute.

Notwithstanding, the numerous advantages of the arbitration process, there, abode some disadvantages within the system. The arbitral body does not often have command of award enforcement agents unlike the courts. Most times, the arbitral bodies and the parties fall back on the municipal courts to enforce some of the awards made.

The courts in many states like in Nigeria, is an arm of government (judiciary) and thus wades tremendous powers which an individual arbitrator may be lacking. One other disadvantage of the arbitral system is that of review or appeal. In the case of litigation, reviews or appeals are inbuilt mechanisms to address issues of dissatisfaction when any judgment or award is given to a particular party. In the case of arbitration awards, it is not the same as it is in litigation in the sense that such parties do not have such opportunities. A court of law may refer a case before it to arbitration and compel the

parties to submit thereto and grant a stay of proceedings pending arbitration. This cannot be said of an arbitration body.

This principle was applied in the case of **Royal Exchange Assurance Co. Ltd. v. Benth Worth Finance Nigeria Ltd**.[42] Just as the municipal courts can adjudicate over international investment issues, Arbitration can also be international in nature According to Section 57(2) of the Arbitration and conciliation Act, an arbitration is said to be international if:

(a) the parties to an arbitration agreement have at the time of the conclusion of the agreement had their places of business in different countries or

(b) one of the following places is situated outside the country in which the parties have their places of business

(i)the place of arbitration if such place is determined in or pursuant to the arbitration agreement (ii) any place where a substantial part of the obligation of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected or

(c) he parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country or

(d) the parties despite the nature of the constraint expressly agreed that any dispute arising from the commercial transaction shall be treated as an international arbitration.

We shall be examining some international arbitration bodies as they relate to settlement of investment disputes as follows.

[42] (1976) NSCC Vol. 10. p. 648. See also section 4(1) of the Arbitration Act 1990.

5.5.5 International Court of Arbitration

Towards the end of the 20th century, international commercial arbitration gained a worldwide application and acceptability in resolving international commercial disputes. Municipal legislations and arbitration have equally been modified in line with this existence across many developed and developing states.

With the gradual removal of state protectionist trade policies by many countries, the establishment of the international court of arbitration became inevitable. Since the international court of arbitration was established in 1923, the international chamber of commerce (ICC) arbitration has been constantly nourished by the experience gathered by the ICC international court of arbitration in the course of administering more than twelve thousand international arbitration cases, now, involving each year parties and arbitrators from over 100 countries and from adversity of legal, economic, cultural and linguistic background.[43]

The current rules of arbitration of the International Chamber of Commerce came into being on the 1st January 1998 and this represents the first major revision of the ICC rules for over 20years. Some of the modifications in the rules are those that have to deal with speedily dispensation of cases, avoidance of ambiguity in dispute settlement and the filling in of some missing gaps that have been necessitated by the evolution of the law and practice of arbitration worldwide.

For parties to resort to the international court of Arbitration for dispute settlement, they must have included a standard ICC arbitration clause in their earlier contract of

[43] ICC Rules of Arbitration 2003. file//A:ICC%20International

agreement. It is equally desirable for such parties to stipulate the law that should govern the relationship, the number of arbitrators to be involved, as well as the place of such arbitration. Clauses like this may be used in some cases:

> all disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the international Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

The functions and establishment of the international court of Arbitration is equally provided for under Article 1 of the International Court of Arbitration (ICC) Rules.

Article 1(1) provides that:

> the international court of Arbitration (the "court") of the international chamber of commerce (the "ICC") is the arbitration body attached to the ICC. The statutes of the court are set forth in Apendix1. Members of the court are appointed by the world council of the ICC. The function of the court is to provide for the settlement by arbitration of business disputes of an international character in accordance with the rules of arbitration of the international chamber of commerce (the "rule").

Under article 1(2), the court on its own settles disputes that apply the rule of arbitration, to ensure that disputes are settled in line with earlier agreements. But any party wishing to have recourse to arbitration under the rules of the International Court of Arbitration must in accordance with article 4 submit such request for arbitration to the secretariat and the secretariat would in turn inform such a claimant and the respondent on the other hand of the receipt of such a request with the date therein which normally is the official date of the commencement of the arbitration proceedings.

Also under Article 8(3) 7(4) of the 242 ICC rules, the arbitrator is empowered to decide on his own and to exercise jurisdiction even if the contract containing the arbitral clause is void ab initio. This position is in sharp contrast to normal judicial litigations in

contract. This is because a court cannot be seized of jurisdiction over a subject matter or dispute which is illegal or/unlawful. This aspect of the ICC rules needs to be further examined with a view to bringing it at the same level of proceedings in municipal courts in most countries. This later position appears to be the position of the English court in the case of **Dalamia Dairy Industries Ltd. v. National Bank of Pakistian**.[44]

In the above case, Kerr, J held inter alia that the parties could empower the arbitrator to decide on his own jurisdiction but the court of Appeal unanimously disagreed with the learned Judge and held that the arbitrator could not be allowed to determine his own jurisdiction.

5.5.6 International Centre for Settlement of Investment Disputes (ICSID)

The international centre for the settlement of investment, dispute is one of the organs of the World Bank in the settlement of investment dispute. It was established in 1965 at a conference known as the Washington Convention. The ICSID is globally accepted by many states and the purpose for its establishment among other things is, to encourage private investments in under developed countries. Hitherto there were great fears and apathy by some countries and individuals to make investments in some countries for fear of expropriation. In an effort to all these fears, the World Bank drafted the convention on the settlement of investment disputes between states and nationals of other states[45] which gave birth to ICSID. More than half the countries of the world including Nigeria are members of the ICSID. The convention has also been incorporated into Nigerian laws as **International Centre for Settlement of Investment**

[44](1978) 2 Lloyds Rep 223. In this case the provisions or Article 13(3) & (4) of the 1955 Rules was considered by the court which is substantially the same as those of Article 6(4) of the 1989 Rules presently in force.

[45] United Nations Treaty Series Vol 5 p.159

Dispute(Enforcement of Award) Act.[46] An award made by the ICSID centre and a copy of which is only certified by the Secretary-General of the centre and filed in the Supreme Court by the party seeking its recognition for enforcement, has the effect for all purposes and intents as if it were contained in a final judgment of the Supreme Court of Nigeria and is enforceable accordingly in that regard.

The reason for the juxtaposition of such an award with the final judgment of the apex court in Nigeria as being at par is, to give adequate comfort, confidence and encouragement to foreign investors that an award of that nature would receive the requisite respect and would command obedience like the judgment of the Supreme Court of Nigeria. One of the basic rules of the ICSID convention is that third party states, including the state of the investor involved in the dispute are forbidden from intervening. Under Article 27(1) of the Convention, it provides that:

> no contracting states shall give diplomatic protection or bring an international claim in respect to a dispute which one of its nationals another contracting state have consented to submit to ICSID arbitration unless the state party to the arbitration fails to comply with an award.

This is a significant departure from traditional notions of international law, which required disputes between a state and the national of another state to be resolved only between the Washington Convention. Under the rules, the parties to the dispute are at liberty to choose or select their arbitrators and the numbers to be agreed upon by the parties.

However, majority of the arbitrators must be nationals of states other than the state party to the dispute. ICSID remedies are usually exclusive in nature in that once such a

[46]Cap 189 Laws of the Federation of Nigeria 1990 (See LFN, 2004)

remedy or award is given, such a dispute cannot be tried in a municipal or other international tribunals but the host state can require that all local remedies be exhausted before the dispute can be taken to ICSID as stipulated under Article 26 of the convention. This principle was applied in the case of **Alcoa Minerals of Jamaica Inc (United State). v. Jamaica**.[47] In the above case the tribunal held inter alia that a party to the dispute cannot turn to his home state for remedy or diplomatic protection after an exclusive remedy has been rendered by the arbitral tribunal.

[47] (1979) Year Book of Commercial Arbitration Vol. 4 p.206.

CHAPTER SIX

SUMMARY, CONCLUSION AND RECOMMENDATION

6.1 SUMMARY

In concluding this work, it is important to re-examine the issues which have previously been considered with a view to underscoring the fundamental issues which can erase the bane of Nigeria's effort at providing an effective legal framework for promotion of Foreign Direct Investment (FDI) in the country.

The historical evolution of foreign investment in Nigeria reveals a peculiar trait, which has tremendously inhibited the development of indigenous investment base in Nigeria. Such indigenous investments ought to have developed from erstwhile foreign investment inflow in the form of technology, expertise and finance. This unfortunate trait is reflected in the underlying ideology for development and protection of foreign investment fashioned out and applied by the British colonialists and their succeeding Nigerian elites before and after independence.

It is incontrovertible that the colonialists were basically concerned with the progress and industrialization of their metropolitan homes rather than the overseas colony. Every investment decision and plan was tailored to enhance the development of the home country and where such development adds to the improvement of the local economy, it is merely at a negligible advantage.

Although the colonialists talked about the dual mandate doctrine,[1] which entails the juxtaposed and mutually beneficial development of the home state and the colony, the truth borne out of the long term operations of colonial investment operations is that the dual mandate doctrine was singularly directed at the technological and industrial progress of metropolitan England. Admittedly certain levels of economic development were ushered into the colony. However such development was geared towards ensuring the welfare of the colonialists' resident in Nigeria and to a very limited extent, the servicing of the colonial economy without which the home state will be bereft of substantial resource flow.

The key policies[2] introduced by the colonialists, served them well in achieving the fundamental goal of colonialism. Firstly, the deliberate prohibition of investment in agriculture effectively blocked an extensive development of investment in this underlying area of the nation's economy. The relevant agrarian technology and investment, which would have satisfied the nation's food and raw materials requirements, were effectively shut out together with allied industries which would have developed as an offshoot of such extensive agricultural investment.

Also the introduction of Marketing Boards effectively shut out foreign trading firms who were initially involved in commodity trade. No doubt these firms would have in the course of their activities diversified into manufacturing concerns as borne out by the recent industrial involvement of former Asian trading concerns.[3]

[1]Dual Mandate Doctrine: W.K. Hancock: Survey of British Commonwealth Affairs, Oxford University Press, London (1949) Vol. 2.
[2]Carls K.E: "The Dynamics of Long term Agricultural Development in Nigeria" (Michigan State University Press, 1970) p. 7.
[3] Busjeet Vinod: Foreign Investors from Less Developed Countries; a Strategic Profile, op. cit.

However, the colonists used the Marketing Boards to dictate the prices of commodities and trap the excess revenue, which they channeled largely to the development of their metropolis. The substantial revenue, which would have provided the inducement for the trading firms to invest in agro-based industries, was lost and the Nigerian economy is yet to recover from its devastating impact up to date.[4]

Moreover, the colonialist effectively blocked any trading relationship with any other country apart from Britain. The healthy competition, which would have led to the establishment of pioneer local industries, was neutralized. Protection of investment was primarily accorded to British firms while firms from other countries were openly discriminated against in terms of duties, levies and trading regulations thereby dissuading them from any serious investment in Nigeria.[5]

In the industrial/manufacturing sector, the colonialists clearly discouraged the participation of firms with foreign origin apart from British. Even though most of the manufacturing concerns were engaged in primary processing of agricultural materials and forestry,[6] there is no gain saying the fact that if necessary protection and incentives were accorded to these firms, they would have evolved into solid indigenous manufacturing conglomerates. They would have constituted the progenitors of the present giant manufacturing concerns which would have provided the needed investment base for Nigeria's industrialization.

[4] Adamu Ibrahim, op.cit pg 189
[5] Adamu Ibrahim Op.cit at p.256
[6] Ekundare, op. cit. at p. 185.

As was observed, the discouraging attitude of the colonialists compelled several foreign investors to participate merely in trading activities instead of investment in manufacturing. The World Bank Mission in 1950[7] was critical of this negative attitude and recommended that the colonialists should actively consider and encourage investment proposal rather than giving such ventures an over-cautious reception.[8]

Strictly speaking, the nature of the Nigerian economy posed its own problem to investments promotion at this period. The lack of skilled labour force and local market to support the minimal size of plants for a viable foreign investments activity mellowed down the readiness of foreign investors who had the opportunity, from undertaking such investment, coupled with the refusal of the colonial administration to consider the grant of investment protection to such activities.

Thus, the indigenous economic environment constituted an impediment to relevant mechanisms of attracting and protecting foreign investments. After independence, the structure of the nation's economy did not really change. The Europeans especially Britain, controlled the apex of the economy comprising of raw materials export and import substitution industries. The Asians controlled the distributive trade while Nigerians were largely left to run the less voluminous trading, farming and other rudimentary activities.

Even though political power was given to Nigeria, it did not have much economic impact. The several regulations made to promote foreign investment were really directed to investments that do not have much added local value. Thus the regulatory

[7] Carl, Liedholm, op. cit. at p. 52.
[8] IBRD Economic Development of Nigeria, op. cit. p. 387.

and protective mechanism benefited the foreign investors without creating the necessary impetus for the development of a local industrial base.

This period witnessed a manifest conflict between the twin objectives of economic nationalism and accelerated economic development.

The government pursued policies and enacted legislations affirming that foreign investments are essential for Nigeria's industrialization and should be courted, attracted, encouraged and protected, notwithstanding the rising economic nationalism of the time.[9] Foreign investors were assured of non-interference with their profit repatriation and other operations by way of nationalisation. Any skepticism by the foreign investor on the adequacy of protection for their investment was therefore laid to rest. Notwithstanding a mild flutter of the investment climate sequel to independence, there was a general increase in the flow of investment from foreign public and private sources. What is more, the 1962 National Development Plan offered a more favourable treatment of foreign investors in the areas of taxation, profit or capital repatriation.[10]

The Second National Development Plan was ushered in 1970 with a view to achieving a rapid and meaningful Nigerianisation of the labour of foreign investment operations and greater indigenous control of the productive sectors of the economy. This was a period of boom in the economy especially in the face of increased oil-revenue and yet Nigerians were effectively marginalized from any meaningful benefit from the boom.[11] The plan moved to secure for Nigerians a definite and effective stake in the ownership

[9] Adamu Ibrahim, op.cit at pg 255
[10] Adamu Ibrahim, op.cit at pg 256
[11] Adamu Ibrahim, op.cit at pg 257

and management of each business venture.[12] Governments' effort was concretized by the enactment of the Indigenisation Decree and its Amendments[13] to restrict foreign participation and investment because of the presumed competence of Nigerians in those areas. Despite the attempt at indigenisation, it is common knowledge that several Nigerians fronted for foreign investors thereby sabotaging the genuine efforts of the government at securing a sizeable control of the economy for Nigerians.

Moreover, indigenisation in the light of the absence of local capital for investment, failed to achieve the expected result. Consequently, the government gradually relaxed on the indigenisation policy, and eventually scrapped it.[14] The Third National Development Plan saw the introduction of import substitution policy by the government. The policy however ignored any serious emphasis on local value added input. Foreign investors were heavily dependent on foreign inputs for their operations, which basically are in the nature of assembly plant investments. Accordingly, more pressure was put on foreign exchange earnings for importation of foreign raw materials. Thus despite the volume of foreign investment inflow and the conducive protective regime, there was a minimal impact on real national development by way of economic industrialization.

The scramble for foreign exchange to beef up import also fuelled inflation especially in the fact of reduced earnings from oil and inadequate infrastructure. It became obvious that a conductive and secure environment without an adequate monetary and infrastructural back up will not yield the maximum benefit from foreign investment into

[12] Federal Republic of Nigeria, Second National Development Plan, op. cit. p. 143.
[13] Decree No. 4 of 1972: The Capital Issue Decree of 1973, Decree No. 3 of 1977.
[14] Nigeria Enterprises Promotion Repeal Decree No. 7 of 1995.

the Nigerian economy even when the right to private property was enshrined in the Constitution.

The 1980s were ushered in with severe economic crisis arising from the significant drop in oil earnings, the Nigerian debt-crisis and the adoption of the Structural Adjustment Programme. No doubt the foreign investment climate was drastically affected by these developments. Nigeria was compelled to further liberalize the investment climate by offering added incentive and protection for foreign investment. The deregulation of the economy and devaluation of the Naira created a leeway for foreign investors to operate unhindered and even repatriate earnings easily.

The year 1989 recorded a net-outflow of foreign private capital to the tune of N5, 132.1 million for the first time ever by foreign investors.[15] The introduction of parallel foreign exchange markets, Bureau de change, and Debt Conversion Programme contributed to give the foreign investors a highly secured base for their operations and repatriation of earnings especially in the area of pent-up liabilities.

A recent development on foreign investment in Nigeria has been in the area of creating requisite institutions and enacting relevant legislations to enhance their operations. The problem of diverse and uncoordinated Government Ministries and Departments engaged in investment regulation led to the establishment of the Industrial Development Coordinating Committee (I.D.C.C.) as a sole agency to handle registration of new foreign investment.

[15] Foreign Private Investment in Nigeria in 1988, op. cit. p. 344.

New laws on Commercialization and Privatisation, Investment Promotion and Export Processing Zones (EPZ) have been put in place to reinforce the positive foreign investment climate. While the laws inhibiting liberation and commercialization have been reviewed, much needs to be done in the areas of privatization and competition.

It is apparent from these developments that Nigeria has progressed from the epoch of over regulations of foreign investment to an era of liberalization and protective relationship with such investment.[16] Much as this accords with global trend, it is needful that appropriate checks be applied to ensure that the operations of foreign investors does not adversely affect the development and sovereignty of the nation.

Investment risks have also constituted major impediments to foreign investment in Nigeria. Such risks, which are largely political include currency transfer risk, expropriation risk, contract repudiation risk, war and civil disturbance risk. As pointed out earlier, Nigeria has never depended on the use of the weapon of expropriation against foreign investors. Even where nationalization of strategic industries occurred, adequate compensation was paid.

Moreover, the succeeding Nigerian governments have honoured their obligations to foreign investors. The only area of conflict is in respect of changes in regulations, which do affect currency transfer and convertibility. Nevertheless, it is clear that this conflict is not far reaching because government policies in this area have always taken cognizance of the interest of foreign investors. Moreover, Nigeria is a signatory to various

[16] Adamu Ibrahim, op.cit at pg 258

international treaties and conventions offering protection to the foreign investors in this area.[17]

6.2 CONCLUSION

For any foreign investment to be realisable, there must have been in existence basic legal regime that regulate the operation of such investments. This also applies to national enterprises in every state. The above scenario is not different in respect of Nigeria. Recently in Nigeria, some legislative reforms have been introduced which have made great impact on the regulatory environment for doing businesses in the country, particularly in respect of foreign investments and dealings in securities.[18]

The need for these legislative reforms became necessary because since her independence in 1960, Nigeria has consistently grappled with the problems of creating a balance between indigenisation of her economy on one hand and creating favourable conditions for foreign investment on the other hand.

An author opined that:

> communicators are unanimous in their views that the 1977 indigenisation Act though well-conceived proved to be counterproductive. The objective through indigenisation of increasing the level of Nigerian ownership and control of business was misconstrued in some quarters to mean the expropriation and exclusion of all forms of foreign participation. This perception affected negatively the flow of new investments and even led to a certain degree of capital flight.[19]

The above scenario can be captured against the background that rather than promote foreign investment, the laws and policies associated with or regulating foreign

[17]The MIGA Convention 1985. ICSID Review, Foreign Investment Law Journal (1986) p. 148 Sesegbon Deji: Nigerian Companies and Allied Matters, Law and Practice, Vol. 6, p. 70.
[18] Igwe, op. cit. p. 129.
[19] Azinge, E. Ibid, p. 229.

investment did not give the desired results. In order to promote and encourage greater foreign investment participation from other nations, there became the need to reform many of these laws inhibiting foreign investment promotion.

6.3 FINDINGS

a. The research was able to establish that the legal framework for the promotion of foreign direct investment in Nigeria is inadequate to meet the dynamism of global economy.
b. This work has established that there is a yawning gap in the regulatory legal framework in the promotion and protection of foreign investment in Nigeria necessitating review to bring it into conformity with other best practices in other parts of the world.
c. The work has exposed and shown the need for review of some of the existing regulatory and legislative organs of foreign investment in Nigeria so as to meet up with what is obtainable in larger developed economies of the world today.
d. The research has established that socio-economic and socio-political factors are adversely impacting on the foreign direct investment in Nigeria.
e. It has been established that the Nigeria Government is not implementing the various international treaties and conventions promoting foreign investments which it is signatory to.
f. The study has also established that the various institutions regulating foreign investments in Nigeria are not effective to cope with the demands of foreign investors.
g. It is observed in the study that there is also lack of Political will or unwillingness of the executive to accelerate the passage of bills in the National Assembly that promote foreign investment.

h. The study has also established that political instability has been a major bane to the promotion of foreign investment in Nigeria.

i. The study also established that high level of financial fraud and insecurity makes a mockery of the institutions and laws put in place to guarantee adequate protection of foreign investors.

j. It has also been established by the study that the privatization programme in Nigeria is almost ineffective in promoting foreign investment in Nigeria and that there is apparent lack of transparency and accountability in the implementation of the programme.

6.4 RECOMMENDATIONS

This research has studied the legal framework for the promotion of foreign investments in Nigeria, government efforts towards making the country an investment haven and the challenges facing promotion of foreign investments in the country. The outcome of this study reveals that Nigeria's vast resources have remained largely untapped because of scarce financial and managerial capital and FDI inflow can bridge the gap between the growth requirements of the country and available financial and managerial resources.

Needless to say, captivated by the high rates of return, investors from all over the world have now set their sights on Nigeria for Foreign direct investment. As Africa's most populous country, Nigeria has the continent's second largest oil reserves and has a very promising growth outlook. As Africa's biggest economy, Nigeria is becoming a rather worthy recipient of foreign capital, receiving anywhere from $10-$12 Billion dollars per year. However, in order to take full advantage of what foreign investment has to offer, Nigeria must first improve its legal, economic and political climate.

Basically achieving a meaningful, long-lasting economic growth and development is almost entirely contingent upon securing substantial amounts of foreign direct investment. Foreign direct investment is crucial for the Nigerian economy, as it permits the transfer of technology and facilitates improvements in productivity. Ultimately, this can help alleviate Nigeria's widespread poverty by increasing per capita income and elevating overall standards of living.

Furthermore, contrary to the wrong notion held by policy makers in the Nigerian government, attracting FDIs require more than just laws, policies and incentive packages to be put in place by the government but also require the government to address wider socio-economic, political and infrastructural issues plaguing the economy as a whole. Making Nigeria an investment friendly nation is a lofty and achievable goal which requires dedication and adoption of the right approach by government towards making it a success. A nation as richly and abundantly blessed in human and natural resources like Nigeria have the potential to be placed at the top rank of countries with an impressive FDI portfolio alongside the likes of Singapore and the other Asian Tigers. With an adoption of the recommendations contained in this research, Nigeria would have been set on the right path towards attracting the much needed FDI to improve its economy and better the standard of living of its citizens.

Most of the incentive packages in Nigeria's legal and regulatory framework have been in place since 1998 without any noticeable improvement in the FDI profile of the country. The time is therefore ripe for a change of strategy to address the wider socio-political issues plaguing the country's investment climate in order to attract foreign

investors to the country. In the light of the foregoing, my recommendations for re-energizing Foreign Direct Investment in Nigeria are the following –

a. There should be a deliberate programme for reducing the cost of doing business by all levels of Government in Nigeria which will promote the inflow of more Foreign Direct Investment. In this regard, there should be major reforms in processes of business facilitation with a view to making doing business in Nigeria much easier and cheaper than similar developing nations. The major areas to touch include energy supply, streamlining of the processes for registration and obtaining approvals, improvements in infrastructures for transportation and communication (among others), and maintaining institutional frameworks that are flexible and responsive to the needs of investors, while protecting the national interests.
b. Sensitivity and flexibility to the needs of foreign investors. Business is a dynamic affair and the needs of foreign investors change from time to time. Changes are sometimes required in the legal and regulatory framework, incentives, tariffs, taxes, interest rates, etc. There is therefore the urgent need for pro-active institutional framework for monitoring and assessing the needs of business operators, without necessarily sacrificing national interests. An investment promotion round table for the NIPC and the relevant State Governments' agencies for investment promotion which meet regularly to advise government on the needs for investment promotion in the country are required.

c. Taking urgent steps to address the problem of power generation and supply in the country as well as an urgent improvement of rail transportation in the country for ease of transportation of goods to various parts of the country. The country's

transportation system is essentially road based with non-existent or badly shaped railway networks. The road systems have become overburdened and this adversely impinges on transportation of goods round the country and therefore is a disincentive for foreign investments.

d. Political reform is paramount, as political stability will be a key component in attracting foreign investment in the future. With a fragmented, multi-cultural society consisting of 250 ethnic groups, rival factions competing for power often times creates politically unstable climate. Meanwhile, radical islamist groups like Boko Haram, which has killed hundred in violent attacks in the past year, further discourages investors by increasing political instability and jeopardizing the return on investment.

e. Urgently addressing the nagging insecurity problem in the country and taking steps to reduce political instability and ethno-religious crisis in the country as these reflects poorly on the country's investment rating in the eyes of the international community. It is imperative to note that FDIs cannot thrive in a country with high rate of insecurity and political instability like Nigeria and these must be addressed by the government in order to promote foreign investments in the country.

f. Fiscal analysis/research also shows that lesser involvement of the Government in the economy through privatization of major sectors, with effective legal and administrative measures put in place to ensure that the privatization process is effective, is necessary to enhance the free flow of FDI into the country. Major utility providers such as NEPA and NITEL managed by the Government have not only failed but have also constituted a burden on the economy. Therefore, it is necessary for the government to embark on privatisation of the major sectors

of the economy but also take caution in doing so through effective policy implementation.

g. Establishing a strong legal framework specifically dealing with foreign investors with regards to dispensation of justice in terms of dispute resolution, issue of intellectual property and counterfeiting and reducing he administrative hurdles to be crossed for foreign investors in terms of business registration as currently provided by the law.
h. Strengthening the Judicial system is an important factor in promoting foreign investment. It is noteworthy that the existence of the court as an institution for application of the law independently and impartially is of great value to the foreign investor. Where a foreign investor is assured of access to the court of law in the event of any investment dispute as well as the certainty of obtaining justice from the host country courts he is satisfied that his investment is protected.
i. Strengthening the capacity of relevant government agencies to function effectively in providing an enabling environment for Foreign Direct Investment. The Nigerian Investment Promotion Commission, the Corporate Affairs Commission, the Securities and Exchange Commission, etc, should be fundamentally revamped to meet the demands of the prospective investors.
j. There should be policy consistency in Nigeria to adequately and pragmatically engender the growth and promotion of Foreign Direct Investment in Nigeria. Akin to this is the fact that a mere change in laws or policies to expand FDI participation as Nigeria has been able to achieve, is not sufficient to promote FDI growth. There must be supportive and effective policies to back up the laws. Furthermore, in order to ensure that the policies implemented are effective, it is

essential that the government builds institutions to address the pertinent issues confronting foreign investors in the local market. Certainly there is therefore need to promote the culture of policy discipline and consistency by Government.

k. There should be a tangible educational agenda that will enable Nigeria stay focused on actualizing its developmental goals. It is imperative to emphasize that there is ongoing skill deficit which poses problems for developing economies including Nigeria. Nigeria's labor force is growing rapidly, but with lagging literacy rates and the lack of necessary skills, investors remain wary.

l. The laws concerning foreign investment in Nigeria should be re-visited and not only so, the government needs to ensure that adequate structure be put in place to enhance the practicability of such laws, in order effectively create an enabling and viable environment for Foreign Direct Investment.

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