

**AN APPRAISAL OF THE LAW AND PRACTICE OF THE  
INVESTMENTS AND SECURITIES TRIBUNAL IN RESOLVING  
CAPITAL MARKET DISPUTES IN NIGERIA**

**BY**

**KIMIBARADIKUMO APPAH**

**DEPARTMENT OF COMMERCIAL LAW  
FACULTY OF LAW  
AHMADU BELLO UNIVERSITY,  
ZARIA**

**NOVEMBER, 2017**

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LLM/LAW/62960/2013-2014**

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

**DEPARTMENT OF COMMERCIAL LAW  
FACULTY OF LAW  
AHMADU BELLO UNIVERSITY,  
ZARIA**

**NOVEMBER, 2017**

**DECLARATION**

I declare that this Dissertation titled *An Appraisal of the Law and Practice of the Investments and Securities Tribunal in Resolving Capital Market Disputes 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 list of references provided. No part of this dissertation was previously presented for another degree or diploma at this or any other institution.

**KimibaradikumoAppah**

.....  
**Signature**

.....  
**Date**

## CERTIFICATION

This Dissertation titled AN APPRAISAL OF THE LAW AND PRACTICE OF THE INVESTMENTS AND SECURITIES TRIBUNAL IN RESOLVING CAPITAL MARKET DISPUTES IN NIGERIA 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.

<b>Dr. S. A. Apinega.</b> Chairman, Supervisory Committee	..... Signature	..... Date
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<b>Prof. D. C John.</b> Member, Supervisory Committee	..... Signature	..... Date
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<b>Prof. A. R. Agom</b> Head, Department of Commercial Law	..... Signature	..... Date
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<b>Prof. S.Z. Abubakar</b> Dean, School of Postgraduate Studies	..... Signature	..... Date
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## **DEDICATION**

This dissertation is dedicated to my late lesson teacher, **Mr. EMZE Iyasara.**

## ACKNOWLEDGEMENTS

One of the happiest tasks of a researcher is to thank those who have assisted him. My first and profound gratitude goes to Jehovah for giving me the opportunity to finish this dissertation successfully despite all odds. The dissertation owes its completion to a large number of people.

To this end, I must mention in the first place and express my sincere gratefulness to my major supervisor in person of Dr S. A. Apinega whose constructive criticisms, useful suggestions and advice proved to be of tremendous importance towards the successful completion of this dissertation. I wish to also thank my minor supervisor Prof. D. C. John for his patience and consistency in making meaning corrections without which this work would not be completed.

I must also humbly express my sincere appreciation and gratitude to my internal examiners. Prof. A. R. Agom and Dr A. M. Madaki for their intellectual, knowledge building contributions. In-fact, at a point when Dr A. M. Madaki was calling my attention to some areas I did not do well, during my internal defence, I felt he was over flogging the issues, but on my sober moment when inputting the correction, I can say with more confidence that this research work was greatly improved. Thanks sir. I am highly indebted to my academic mentor Professor I. A. Aliyu and Dr O. Iloba-Aninye. I also place on record my gratitude to Professor A. K. Usman the Principal Partner in the office I work as the Head of Chambers and Managing Partner; A. K. Usman & Co. and the entire partners and staff of A. K Usman & Co. which include: Imam John Esq., Kure Joshua Esq., and Samuel Madaki Esq.

I also wish to thank Dr Ibrahim Umar for his encouragement. I am also very grateful to the entire members of staff of Faculty of Law, Ahmadu Bello University, Zaria.

I wish to record my thanks to my dearest parents; Mr. and Mrs. Livingstone Appah and my brothers and sister. This acknowledgement would be incomplete without placing on records my eldest brother Dr E. Appah, FCA for his continues encouragement even when I felt master is not necessary for a legal practitioner in private practice but he changed my view. I wish to thank Hilda Duniya, in-fact, if not of her, I would not be talking of writing a dissertation.

Finally I salute my dear wife who patiently endured and sacrificed in no little way and to my friends' thanks.

## ABSTRACT

*Acceptable dispute resolution mechanism is a major factor intending investors seek before investing in any viable international contractual relationship. The Nigerian capital market is a major player of wealth creating and improving the Nigerian economy as the market is open to both local and international investors. Disputes being part of human nature may occur in business relationship. The Nigerian capital market is a special kind of market and transactions before the market is mainly trading of chooses in action. The methodology of resolving disputes from this sector must be such that is fast, flexible and meets international best practices. The conventional courts are already loaded with myriads of cases, leaving commercial disputes many years before final judgment, being that lawyers key into every opportunity to seek for adjournment. The Investments and Securities Tribunal was conceived to resolve capital market dispute in a fast, timely and professional manner with justice as it main thrust. This research” An Appraisal of the Law and Practice of the Investments and Securities Tribunal in resolving Capital Market Dispute in Nigeria” considered the mechanism for the resolution of capital market disputes under the Investments and Securities Act by the Investments and Securities Tribunal. This research focuses to reveal that there is no conflict between the jurisdiction of the IST and that of the Federal High Court in resolution of capital market in Nigeria. The focal aim of this research is to reveal that there is a different between the establishment and Jurisdiction of the IST. This research adopts the doctrinal research method as the principal method of retrieving information, expanding or analyzing the gathered information. The primary sources of material for this research are relevant statutes and judicial authorities. Secondary materials are extracted from journals on written articles therein, text books on the wide range of commercial law and written text on securities law. PhD thesis and LL.M dissertations on related field on securities law and practice are analyzed. Seminar papers, handbooks from the Securities and Exchange Commission and decided cases were important materials that were accessed for this research. The jurisdiction of the Investments and Securities Tribunal has been confused with the establishment of the tribunal. This dissertation has separated the concept of jurisdiction and establishment of the tribunal and reiterated the exclusivity of the jurisdiction of the tribunal that is separate and distinct from that of the Federal High Court. But despites the good found in the establishment of the tribunal, below are some major findings. This research finds that section 275, 281 and 315 of the Investment and Securities Act (ISA) saddled the responsibility of appointing and removing the Chairman and Members of the IST without recourse to the National Assembly and or the National Judicial Council on the Minister of Finance. By the provisions of sections 275, 281 and 315 of the ISA, the IST would hardly be impartial in deciding any issue involving the Federal Government of Nigeria and a market operator. This research has also noted that Section 289 (5) of the ISA provided three months from the date of commencement of hearing to the date of judgment. This aspect of the modus operandi of the Tribunal may affect substantial justice due to time constraint to resolve all legal issues and it goes with the popular saying that justice rush may be justice crush. This is further place on the scale of the right of a litigant pursuant to section 240 and 241 of the Constitution, that grants right of appeal on any ruling of the tribunal that may affect the right of a litigant. By virtue of section 293 (3) of the Investment and Securities Act, the Tribunal does not have the mechanism of enforcing its judgment but a reliance on the Federal High Court which may stand as a reason for delay of enjoyment of judgment by litigants, as the*

*Chief Registrar of the Federal High Court cannot be compelled by the Tribunal to register the judgment of the Tribunal as that of the Federal High Court. The registration of IST's judgment at the Federal High Court may lead to forum chopping, as litigants that wants to challenge an improper execution of judgment would be faced with the issue of which of the two courts to approach. The development of modern scientific and computerized businesses in Nigerian is not alien to the Nigerian capital market. These wide beneficial modernizations have also brought with it a wide range of dangers that may lead to crime. Section 290 (3) of the ISA qualifies the IST as mere civil court without criminal jurisdiction. The danger of describing the IST as having only a civil jurisdiction lends investors and some market operators to the failure of not effectively covering the cybercrimes or cyber related criminal transaction that could also occur at the Nigerian capital market. The absence of criminal jurisdiction and power of the IST have inhibited the IST to fully cover all operations in the Nigerian capital market as a specialized court. Cyber criminals and or cybercrimes are left to the regular courts, the Economic and Financial Crimes Commission and the Attorney General of the Federation to prosecute such offenders even though the main or genealogy of the crime emanates from the Nigerian capital market. This research recommends as follows. This research recommends that section 275 of the ISA should be amended by the National Assembly and the said section should read; the Tribunal shall consist of ten members who shall be appointed by the Minister of Finance on the recommendation of the National Judicial Council. The first recommendation of this research is that the appointment of the chairman and members of the IST by the Minister of Finance should be subject to the recommendation of the National Judicial Council. Section 289 (5) of the ISA should be amended by the National Assembly to read: "The Tribunal shall, in the exercise of its powers under this Act, conduct its proceedings in such manners as to avoid undue delays and may dispose of any matter before it finally, if practicable, within three months from the date of the commencement of the hearing of the substantive action". There is the need to delete section 293 (3) of the ISA and the National Assembly should extend the jurisdiction of the Chief Registrar of the IST to the extent of enforcing the judgment of the IST without recourse to the Chief Registrar of the Federal High Court. Or, in the alternative, the National Assembly should enact sub-section (4) of Section 293 of the ISA to read "Failure of the Chief Registrar to register the judgment of the Tribunal within 14 days from the date of the payment of appropriate filling fees, the Tribunal shall mandate the Chief Registrar of the Federal High Court and shall award adequate cost against the Chief Registrar". Section 290 (3) of the ISA should be amended and the National Assembly should delete the word "civil court" from the said section. The IST should be allowed to assume criminal jurisdiction only when the criminal matter and or case emanates from a matter that is before the Tribunal.*

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## **LIST OF ABBREVIATION**

1. ADR. - Alternative Dispute Resolution.
2. AHC - Administrative Hearing Committees.
3. CAMA - Companies and Allied Matters Act.
4. CBN - Central Bank of Nigeria.
5. CIC - Capital Issue Committee.
6. CSCS - Central Securities Clearing System.
7. EFCC - Economic and Financial Crimes Commission.
8. FHC - Federal High Court.
9. JSC - Justice of the Supreme Court.
10. ISA - Investments and Securities Act.
11. IST - Investments and Securities Tribunal.
12. NJC - National Judicial Council.
13. SEC - Securities and Exchange Commission.
14. NSE - Nigerian Stock Exchange.
12. NDIC - Nigeria Deposit Insurance Company

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## CHAPTER ONE

### GENERAL INTRODUCTION

#### 1.1 Background to the Study.

Dispute is a very constant phenomenon that is present in all human relations. The capital market is a special kind of market where rights and obligations pass from one person to another. The mere existence of human relations also introduces the possibility of the existence of conflict. The major players in the capital market tend to look for a dispute resolution mechanism by trained experts that appreciate the issues and resolve arising conflicts speedily, efficiently, and to the best of international professional standard. The objective led to the establishment of the Investments and Securities Tribunal by the Investment and Securities Act (ISA)<sup>1</sup>.

The Investment and Securities Act<sup>2</sup> is the principal statute that governs the operation and regulation by both investors and regulators of the capital market. Capital market was not defined in the ISA but capital market has been described<sup>3</sup> as a financial market for medium and long term funds through financial instruments such as government bonds, corporate bonds and equity. The capital market, unlike the money market, whose function is to provide short term funds rather the capital market, is a network of financial institutions that in various ways brings together suppliers and users of capital, facilitating the issuance of secondary and long term instruments<sup>4</sup>.

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<sup>1</sup>. The Investments and Securities Act No.29, 2007.

<sup>2</sup>. *ibid.*

<sup>3</sup>. Oyinke N. O. (2008) " An Introduction to the Capital Market" Being a paper delivered, Orojo J. O. in *Company Law and Practice*, LexisNexis, Cape Town p. 361.

<sup>4</sup>. *Ibid.*

The Investments and Securities Tribunal was set up by the ISA to sanitize the capital market, restore and sustain investors' confidence through timely and efficient resolution of disputes. The capital market is a complex institution and mechanism through which intermediate and long term funds are pooled and made available to business enterprise and government and government agencies all over the world. Armstrong describes the capital market as:

...an institution that has been evolved by time and perfected by experience. It exists for the purpose of providing a market which is to buy and sell the world's capitalized value. Here interest small or large in the whole of man's activities can be exchanged. It is the citadel of capital the temple of values. It is the axle on which the whole financial structure of the capital system turns. It is the bazaar of effect and endeavour, the mart where man's courage and labour are marketed<sup>5</sup>

The nature of the Capital market in its importance cannot be left to chance; it allows the efficient transfer of funds that can be efficiently allocated from individuals with few productive opportunities and great wealth to individuals with many opportunities and insufficient wealth. The unending issue that may arise from the capital market is dispute, the question of dispute cannot be over emphasized. There could be breaches either deliberately or not<sup>6</sup>, shortchanging, fraud-related breaches are common in such transactions. The dispute sometime are desirable to effect change, generate new ideas, test existing ideas, establish and test boundaries between the possible and the impossible, reveal and exercise fear, test group

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<sup>5</sup>. Armstrong F. E. (2002) *The Book of Stock Exchange*. (Pitman, London, 4th Edition) p. 4.

<sup>6</sup>. Abgadu-Fishim J. T. (2008-2009) "Dispute Resolution under the Investment and Security Act 2007" in *Nigeria Law and Practice Journal 6 (NLPJ)* p. 37.

cohesion, build terms, reveal different needs interest among individual and among groups, explore personalities, bring feelings into the open and create mutual dependence<sup>7</sup>. Adjudication in the already congested courts could drag on for so long due to delay that could emanate from the courts or the parties that can employ several delay tactics through their counsel, especially from the party on the defensive<sup>8</sup>. Oputa made a telling remark on the state of the judiciary when he said,

“the administration of our courts suffers from two major constraints, namely delay and expense. If it takes 7-10 years to decide a case, a prospective litigant may decide not to go to court at all. But the one thing that frightens litigants from the court is the inordinate expense incurred with the result that a very large proportion of our country men are, as it were priced out of the legal system”.

The delay in adjudication of matters especially on commercial issue has a negative impact on investors who would be willing to invest on the financial system. To overcome the challenges that may be associated with capital market's dispute resolution system, the ISA introduced a dispute resolution mechanism that is flexible, time propelled, accessible and fair. The Investments and Securities Tribunal (IST) was conceived as an option in this regard.

Dispute arising from the capital market was segmented by the Denis Odife Panel in 1996 whose thrust was the review of the Nigerian Capital market. The

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<sup>7</sup>. Agom A. R (2009) “An Expose on the Investment and Securities Tribunal” in *Journal of Private and Comparative Law (JPCL) VOL. 2 & 3 p. 57.*

<sup>8</sup>. Goodluck O. O (2010) “An Overview of the Modus Operandi of the Multi Door Court Houses” in *Alternative Dispute Resolution and Some Contemporary issues* edited by Aliyu I. A. et al, M. O Press & Publishers Ltd Kaduna P. 256. The learned High Court Judge in her paper cited the opinion of Hon. Justice Oputa C. (JSC As he then was) as reported in a paper delivered by Prof. Charles Soludo titled “Access to Justice and Sustainable Economic Development” A Public Private Partnership at the 1st NCMG African ADR Summit, 2006 reproduced in 35 F.R.D. 241 at p. 291.

Denis Odife Panel divided the disputes that may arise from the capital market as dispute between the Securities and Exchange Commission and the Lagos Stock Exchange<sup>9</sup>. Dispute between the Securities and Exchange Commission and Market Operators. Users quoted companies and dispute between operators and members of the public<sup>10</sup>.

The IST is a tribunal specialized in resolving dispute, conflict arising from dealings in the capital market in Nigeria. The IST's *modus operandi* is to resolve disputes in an informal, flexible and timely manner<sup>11</sup>.

## **1.2 Statement of the Research Problem**

Dispute resolution mechanism in Nigeria is highly depressed with myriads of cases on a judge that may not have any specialized knowledge in some very highly technical field. The Nigerian Capital Market is one of the set specialized fields that if not well organized with a view of meeting the best global standard will disinterest some highly respected firms that may invest in Nigeria as a means of job and wealth creation. Mechanism in resolving disputes is one area a potential investor may consider before transferring his income and invest in Nigeria. The method of resolving dispute must be firm, professionally inclined, flexible and timely; these factors influenced Odife, the Chairman of a panel set up in 1996 to undertake a review of the Nigerian Capital Market and whose recommendations led to the establishment of the IST.

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<sup>9</sup>. The Nigeria Stock Exchange was established in 1960 as the Lagos Stock Exchange. In December 1977 it became the Nigeria Stock Exchange.

<sup>10</sup>. Ateiza S. A and Anthony O.U (2008-2009) "The Constitutional Status of the Investment and Securities Tribunal" *Ahmadu Bello University Journal of Commercial Law* Vol.4 No. 1. p. 93.

<sup>11</sup>. Agom A. R. *opcit.*

From all spheres of sincerity, the establishment of IST is a giant stride taken by the Federal Government of Nigeria in decongesting the courts to meet with approved and highly technical business transactions arising from Capital market dealings. But the efforts of the Federal Government in the implementation of the Odife panel's recommendations of the creation of a specialized court or tribunal have left the IST with some noticeable problems:

From the forgoing, this research work seeks to tackle the following questions:

- i. Whether the power of the Minister of Finance in the appointment and the removal of the Chairman and Members of the Investments and Securities Tribunal without recourse to the National Judicial Council or subject to the approval of the National Assembly would not robe the IST of being impartial in matters affecting the Federal Government and market operators?
- ii. Whether the three months periods allowed by the IST from the date of hearing to judgment would not prove true the cliché; justice rushed is justice crushed?
- iii. Whether the inability of the IST to enforce its judgment would not defeat or delay the judgment creditor's enjoyment of the fruits of his judgment?
- iv. Whether the inability of the IST to entertain criminal related disputes that emanated from the capital market is not a clog in the IST dispute resolution mechanism?

### **1.3. Aim and Objectives of the Research.**

This research work focuses to establish that there is no conflict between the jurisdiction of the IST and that of the Federal High Court in resolution of capital market disputes in Nigeria. The focal aim of this research is to reveal that there is a difference between the establishment and Jurisdiction of the IST.

The research further shows that the fact that the IST is not listed amongst superior courts in section 6 of the 1999 Constitution does not limit the functionality of the IST as an impartial arbiter for the resolution of capital market disputes. Despite the good found in the establishment of the IST, this paper finds against the IST some weaknesses that would affect the smooth functioning of the IST.

This research work aims to achieve the following objectives:

- a. To demonstrate an indebt analysis of the Investments and Securities Act in a bid to reveal the weakness wherein the Minister is empowered to appoint and remove the Chairman and members of the Investments and Securities Tribunal without recourse to the National Judicial Council or subject to the approval of the National Assembly.
- b. To examine the Investments and Securities Tribunal Rules in a bid to establish the weakness and benefits associated with the fixing of three months from hearing to the date of judgment.
- c. To analyze the legal and jurisprudential implication(s) of enforcing the decisions of the IST by the Federal High Court.
- d. To dispassionately analyze the jurisdictional conflict between the IST and the Federal High Court.
- e. To expatiate on the dangers of the IST not having criminal jurisdiction on issues and matters arising from the Nigeria Capital Market.

#### **1.4. Scope of Research.**

Capital market is not a phenomenon limited to Nigeria as a game player but as an international global concept. Though the Nigerian capital is the pursuit under consideration, reference may be made to other jurisdictions to shape, improve and develop the effectiveness of the Nigerian capital market. This research is basically governed by the operation of the Investments and Securities Tribunal Establishment Act, which stands as the Investments and Securities Act. The Investments and Securities Tribunal (Procedure) Rules will be a great tool for the discussion of the procedural framework for resolving disputes before the Tribunal.

The basic crux of this research is to examine the mechanism of resolving disputes by the Nigerian Capital market in such a way that is fast, cost effective, efficient and globally acceptable. The scope of this research shows the nature of dispute that could emanate from the Nigeria capital market, the procedural jurisdiction and powers of the Investments and Securities Tribunal. The scope of this research will further extend to the legality and composition of the Investments and Securities Tribunal. Historical development of the Investments and Securities Tribunal and the flexibility of resolving disputes by the tribunal will be considered by this research. The regulatory powers of the Securities and Exchange Commission in resolving disputes arising from the Nigerian capital market will be considered by this researcher.

To improve the quality and content of this research some other subjects in relation to the Nigerian capital market will be injected in course of explaining the

outlined subject matter. The research will be concluded by suggestions to cover the existing lacunae in the operations of the Investments and Securities Tribunal.

### **1.5. Research Methodology.**

This research adopts the doctrinal research method as the principal method of retrieving information, expanding or analyzing the gathered information. The primary sources of material for this research are relevant statutes and judicial authorities. Secondary materials are extracted from journals on written articles therein, texts books on the wide range of commercial law and written text on securities law. Post graduate dissertations on related field on securities law and practice are analyzed. Seminar papers, handbooks from the Securities and Exchange Commission were important materials that were accessed for this research.

### **1.6. Literature Review.**

The scarcity of materials in the broad spectrum of the Nigerian capital market which stems from the wave could be felt by writers on this area when put in the scale of the money market. Despite the plight upon which the market is judged, there are some materials that act as a solace to the exposition of the market. The principal instrumentality of the market is ISA 2007 and the Securities and Exchange Commission's Rules and Regulations.

The Capital market that operated as part of the scope of commercial law and practice is now gradually parting ways with commercial law and practice, to form an emerging field of study called securities law and practice. The nature of this emerging and or developing field of study does not have a complete legal text known to this researcher solely on securities law and practice. Writers who intend to

contribute their own bid are mostly doing so through journals, theses or single chapters on company law text.

Agom<sup>12</sup> wrote on the Legal and Institutional Framework for the Regulation of the Nigerian capital market. In chapter four of his research work, he discussed the Institutional Framework for the Regulation of the Nigeria Capital market. The said chapter centered on the specific role of the Securities and Exchange Commission and the Investments and Securities Tribunal regarding its primary role on the regulation of the Nigeria capital market, the researchers work centered on regulation but not on dispute resolution. Issues like the procedure of dispute resolution were not discussed.

Agbadu-Fishim<sup>13</sup> wrote on “Dispute Resolutions under the Investment and Securities Act 1999”. The article discussed the dispute resolution mechanism available to the general public under the Investment and Securities Act 1999. The article is limited by time as the work was written under a repealed Act. The Act that governs the securities market in Nigeria is the Investment and Securities Act 2007. The Investment and Securities Act created the Investments and Securities Tribunal that claimed to have exclusive jurisdiction in disputes emanating from the Nigerian capital market.

Orojo<sup>14</sup> in his work “Company Law and Practice in Nigeria” highlighted the Investments and Securities Tribunal as contained in the Investments and Securities

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<sup>12</sup>. Agom A. R (2009) “The Legal and Institutional Framework for the Regulation of the Nigeria Capital Market”. *An Unpublished PhD Theses. Faculty of Law, Ahmadu Bello University Zaria.*

<sup>13</sup>. Agbadu-Fishim J.T (2002) “Dispute Resolution under the Investments and Securities Act of 1999 ” *in Nigeria Law and Practice Journal.* p. 37.

<sup>14</sup>. Orojo J. O. (2005) “*Company Law and Practice in Nigeria*” LexisNexis, Cape Town, South Africa p. 361.

Act. The work did not show the jurisprudential limitations between the Investments and Securities Tribunal in comparison with the Federal High Court.

Tayo- Oyetibo<sup>15</sup>the article centered on the jurisdictional conflict between the Federal High Court and the IST with regard to the resolution of capital market disputes in Nigeria. The article submitted and concluded that the IST jurisdiction is specific while that of the Federal High is general and there is no dispute or conflict between the Federal High Court and the IST in terms of the resolution of capital market dispute in Nigeria. The authorswork greatly assists this research on the issue of jurisdiction but the work did not discuss the practice procedure of the IST in the resolution of dispute, this research tends to cover.

Mukhtar<sup>16</sup>wrote on “The Role of Tribunals and Dispute Resolution Centers in the Administration of Justice in Nigeria”. The PhD thesis was of great help to this research because the researcher wrote extensively on the criminal aspect of the dispute resolution mechanism of the IST.The thesis did not center greatly on the *modus oparandi* adopted by IST in the resolution of dispute. This research tends to fill that gap.

Akume<sup>17</sup>wrote on “The Unconstitutionality of the Investments and Securities Tribunal in Nigeria”; the article was published sequel to the repealed ISA 1999. The article centered only on the legal framework of the IST and did not discuss the

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<sup>15</sup> . Tayo- Oyetibo M. (SAN) Jurisdiction: Defining the Investment and Securities Tribunal in the Light of the Federal High Court. An unpublished article pp. 1- 14.

<sup>16</sup> . Mukhtar H. (2012) The Role of Tribunal and dispute Resolution Centers in the Administration of Justice in Nigeria”, *an unpublished PhD thesis, Faculty Law, Ahmadu Bello Univerty Zaria*. p. 240.

<sup>17</sup> . Akume A. A (2004)“The unconstitutionality of the Investment and Securities Tribunal in Nigeria”*Benue State University Law Journal Vol. 3 p. 57.*

practice or procedures adopted by the IST in resolving disputes that emanates from the Nigeria capital market, as an extract from the article states thus:

The ISA is one of such other enactment envisaged under the Constitution. There was no need for the creation of the Tribunal. We would not have quarrel if the motive of the law makers was to fashion an efficient and complimentary administrative body to handle matters of company securities instead sidelining into a reckless congruity, which we think arose into a reckless legislative oversight or a deliberate legislative impunity.

Ateiza and Anthony<sup>18</sup>, the duo-authors whose article “Constitutional Status of the Investments and Securities Tribunal”, the authors’ main theme, centered on the legal structure of the creation of Investment and Securities Tribunal. The attention of the authors centered basically on legality or otherwise of the Investment and Securities Tribunal but did not discuss on the dispute mechanism of the Investment and Securities Tribunal. The frontloading system adopted by the Investment and Securities Tribunal was not highlighted by the authors. They did not discuss the historical reasons that led to the formation of the Investment and Securities Tribunal and the rules and procedures of the dispensation of cases because it was also not highlighted. Despite the un-discussed point by these researchers, we find the following extract from the authors work as valuable:

This paper also disagrees with the argument that the ISA and the Constitution were enacted through the same process. This is

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<sup>18</sup>. Ateiza S.A and Anthony (2008-2009) “*Constitutional Status of the Investment and Securities Tribunal*” in *Ahmadu Bello University, Journal of Commercial Law Vol. 4. NO. 1. p. 93.*

fundamentally not correct. A proposed Act of the National Assembly is either initiated by the Lower House or the Upper House and passes through the first reading, second reading, committee stage, third reading, report stage and the assented to by the President. But the constitution does not have to pass through these stages. It is only amendment of a portion of the constitution that may be subjected to this process; certainly not a constitution, be it a fresh or a new made by the military, or even a civilian regime (if need be) Rather usually referendum/debate by the public is conducted, and Constituent Assembly is raised to draft the constitution.

From whatever angle one may look at the Tribunal, its purported creation is *ultra vires* the National Assembly as they lack the legal powers to do so<sup>19</sup>.

This research believes that the combined effect of the argument and legal submission of Akume and Ateiza and Anthony centered on the premise that the establishment and operation of the Investments and Securities Tribunal is illegal. This research considers Agom's<sup>20</sup> view on the legality of the Investments and Securities Tribunal more plausible as Agom opined as follows:

...a careful digest of section 6 (5),(J) of the same Constitution shows that the judicial powers of the Federation shall also vest on such courts as may be authorized by law. The ISA, which came into effect on the 26/05/1999, before the 1999 Constitution on the

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<sup>19</sup>. Ibid p. 108.

<sup>20</sup>. Agom A. R (2007-2009) op cit. p. 57.

20/05/1999 is an existing law, deemed passed by the National Assembly. Fully aware of its provisions before the promulgation of the 1999 Constitution, ISA is deemed to convey the legislator's intention. *Afortiori*, Section 240 of the said Constitution contemplates appeals from the Tribunal being heard by the Court of Appeal<sup>21</sup>.

Orji<sup>22</sup> wrote on "Investments and Securities Tribunal: Enforcement Tool in the Nigerian Capital Market". The author discussed the enforcement procedure of the IST in a bid of resolving the capital market disputes. The origin of the capital and the quorum of the IST have its fair discussion by the author. The jurisdictional conflict between the IST and the Federal High Court was however not discussed by author leaving this research to fill the lacuna.

Chianakwam<sup>23</sup> she wrote on the Investments and Securities Tribunal: Achievement, Challenges and Prospect. The author's article identified the legality of the IST as a constant bane in the dispute resolution of the IST. The author did not proffer solution to the challenges faced by the IST in the resolution of capital market disputes.

Iloba- Aninye<sup>24</sup> wrote an article title Regulatory and Enforcement Institutions under the Investments and Securities Act. The role of the IST in investment and capital market disputes resolution were considered.

Raji<sup>25</sup> the author wrote on the constitutional limitation of the IST. The author examined the power of the National Assembly in creating the IST vis-à-vis the Constitution. The

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<sup>21</sup>. *ibid* p.68.

<sup>20b</sup>. Zephy L. (2004) "Know Your Capital Market" Creation House, Lagos.p. 45.

<sup>22</sup>. Orji A. N (2007) "Investment and Securities Tribunal: Enforcement Tool in the Nigerian Capital Market" *Law and Investment Journal Vol. 1. No 1. P. 96.*

<sup>23</sup>. Chianakwam N. (2013) "the Investments and Securities Tribunal: Achievement, Challenges and Prospects" *Ahmadu Bello University Journal of Commercial Law Vol. 6 No. 1 p. 105-118.*

<sup>24</sup>. Iloba- Aninye O. (2013) Regulatory and Enforcement Institutions under the Investments and Securities Act 2007: An Introspective Analysis" *Ahmadu Bello University Journal of Commercial Law. Vol. 6. No. 1. p. 191.*

author's article concluded by submitting that the equation of the jurisdiction of the IST with the Federal High Court is unconstitutional.

Igwe<sup>26</sup>the author in his book wrote on the Investments and Securities Tribunal. The book centered on analyzing the cases or disputes the IST has resolved pursuant to its mandate as the judicial arm of the Nigeria Capital market in dispute resolution.

Umar<sup>27</sup>, wrote "A Critical Examination of the Investments and Securities Tribunal and Its Role in Investment and Capital market Dispute Resolution in Nigeria". A close perusal of the said work reveals that he was more concerned with the legal structure of the IST but did not discuss the conflicts that might emanate from the NigerianCapital market. The author did not further discuss the origin of the NigerianCapital market and the reasons behind the establishment of the IST. Below is an extract from the submission of the author on the legal structure of the IST which in our opinion is what the said paper centered on, not really on the method of conflict resolution from the IST. "The act of the National Assembly in arrogating equal jurisdiction totheIST and the FHC amount to an act of legislative rascality that needs to be checked and declared null and void"<sup>28</sup>.It is imperative to further note that the rule of procedure in dispute resolution was not mentioned in the entire work. The learned author did not also talk about case management and procedure of instituting an action before the IST.

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<sup>25</sup> . Raji K. G. (2002) Constitutional Limitation of the Investments Securities Tribunal" *Modern Practice Journal of Finance and Investment Law, Vol. 6. No 1-2, Learned Publishers Limited, Lagos.* p. 104.

<sup>26</sup>Igwe J. U. K. (2008) *Globalisation, Law and Ethical Issues in Business Relations.* Law Development, Research, Publications and Consulting Limited. Lagos. P. 114.

<sup>27</sup>. Umar S. (2014)"A Critical Examination of the Investment and Security Tribunal and its Role in Investments and Capital Market Dispute Resolution In Nigeria." *An unpublished seminar paper presented at the Faculty of Law Ahmadu Bello University, Zaria.*

<sup>28</sup>. Ibid p. 13.

Azi<sup>29</sup> the researcher wrote on the dispute resolution mechanism of the Nigeria Capital Market. He discussed some of the challenges facings facing the IST that ranges from the non-criminal jurisdiction of the IST, the exclusivity of the jurisdiction of the IST in comparison with the Federal High Court and he concluded that the provision of the ISA that empowers the IST to review its own decision is absurd because it renders the appellate jurisdiction of the court of Appeal illusory.

### **1.7. Justification.**

This research work consumes huge resources. The resources, time and energy to be dissipated on it is to achieve the purpose of contributing to knowledge and learning particularly in the area of the Nigerian capital market. It is therefore presupposed that the thesis is expected to be of immense benefit to a cross section of people in the discharge of their professional callings.

**First**, in a democratic setup like ours, the heavy task of legislators cannot be underestimated. The National Assembly, being the institution vested with legislative powers in Nigeria is empowered to make laws for the peace, order and good governance of the federation or any part thereof with respect to any matter listed in the Exclusive Legislative list. This heavy obligation with which the National Assembly is saddled cannot be accomplished with an empty head. The individual law maker has to be imbued with a wide range of knowledge to meet the challenges of lawmaking. Furthermore, the National Assembly retains the power to impose, increase, reduce, vary or cancel the Investments and Securities Act. The topic of this research forms one of the items on which the National Assembly is competent to

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<sup>29</sup> . Azi A. I (2011) “ An Appraisal of the Disputes Resolution Mechanism in the Nigerian Capital Market under the Investments and Securities Act 2007” *an unpublished LL.M dissertation, Faculty of Law, Ahmadu Bello University, Zaria.* p 102.

legislate. To that extent therefore, this thesis will inform better both the legislators and the legislative counsel (*whose main function is to assist legislators in fulfilling their legislative tasks*) in making valuable contributions to the development of Nigeria through law making.

**Second**, a wide range of the efficiency of the Investments and Securities Act rest with the powers of the Minister. The Minister is an appointee of the executive arm of government that ought to ensure the efficient and effective working of the Investments and Securities Tribunal. The Nigerian Capital market stands as a means of the executive arm of government generating income and finances in catering for the wide spectrum of governance. This research will also be beneficial to the executive arm of government in the management of the Capital market toward efficient fund generation in Nigeria. Also, **judges** will find the contents of this dissertation very helpful in discharging their judicial functions. The classical responsibility of the courts is to interpret laws and apply them to the facts of the case before them. Decisions reached as a result of the interpretation by superior courts of records have the force of law and sanction like any other law made by the legislature. This research work would effectively and beneficially increase the unending quest of knowledge for judges about the workings of the Nigerian Capital in relations to dispute resolution in Nigeria.

**Third**, to Lecturers and Students of the law of Capital market and Practice in Nigeria, no literature could effectively claim to have covered this field in research because legal work is evolving in nature. This work has contributed a modest nature toward improving the dispute resolution mechanism arising from the Nigerian

capital market. Law teachers and students could vary, improve this work, hence this work would be of high benefit to them. The Capital market operators and members of the IST no doubt would see reasons on the importance of this research.

### **1.8. Organizational Layout**

Chapter one gives a general introduction of this research, with scope, objectives, literature review and the thrust of the research contained therein.

Chapter two discusses the nature of dispute from the Nigerian capital market, the role of the Securities and Exchange Commission as a capital market regulator and its dispute resolution mechanism. The said chapter further discusses the dangers militating against the effective dispute resolution mechanism of the Securities and Exchange Commission.

Chapter three discusses the historical origin of the IST as a dispute resolution institution. This chapter discusses the factors militating against the effectiveness of the IST. The chapter discusses the mode of case management in the IST and the dangers and limitation of the frontloading system adopted by the IST. Compositional power of the IST has been discussed in chapter two and the alternative dispute resolution adopted by the IST.

Chapter four discusses the jurisdictional conflict between the IST and the Federal High Court. The mode of enforcement of judgment by the IST has been discussed. The appellate jurisdiction of the IST is also discussed. Chapter five contains the summary of the research work, the findings and the recommendations.

## CHAPTER TWO

### CAPITAL MARKET DISPUTES IN NIGERIA.

#### 2.1 Introduction.

Securities disputes require a professional and specialized body with an accelerated performance in line with the nature of such transactions within a capital market full of variables affecting the pace of its performance. The financial activities are of a technical manifold nature and enjoy special customs that receives international recognition making disputes thereof difficult and complex. Moreover, the echo of resolving such disputes leaves an outstanding imprint on the economic and financial stability.

Therefore, the capital market Law entrusted a specialized body to look into such disputes. The members of this body are specialized in the doctrine of transaction and financial markets, as well as being experts in commercial and financial matters along with securities cases. The capital market law also took into account the distinctiveness of such disputes. The pattern of dispute in the Nigerian capital market Include disputes between the Securities and Exchange Commission, (SEC) and the Nigerian Stock Exchange (NSE), the SEC and Market Operators; NSE and market operators; market operators and members of the public<sup>30</sup>. In view of the complex nature of human relations, crimes are normal disputes that may occur in the capital market. Section 290 (3) of ISA provides that any proceeding before the tribunal shall be deem to be a judicial proceeding and the tribunal shall be deemed to

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1. Agom A. R(2007 – 2009) “An Expose on the Investments and SecuritiesTribunal” *Journal of Private and Comparative Law* Vol. 2 & 3. Zaria p. 57.

be a civil court for all purpose. However, where offences that are criminal in nature are disclosed during investigation, the Securities and Exchange Commission normally refers such case to an appropriate prosecuting authority like the Attorney General of the Federation or of a State as the case may be. In *U. B. N. PLC (Registrar's Department) vs. S.E.C*<sup>31</sup> while the IST directed the SEC to formally hand over the fraud aspect of the case to Economic and Financial Crimes Commission and to the Attorney General of the Federation for criminal prosecution on the one hand, the IST went further and directed the SEC to liaise with the EFCC or the Inspector General of Police to locate and produce one Lawrence Okwufulueze and his cohort in order to seize assets belonging to him. The IST further ordered that such confiscated assets be sold and the proceeds thereof be used to compensate the investors who were defrauded.

Mukhtar<sup>32</sup> submitted that the above verdict was tantamount to conviction of the appellant by the IST without trial and merely directing the SEC to execute its disguised conviction. The fact that the person convicted is a corporate body is immaterial. The fundamental right to fair hearing under the 1999 Constitution has no barriers regardless of natural or corporate personality. The word "person" used in section 36 of the 1999 Constitution should be interpreted to mean not only natural person but also corporate entity, if not for any other purpose, at least, with regard to the fundamental right to fair hearing in criminal trials.

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<sup>31</sup> . (2004) 1 ISLR, 1.

<sup>32</sup> . Mukhtar H. (2012) "The Role of Tribunals and Dispute Resolution Centres in the Administration of Justice in Nigeria". *An unpublished ABU PhD thesis*.p.240.

## 2.2 Nature of Capital Market Disputes in Nigeria.

The nature of disputes from the Nigeria capital market could easily be traced to the Denis Odife's panel on the Review of Nigerian capital market 1996. The Panel revolutionarily restructured the Nigerian capital market. Grievance redress machinery in Nigerian capital market has a *chequered* history which until now was anything but satisfactory<sup>33</sup>. It was against this background that the panel on the review of the Nigerian capital market was charged

to consider the desirability or otherwise of setting up an appropriate informal judicial forum, within the capital market for the prompt determination of any question, dispute or controversy that may arise between the institution in the Nigerian capital market in-terse or market operators generally<sup>34</sup>.

The panel extensively came up with the nature of dispute in the Nigeria capital market as thus:

- i) Dispute Between Securities and Exchange Commission and the Lagos Stock Exchange, dispute between these two institutions that have arisen in the last few years and event presently include<sup>35</sup>:
  - a) A directive by the Securities and Exchange Commission that the time be changed from Nigerian Stock exchange and suspension of latter's key officers as a result of the refusal to comply with the directive.
  - b) Intervention by the Securities and Exchange Commission in the Secondary market.
  - c) Trade halt by the Securities and Exchange Commission.

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<sup>33</sup>. Agom A. R. op cit (fn 1).

<sup>34</sup>. Chief Dennis Odife (Odife's panel). See. Federal Ministry of Finance, Final Report of the Panel on the Review of the Nigerian Capital Market, September 1996. p. 21. Term of reference NO.12.

<sup>35</sup>. Orji N. A. "Investment and Securities Tribunal: Enforcement Tool in the Nigerian Capital Market" op cit p. 100.

- d) Discipline of Members.
- e) Decision by Securities and Exchange Commission that commercial bank should act as issuing houses.
- f) Lack of consensus on guideline for price movement.
- g) Lack of consensus on foreign investment in the Nigerian capital market.
- h) Lack of consensus on the list of receiving agent.

An example of conflict between the Securities and Exchange Commission and Lagos Stock Exchange, now the Nigerian Stock Exchange has a resemblance in the case of *Central Securities Clearing System (CSCS) vs. Securities and Exchange Commission (SEC)*<sup>36</sup> wherein the IST was called upon to interpret the duties of the Securities and Exchange Commission. The fact of the case is the appellant, a registered capital market operator, applied for review of order/decision of Administrative Proceeding Committee of Securities and Exchange Commission on account of trading in false securities. SEC became aware of alleged scam and fraudulent sale of shares of Nestle Food Plc, Unilever Plc and other securities to the tune of about Three Hundred and Eighteen Million Naira (N 318,000,000.00) only. The fraud was allegedly perpetrated by a syndicate group through certain stock broker firms. In March 2002, the appellant in course of his routine check discovered that some share certificate including 3,130,469 unit of Nestle Shares has been fraudulently brought to its depository by some stock brokers (stock broken firms) most of which had been sold and the appellant had cleared. The staff of the appellant

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<sup>36</sup>. Appeal No. IST/APP/01/2003 Nigerian Investment and Securities Law Reports (which shall be referred to as "NISLR), 1 (2004) p. 41.

namely BaruwaHameed, Augustine OnyekweluEbadem, YibisRitgakGotar and Emmanuel Iwuno acted in concert with the fraud syndicate, introduce the shares into the CSCS system. The value of the shares sold, which translated as a loss to the investing public is worth about N 318 Million. Following the discovery, the appellant reported the matter to the Nigeria Stock Exchange. The respondent invited the appellant to its Administrative Proceedings Committee and the charges brought against it include inter alia, employing manipulative and deceptive contrivance in securities transaction/ trading, engaging in acts capable of affecting public confidence in the capital market and failure of the company to properly supervise its staff. The respondent after thorough investigation and hearing conducted held that the appellant was liable on all counts. The appellant was ordered by the respondent to compensate or buy back all the shares they traded on stock exchange in relation to the scam. The appellant being dissatisfied with the decision to appealed to the tribunal. The tribunal held:

There is a need to stress the fact that the appellant being a settlement and clearing agent in the market, the duty to exercise extreme care in its operation cannot be overemphasize as other operators relied on its expertise. It is trite law that in a sphere in which a person is placed that others could reasonably rely upon his judgment or skill or ability to make a careful enquiry, if that person takes it upon himself to give information or advice to be passed on to another person

as he knows or should know will place reliance upon it then a duty of care will arise.<sup>37</sup>

The tribunal accept the argument of the appellant that it does not initiate transactions, however, as a central depository agent, its crucial role in the market necessitate taking extra care and exercising due diligence in ensuring that market operators are not misled. The Investments and Securities Tribunal is called on by means of originating processes before the tribunal to resolve conflicts between the SEC and NSE.

ii) Dispute between Securities and Exchange Commission and market operators.

The disputes between these two arise as follow:

- a) Lack of agreement on the method of share pricing.
- b) Non communication on policy changes by security and Exchange Commission to issuing houses who often find out about changes in the media.
- c) Discipline of market operators.
- d) Lack of agreement on list of receiving agents
- e) Problem of interpretation of laws and regulation.
- f) Arbitrary deletion of names of market Operators by Securities and Exchange Commission for minor infractions.
- g) Arbitrary use of 'suspension' 'instead of "fines"' against market operators.

In the case of *FIS Securities Limited vs. Securities and Exchange Commission (SEC)*<sup>38</sup> the fact of the case is that in April 2002 the SEC became aware

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<sup>37</sup> . *ibid.* p. 72 para D.

of allege scam and fraudulent sale on the floor of the Nigeria Stock Exchange (NSE), of the shares of Nestle Foods Plc, Unilever Plc and certain other securities. A syndicate group through certain stock broking firms allegedly perpetrated the fraud. Pursuant to its powers under the Investment and Securities Act and Rules made there under, the Commission investigated the allege fraud. Based on the finding from the investigation, the Commission directed its administrative Proceeding Committee to conduct hearing into the allege violation of some provision of the ISA and SEC Rules made there under. The appellant is one of the Stock broken firms summoned by APC was alleged to have been involved in the fraudulent sale of:

- i. 430,000.00 units of nestle shares.
- ii. 60, 000, 00 units of Union Bank Plc shares.
- iii. 60, 000, 00 units of First Bank Plc shares; introduced and transferred to the appellant by Bonkulans Investment Limited.

The appellant being dissatisfied with the decision of the APC appeal to the Investments and Securities Tribunal. The tribunal held:

The tribunal hold that the SEC order for buyback be set aside as it will lead to multiple buy back effect and is not an appropriate remedy in this case. We hereby uphold the APC order for refund with interest where the price/ values of the shares have improved or appreciated.

The case of *BETA Consortium Limited vs. Securities and Exchange Commission*<sup>39</sup> the facts of the case is that the applicant, BETA Consortium Limited, was the proffered bidder

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<sup>38</sup> . Appeal No. IST/APP/04/2003.(2004)1 NISLR p. 165.

<sup>39</sup> . Case No. IST/OA/01/2004.(2007) 2 NISLR. p. 33.

for 100% shareholding of Ikoyi Hotel Limited. BPE formally handed over the properties belonging to and forming part of the entities known as Ikoyi Hotel Limited in a letter dated May 30 2003 to the applicant. Subsequently, by a letter dated May 6, 2003, the respondent demanded that the applicant forward to it certain documents and pay the stipulated acquisition fee to enable it regularize the transaction.

The applicant being dissatisfied by the demand of the respondent filed an application dated 30<sup>th</sup> July, 2004 before the tribunal seeking inter alia a declaration that the transaction of the applicant was accepted from those requiring the prior approval of or regularization by the respondent. The applicant relied on several provisions of the ISA and the Rules and Regulations of the Securities and Exchange Commission especially section 99 (3) and (4) of the ISA which provides exemptions. The applicant sought a declaration that they were a private limited liability company outside the purview of the respondent and that the acquisition of assets and share of Ikoyi Hotel Limited was solely for the purpose of investment by the applicant as a holding company and that the transaction did not require prior review and approval of regularization by the respondent as the transaction was carried out under the authority of the National Council on Privatization, a government agency. The respondent thereupon brought a Notice of Preliminary Objection dated September 6, 2004 asking the tribunal to dismiss the action on the grounds inter alia that the applicant failed and or neglected to comply with the mandatory regulatory requirement of section 99 (2) of the ISA 1999.

The tribunal dismissed the Notice of Preliminary Objection brought by the respondent. The applicant called no witnesses but relied on the content of the affidavit in support of the originating application and Respondent called two witnesses. For the sake of ease of

reference, section 99 (2), (3) and (4) of the ISA provides “Notwithstanding anything to the contrary contained in any enactment, every merger, acquisition or business combination between or among companies” while subsection (3) sic provides that “nothing in this section shall apply to holding companies acquiring shares solely for the purpose of investment and not using same by voting or otherwise to cause a substantial restraint of competition or tend to create a monopoly in any line of business enterprise”. And Subsection (4) sic provides further that “nothing in this section shall apply to transaction dully consummated pursuant to the authority given by any federal government agency under any statutory provision vesting such power in the agency. The tribunal held:

The legislative history of the ISA 1999 indicates that the main concern of the law makers was to provide full and fair disclosure in securities transactions. However, the legislators recognized that there were certain situations in wish the protections afforded by the Act were not necessary. The exemptions provided under ISA 1999 therefore are essential to the viability of the Act’s regulatory scheme. For this reasons, the Act carefully exempt from its applications certain types of securities transaction were there is no practical need for its application or where the public benefit are too remote. Section 99 (3) and (4) are examples of such exemptions...having held that the respondent has failed to contradict the assertion of the applicant and that in accordance with section 99 (3) and (4) of the ISA the applicant is exempted, it follows that the

respondent cannot regularize a transaction which the law exempt from its purview.

In *Central Securities Clearing System Limited vs. Bokolans Investments Limited*<sup>40</sup> this case is in relation to the fraudulent sale of share of Nestle Plc on the floor of the Nigeria Stock Exchange to unsuspecting Nigerians. During the hearing at the APC, the APC found that the scam was able to scale through because the principal and Chief executive officers of the 1<sup>st</sup> applicant failed to carry out its routine check on its staff and agents. The tribunal held. “It is an undeniable fact that the 2<sup>nd</sup> applicant was under the control and supervision of the 1<sup>st</sup> applicant at the time the fraud occurred. It is settled law that if the agent commits the fraud purporting to act in the course of business such as he was authorized or held out as authorized to transact on account of his principal then the later may be held liable. Rule 68 of the NSE Rules and Regulations, which was admitted in the instant case as Exhibit W provides thus: A member shall accept full responsibility for all transactions on the Exchange undertaken by his authorized clerks”. Like in every human endeavor, the IST has proved to be reliable, professional, fast in the resolution of capital market disputes which may have occurred between capital market operator and the SEC.

- iii) Dispute between Lagos Stock Exchange market operators / users quoted companies. Dispute here arise from:
  - a) Selection of operators’ representative of the counsel of the stock exchange.
  - b) Lack of agreement on guideline on market operation.
  - c) Intervention of price policy.

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<sup>40</sup>. (2) The Nigerian Stock Exchange vs. 2. Lawrence Okwufulueze, (3) Diamond Bank Limited, (4) SEC, (5) B & N International Limited, (6) Mr. Basil OkolieNkenchor (Case No IST/OA/03/2003), (2007) 2, NISLR. 93.

- d) Policy formulation and implementation without consultations.
  - e) Dealing outside the trading floor of the stock exchange.
  - f) Arbitrary charges and fees.
  - g) Lack of consensus on the investors protection fund.
  - h) Interpretation of rules and regulation.
- iv) Dispute between operators and members of the public.
- a) Dispute in the course of public issues of securities.
  - b) Dispute in secondary market operations.
  - c) Failure by customer to redeem financial and others commitments made to market operators.
  - d) Failure of operators to redeem commitment to customers.

The case of case of *Chief Livinus Ezemegbe vs. NSE & Anor*<sup>41</sup> explains circumstances that likely disputes could occur between market operators and the investing public. The facts of the case reveal that there was misappropriation of client investments and the tribunal held as follows:

- a. The respondents were directed to compensate the applicant from the investors' protection fund in accordance with provisions of part 12 of ISA 1999.
- B. That the applicant be paid from the Investors Protection Fund within 6 months when he became aware of the defalcation.
- C. That the NSE in collaboration with SEC are to draw up and make public within 90 days necessary guidelines for the implementation of the IPF in line with section 159 and 160 of the ISA, 1999.

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<sup>41</sup> . Suit No. IST/OA/2006, Judgment delivered on the 13th December, 2006.

Prior to this decision the Investors Protection Fund in Nigeria had been lying dormant without any rule to regulate its implementation and nobody had been compensated there from. In *Blue-Chip Acquisition and Investment Company Limited vs. Zenith Bank Plc*<sup>42</sup> the fact of the case is that the applicant had subscribed to 10, 000 units of Zenith Bank shares bought at the rate of N10.90 per unit during the 1<sup>st</sup> Respondent initial public offering of its shares. After the close of the initial public offer, the respondents failed to provide the applicant with share certificate for the share subscribed to within the time prescribed by law. The applicant wrote letters demanding for its share certificate but the letters were unattended to. Aggrieved, the applicant filed an action at the tribunal. The tribunal held among other things:

It is apparent that from the totality of the evidence given by the AW1 and AW2, there was a violation of SEC rules and regulations. It is obvious that from the totality of the case that there was serious dereliction of duties by the respondent especially the 4<sup>th</sup> Respondent in dealing with the applicant. The respondents could not give convincing evidence that the applicant share certificate was part of the bulk dispatched. Even if it has been part of the bulk, there is still a burden to prove that it was dispatched by the registered post as required by SEC Rules and regulations and the condition for allotments. The implication is that SEC Rules and Regulations were not complied with... applicant is genuinely entitled to the share certificate whether or not there was complaint to the 4<sup>th</sup> Respondent on the status of its possession of the share certificate. The justification is founded on the ground that as soon as the allotment is cleared and approval given by

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<sup>42</sup>. Case No.IST/OA/04/2004.Reported in (2007) 2 NISLR p. 61.

SEC and the applicant's application for shares was not disqualified, the shareholder automatically own the share and is entitled to possession of the certificate...the tribunal is of the view that the applicant is entitled to damages... No doubt, it is crystal clear from the evidence that the respondents failed to provide the applicants with share certificates as required of them.<sup>43</sup>

This decision no doubt brightens the faces of innocent Nigerian investing on capital market securities. The tribunal decision on this matter has the concomitant effect of protecting the investors by re-enforcing the statutory capacity of the Apex capital market regulator.

The Denis Odife panel's finding on the dispute resolution mechanism operating in the Nigerian capital market is unsatisfactory. Lashman<sup>44</sup> gave reason for this position thus:

The disciplinary committees or the Administrative Hearing Committees (AHC) of the commission by nature of their composition could not be seen to be unsatisfactory as a result stock broker and other key capital market players did not have much confidence in their fairness.

The Denis Odife Panel therefore considered the desirable or otherwise of the setting up of an informal judicial forum within the Nigeria capital market for the prompt determination of any question, dispute or controversy that may arise between the institutes in the Nigeria capital market or market operators generally. In the light of the above problem perhaps that the ISA 1999 and the ISA 2007

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<sup>43</sup>. Ibid. p.pp84- 85, para. D.

<sup>44</sup>. Lashman A. (1999) "Salient Features of the Investment and Securities Act 1999" *Modus International Law and Business Quarterly* Vol. 4.No. 4 December p. 79.

made provision for the establishment of a separate dispute resolution tribunal to handle disputes that may arise under the act. In the light of Chief Denis Odife's report on the review of the Nigeria capital market 1996, can comfortably divide capital market dispute thus: Dispute between the Security and Exchange Commission and the Lagos Stock Exchange now the Nigeria Stock Exchange, dispute between Security and Exchange Commission and market operators. Dispute between the Nigeria Stock Exchange and Market Operators, Dispute between market operators and the members of the general public and crime as capital market dispute.

### **2.3 The Nigeria Securities and Exchange Commission in Perspectives.**

The Securities and Exchange Commission (SEC) is the apex regulatory body for Nigeria's capital market. It operates under the supervision of the Federal Ministry of Finance. The Securities and Exchange Commission like other exchange commission's elsewhere regulates the operation of capital market transactions, ensuring that relevant rules are complied with. The business of capital formation and mobilization is at the root of economic development, which is why every economy wants to develop its capital market. Capital market drives capital mobilization and allocation to business, in the push for economic growth. Through the capital market, companies and government mobilize capital for investment, while offering opportunity to investors to seek profitable outlets for their funds. Because complex financial processes are often involved, and large numbers of investors

participate, the need for guarding the mechanism for those transactions becomes apparent. Investors need to be protected, just as the process needs to be kept viable<sup>45</sup>.

The history of the Nigerian capital market is not certain as there are various versions as to when it all started for instance; one version states that it can be traced back to 1946, with the floatation of 300,000 pounds bond by the then colonial government to implement its 10 year development plan. In 1959, the Lagos Stock Exchange was established as a private company limited by guarantee and commenced operations in 1961 through the Lagos Stock Exchange Act. This act gave the Lagos Stock Exchange the obligation to forward a quarterly report to the Governor of the Central Bank who will submit same to the Minister of Finance with all comment contained therein in the operations of the Lagos Stock Exchange where subsidized by the Central Bank of Nigeria. The Central Bank of Nigeria on the 1<sup>st</sup> day of July 1962 established an in- house committee called the Capital Issues Committee (CIC);<sup>46</sup> an ad-hoc non-statutory committee, charged with the primary responsibility of regulating the timing of public issues price and amount of all issues by Public Companies in Nigeria and a consultative and advisory body to the Central Bank of Nigeria, Lagos Stock Exchange and the Federal Ministry of Finance<sup>47</sup>.

In 1972, the Federal Government commenced the indigenization of the economy<sup>48</sup> this policy had serious implication on the Nigerian capital market and imposed new pressures on the existing structure for securities regulation in Nigeria. The immediate concern is how to

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<sup>45</sup>. Securities and Exchange Commission, SEC Nigeria. [https// www. smartnigerianinvestor.com](https://www.smartnigerianinvestor.com), accessed August 3, 2015 by 4:17.

<sup>46</sup>.Okojie E. A and Enakemere L. E (2014)“A Critical Analysis of The Jurisdiction Of Nigeria’s Investment And Securities Tribunal”*Mustang Journal Of Law And Legal Studies* Volume 6, p.55.

<sup>47</sup>.Agom A. R (2009) “The Legal and Institutional Framework for the Regulation of the Nigeria Capital market”, *An unpublished PhD thesis, Ahmadu Bello University Zaria*. p. 147.

<sup>48</sup>.The Federal Government was able to achieve this due to the promulgation of the Nigerian Enterprise Promotion Decree No. 4, 1972.

ensure that securities invested were done at fair and reasonable price having regards to past performance of the enterprise. The then military head of states of the Federal Republic of Nigeria transformed the Capital Issues Committee (C.I.C) to the Capital Issues Commission, following the promulgation of the Capital Issues Commission Decree 1973<sup>49</sup>. The commission was saddled with the responsibility of determining the price of shares and debentures are to be sold to the public. The timing and amount of any subsequent public issue of shares and debentures by a company and such other matters incidental and supplementary to the forgoing as the commission may at its discretion determine.<sup>50</sup>

In 1976, the Federal Government set up the financial systems review committee headed by Dr. Pius Okigbo<sup>51</sup> to study the structure and operations of the financial system and make recommendations to improve the capital market. The committee observed that the CIC was more pre-occupied with pricing of securities rather than the protection of investors and the fullness of disclosure of information by the companies engaged in issue of securities. A major recommendation by the panel was the establishment of the Securities and Exchange Commission<sup>52</sup> with the thrust of the registration and regulation of securities in the capital market intermediaries and stock exchange as to maintain proper course of conduct and professionalism on the securities business. This recommendation was welcome and gave room for the signing into law of the Securities and Exchange Commission Decree of 1979<sup>53</sup> the establishment of SEC changed the model of regulation and directive principles in Nigeria, outlawing the British model which is a self-regulation to the American style. The SEC is different in periscope of functions from the CIC, notable among is the SEC becoming a body

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<sup>49</sup>.No. 14 of 1973.

<sup>50</sup>.<http://www.sec.gov.ng/about>. Accessed on August 3, 2015 by 4:17.

<sup>51</sup>. Ibid.

<sup>52</sup>. Hereinafter referred to as SEC.

<sup>53</sup>. Securities and Exchange Commission Decree No. 71 of 1979.

corporate with perpetual successions and common seal. It was patterned after the US SEC, constituted as the apex regulator of the Nigerian capital market.

### **2.3.1 Securities and Exchange Commission Enforcement**

#### **Process.**

The Commission enforces the myriad of laws and regulations under its jurisdiction in a number of ways. The SEC may seek a court injunction against acts and practices that deceive investors or otherwise violate securities laws; suspend or revoke the registration of brokers, dealers, investment companies, and advisers who have violated securities laws, refer persons to the Justice Department for Criminal Prosecution in situations involving criminal fraud or other willful violation of securities laws; and bar attorneys, accountants and other professionals from practicing before the commission.

The SEC may conduct investigations to determine whether a violation of federal securities laws has occurred. The SEC has the power to subpoena witnesses, administer oaths, and compel the production of records anywhere in the United States. Generally, the SEC initially conducts an informal inquiry, including interviewing witnesses. This stage does not usually involve sworn statements or compulsory testimony. If it appears that a violation has occurred, SEC staff members request an order delineating the scope of inquiry. Witnesses may be subpoenaed in a formal investigation. A witness compelled to testify or produce evidence is entitled to see a copy of the order of investigation and be accompanied, represented and advised by counsel. A witness also has the absolute right to inspect the transcript of his or her testimony. Typically the same privileges one could assert in a judicial

proceeding such as the constitution's fourth amendment prohibition against unreasonable searches and seizures and the Fifth Amendment's privilege against self-incrimination apply in an SEC investigation. Proceedings are usually conducted privately to protect all parties involved, but the commission may publish information regarding violations uncovered in the investigation<sup>54</sup>.

Section 21 (a), (1) of the US SEC Act of 1934 provides thus :The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this title, the rules or regulations there under, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated, or, as to any act or practice, or omission to act, while associated with a member, formerly associated with a member, the rules of a registered clearing agency in which such person is a participant, or, as to any act or practice, or omission to act, while participant, was a participant, the rules of the Public Company Accounting Oversight Board, of which such person is a registered public accounting firm, a person associated with such a firm, or, as to any act, practice, or omission to act, while associated with such firm, a person formerly associated with such a firm, or the rules of the Municipal Securities Rulemaking Board, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized in its discretion, to publish information concerning any such violations,

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<sup>54</sup>. See further Okojie E. A and Enakemere L. E Op cit p. 65.

and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this title, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this title relates.

In a private investigation, a targeted person has no right to appear to rebut charges. In a public investigation, however, a person must be afforded a reasonable opportunity to cross-examine witnesses and to produce rebuttal testimony or evidence, if the record contains implications of wrongdoing. When an SEC investigation unearths evidence of wrongdoing, the commission may order an administrative hearing to determine responsibility for the violation and impose sanctions. Administrative proceedings are only brought against a person or firm registered with the SEC, or with respect to a security registered with the commission. Offers of settlement are common. In these cases the commission often insists upon publishing its findings regarding violations. An administrative hearing is held before an administrative law judge, who is actually an independent SEC employee. The hearing is similar to that of a non-jury trial and may be either public or private. After the hearing, the judge makes an initial written decision containing findings of fact and conclusions of law. If either party requests, or if the commission itself chooses, the commission may review the decision<sup>55</sup>.

The SEC must review cases involving a suspension, denial, or revocation of registration and may request oral argument will study briefs and may modify the

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<sup>55</sup>. Section 22 of the US Act of 1934 provides “Hearings may be public and may be held before the Commission, any member or members thereof, or any officer or officers of the Commission designated by it, and appropriate records thereof shall be kept”.

decision include increasing the sanctions imposed. Possible sanctions in administrative proceedings include censure, limitations on the registrant's activities, or revocation of registration. In 1990 SEC's powers were expanded to include the authority to impose civil penalties of up to five hundred thousand dollars to order disgorgement of profits and to issue cease and desist orders against persons violating or about to violate securities laws, whether or not the persons are registered with the SEC.<sup>56</sup>

The United States Court of Appeals for the District of Columbia or another applicable Circuit Court of Appeals has jurisdiction to review most final orders from an SEC administrative proceeding. Certain actions by the commission are not reviewable. The SEC may request an injunction from a Federal District Court if future securities law violations are likely or if a person poses a continuing menace to public. An injunction may include a provision that any future violation of law constitutes contempt of court. The SEC may request further relief, such as turning over profits or making an offer to rescind the profits gained from an insider trading transaction. In cases of pervasive corporate mismanagement, the SEC may obtain appointment of a receiver or of independent receiver or of independent directors and special counsel to pursue claims on behalf of the corporation. Willful violations may be punished by fines and imprisonment. The SEC refers such cases to the Department of Justice for criminal prosecution<sup>57</sup>. Like the US SEC, the Nigerian

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<sup>56</sup>. Chatman L. (2005) "An Overview of Enforcement" *International Institute for Securities Market Development Program*, p. 5  
[https://www.sec.gov/about/official/oia\\_enforce/overviewenfor.pdf](https://www.sec.gov/about/official/oia_enforce/overviewenfor.pdf). accessed 25th August. 2015.

<sup>57</sup>. See Section 25 of the 1934 Act which provides for jurisdiction of other Government Agencies over securities.

SEC that is modeled toward it, in Section 289, decision of the SEC is appealable to the IST. Section 289 of the ISA enshrined the appeal-ability of the decision of the SEC.

### **2.3.2 Establishment of the Administrative Proceeding Committee.**

The SEC Decree of 1988 contained an innovation that had lasting impact on the practice of capital market dispute resolution in Nigeria. Section 24 (1) of the decree authorizes the SEC to suspend the registration of a security or any person registered under the decree for a period not exceeding 12months if in its opinion the public interest and the protection of the investor so required. With the approval of the minister, it may further authorize the SEC to revoke the registration of a security or any person registered under the decree if the commission finds that the issuer of the security or the person registered by the commission has failed to comply with any provision of the Decree. The exercise of this power by The SEC was made expressly upon notice and opportunity for hearing having been given to the affected person. That proviso made the regulatory power of the SEC subject to the principle of fair hearing as precondition for the exercise of the commission powers and the commission's power was subject to judicial review. It was this fair hearing that gave rise to the establishment of the Administrative Hearing Committee by the commission which was later renamed as Administrative Proceeding Committee. As a formal mechanism for providing fair hearing to issuers of securities or persons registered by the commission who were alleged to have failed to comply with any provision of the decree, prior to the imposition of sanction by the SEC.

Decisions of the Administrative Proceeding Committee of the commission are deemed to be decisions of the commission itself. In *UBN Plc (Registrar's Dept) vs. S.E.C*<sup>58</sup>, the Investments and Securities Tribunal held thus: A committee set up by the commission is part of the commission. The Administrative Proceeding Committee (APC) is not an ad hoc committee and therefore not different from the commission. The Court of Appeal had given judicial pronouncement on the functions of the Administrative Proceeding Committee of the SEC in the case of *Mr. Olubunmi Oladapo Oni vs. Administrative Proceeding Committee and Security and Exchange Commission*<sup>59</sup> the court's decision settled the controversy regarding SEC's regulatory powers to disqualify persons from acting as directors of publicly quoted companies. It had been argued in the case that the powers of the SEC were restricted to the regulation of capital market operators and not to companies simply by virtue of the fact that their shares were listed on the stock exchange.

The facts of the case summarily show that the appellant, Mr. Olubunmi Oladapo Oni, was a former Managing Director of Cadbury Nigeria Plc ("Cadbury"), a company quoted on the Nigerian Stock Exchange. Following an extensive process of investigations, the Securities and Exchange Commission made a finding that Cadbury's 2006 accounts had been misstated to the tune of N13 billion. Consequently, Cadbury, its directors, persons in charge of the running of the company, the external auditors, registrars, and about twenty (20) other persons were invited to appear before the Administrative Proceedings Committee of the SEC ("APC"), to explain why punitive measures should not be taken against them for

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<sup>58</sup>. (2004) INISLR 115 at 160.

<sup>59</sup>. (2014) N.W.L.R. (PART 1424) 334.

violation of several provisions of the ISA, the SEC Rules and Regulations 2000 (as amended), code of conduct for capital market operators and their employees, and the Code of Corporate Governance in Nigeria.

At the end of the proceedings of the APC, several sanctions were imposed on those who were found to have been culpable and the appellant was disqualified from operating in the capital market, being employed in the financial services sector, and from holding a directorship position in any public company. The appellant was aggrieved by the APC's decision and filed a suit in the Federal High Court ("FHC"), for among other reliefs, an order to prohibit the SEC from imposing the sanction on him.

The FHC dismissed his suit and he further appealed to the Court of Appeal. The appellant contended, among other things, that, as defined in section 315 of the Investments and Securities Act, (ISA), a capital market operator is a person duly registered by SEC to perform specific capital market activities; that he was not a capital market operator; that his appointment as a director of Cadbury did not require registration with or approval by SEC; that as director of Cadbury, he was involved in the business of the company (i.e. manufacture of confectionary and beverages ) and he could not be said to be involved in securities business merely because the shares of the company were available to the public. He contended that the power of the SEC under section 13 of the ISA was limited to disqualification of persons from capital market activities and securities business or dealing in securities and did not extend to disqualification of a person from membership of the boards of companies; and that the power to regulate the appointment, removal and disqualification of

directors or members of boards of companies had been conferred on the Corporate Affairs Commission under the relevant provisions of the Companies and Allied Matters Act. In summary, he asserted that the SEC is not empowered to regulate the membership of companies. The court disagreed with the appellant's arguments and dismissed his appeal. In dismissing the said appeal, the court held as follows that:

- i. Any corporate body that issues stocks, shares and debenture is part of the securities industry;
- ii. Since Cadbury's stocks were quoted in the Nigerian Stock Exchange and open to investment by interested investors, SEC has a responsibility (under sections 13(bb), 66(1) and (2) of the ISA ) to protect the interest of investors in those stocks and that the responsibility of SEC includes the power to check the activities of directors of public companies;
- iii. The provisions of CAMA do not take away from SEC the power to regulate the activities of companies and their boards.

The above has shown the methods of resolving dispute by the SEC modeled after the US SEC.

#### **2.4 Dispute arising on the Nigerian Stock Exchange.**

The rapid economic development of any economy depends among other things on ready access to adequate financial resources. The desire to develop financial market in an economy is intimately connected with the objective of accelerating industrial and agricultural development. Among this financial market is

the Nigeria Stock Exchange which deals with the mobilization of both medium and long term capital funds. The mechanism of stock exchange came into existence to enable investment which was inherently illiquid to become liquid through re-conversion into cash at the decision of the investor without inconveniencing the company. The stock market provides equity and a direct form of finance to potential investors for economic purposes. This function of the stock exchange enables it to be a critical long term lubricant in the economic growth process<sup>60</sup> in Nigeria. The Nigerian Stock Exchange is one of the principal trading points of the Nigeria capital market that disputes could emanate.

The stock exchange business in Nigeria started in 1960 with the establishment of the Lagos Stock Exchange, which was incorporated in September 1960 as a private company limited by guarantee and having a share capital and permitted under Section 20 of the Companies Act<sup>61</sup> to dispense with the use of the word “limited” as the last words in its name. The Lagos Stock Exchange started with a share capital of five thousand pounds in 1960 and the Lagos Stock Exchange Act, of 1961 was enacted. Section 3 of the Act provides as follows“... the business of stock broking in Nigeria in relation to stock, shares and other securities for the time being granted a quotation by the exchange shall be undertaken only by members of the exchange”. The Lagos Stock Exchange was transformed into the Nigerian Stock Exchange in December 1977 following the recommendation in the report of the Okigbo Committee. The stock exchange established branches in Port Harcourt in

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<sup>60</sup>. <http://www.projectfaculty.com>.

<sup>61</sup>. Cap. 17, Laws of Nigeria, 1958. See Orojo O. (2008) *Company Law and Practice in Nigeria*, LexisNexis, South Africa. p. 370.

1979, Kaduna 1978, Kano 1989, Onitsha 1990, Ibadan 1990 and Yola 2002<sup>62</sup>, Calabar, Illorin, Uyo and the latest is the Abeokuta branch commission in November 2008. The Lagos Stock Exchange Act<sup>63</sup> despite the change of name continued to exist in the statute but was repealed in 1999 by section 266 of the Investments and Securities Act 1990<sup>64</sup>.

In addition to the above branches, a separate Abuja Stock Exchange was incorporated into a public liability company on 17<sup>th</sup> June 1998 following the recommendation of Chief Denis Odife Panel report in October, 1996 and was dully licensed as a stock exchange by the SEC. The shares of the Abuja Stock Exchange were held by the Central Bank of Nigeria (CBN), The National Insurance Corporation of Nigeria (NICON), and The Nigerian Deposit Insurance Corporation (NDIC). The Abuja Stock Exchange is primarily owned by the government as the shares of the company is not having the name of private investors.<sup>65</sup> The Abuja Stock Exchange is a modern form of stock exchange with technology-driven means, as it provides an electronic, screen-based trading system designed to facilitate an orderly, cost-effective, efficient and transparent nationwide market for trading in securities<sup>66</sup>, the name retention of the Abuja Stock Exchange different from the Nigerian Stock Exchange. Orojo puts the evolution of the Abuja Stock exchange in this light:

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<sup>62</sup>. Orojo O (2008) *Company Law and Practice in Nigeria* op cit (fn 28). p 371.

<sup>63</sup>. see Cap. 200, LFN, 1990.

<sup>64</sup>. Cap. 124, LFN, 2004.

<sup>65</sup>. Orojo O (2008) *Company Law and Practice in Nigeria* op cit (fn 28) p. 371.

<sup>66</sup>. Ahmed A. “ *History of the Nigerian Capital market: The Legal Perspective*”, being a paper delivered at a seminar at Abuja organized by the SEC on the Securities Laws and the Capital market in December, 2001.

About 2001, there was a persistence effort by the SEC to make the Nigerian Stock Exchange and Abuja Stock Exchange equal in status. As part of this effort, the Nigerian Stock Exchange refused to comply in which the SEC announced a suspension order from the Director-General and President of the NSE. This was not complied with and led to litigation between the Nigerian Stock Exchange and the SEC. However, the dispute was resolved out of court and the Nigerian Stock Exchange retained its name and reasserted its status as the only stock exchange in Nigeria. This competing Abuja Stock Exchange was changed to Abuja Securities Commodity Exchange (ASCE)<sup>67</sup>.

The Abuja Securities and Commodity Exchange (ASCE) were fashioned toward the New York Stock Exchange. Among the major problems facing the Nigerian Stock Exchange is the size of the stock exchange. At about 200 quoted companies and a market capitalization of 294.1 billion at the end of December, 1999 the size of the market can be considered when compared with stock market in other emerging markets. For example, the South African stock market has about 650 listed companies while South Korea has about 700 listed companies<sup>68</sup>. The small size of the Nigerian stock market has been traced to apathy of Nigerian entrepreneurs to go public due to the fear of losing control of their businesses. Another factor is the weak

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<sup>67</sup>. *ibid.*

<sup>68</sup>. Babalola J. A and Adegbite M.A. *The Performance of the Nigerian Capital Market Since Deregulation in 1986* CBN Economic & Financial Review, Vol. 39 no. 1 1-19. p. 8.

private sector which is a serious constraint militating against healthy growth of the stock market.

#### **2.4.1 Members of the Nigerian Stock Exchange.**

The members of the Nigerian Stock Exchange are open to individuals and firms and corporate bodies registered in Nigeria. The members of the stock exchange have been divided into three namely;

- a. Council members who, through the council, formulate the policy of the exchange. They are like the directors of the company.
- b. The dealing members who are registered market operators, in other words members who are granted licenses to deal in securities quoted on the stock exchange. But not every market operator is a member. They are bound by the rules and regulations of the Stock Exchange. They licensed stock broker firms. The dealing members in council are selected from among ordinary dealing members in rotation for three years.
- c. Ordinary members. All other members, in other words, those who subscribe to the memorandum and articles of the company, are ordinary members<sup>69</sup>.

#### **2.4.2. Nigerian Stock Exchange Dispute Resolution Process.**

The Nigerian Stock Exchange is not immune to dispute because of its pivotal role in bringing trading parties together for investment. The Nigerian Stock Exchange has instituted a robust complaint management and dispute resolution framework to manage investor complaints in an expedient, just and equitable manner. Nigerian Stock Exchange introduced the Tips and Complaints Management

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<sup>69</sup>. Orojo O. (2008) *Company Law and Practice in Nigeria* op cit (fn 28) p. 372.

(TCM) Unit to redress investor's grievances. Since its establishment, the TCM has played a vital role in enhancing and maintaining investors' confidence by resolving their grievance against the NSE dealing members. The TCM procedure for resolving disputes are:-

- i. Contact Dealing Member Firm on Complaint/ Dispute: Complainant is required to contact the dealing member or firm in the first instance for a resolution of their complaint. If the matter is not resolved or the complainant is dissatisfied with the resolution, the complainant is expected to send a mail to the Nigerian Stock Exchange.
- ii. Formal Complaint made to the Nigerian Stock Exchange: Complainant being dissatisfied with the action of the disputing dealing member or firm may formally write to the Nigerian Stock Exchange through the approved email address of the Nigerian Stock Exchange. At the receipt of the complaint, the Nigerian Stock Exchange may do any or all of the following:
  - i. The Nigerian Stock Exchange would contact the dealing member firm for a response to the complaint.
  - ii. Where the matter in the opinion of the Nigerian Stock Exchange is contention, the NSE may invite all the disputing parties in view of resolving the dispute through the alternative dispute resolution mechanism for mediation at the Nigerian Stock Exchange dispute resolution centre.

- iii. If the dispute is unresolved by the mediation adopted by the NSE, the NSE may refer the matter to the investigation panel of the Nigerian Stock Exchange.
- iv. Unresolved disputes from the Investigation panel are referred to the Disciplinary Committee of the Council.
- v. Appeals from the Disciplinary Committee are referred to the National Council of the Nigerian Stock Exchange.
- vi. If the matter is not resolved or a complainant is not satisfied with the decision of the National Council of the Exchange, the complaint will be referred to the Securities and Exchange Commission<sup>70</sup>.

The dispute resolution model adopted by the Nigerian Stock Exchange no doubt is a means of reducing the disputes that ordinary may have ended in court litigation. The extents of the dispute resolution model adopted by the Nigerian Stock Exchange primarily relates to disputes between members of the investing public and the accredited firms. Disputes may arise between the Nigerian Stock Exchange and the Securities and Exchange Commission. The events surrounding the case of *Nigerian Stock Exchange vs. Securities and Exchange Commission &Anor*<sup>71</sup> betray the palpable weakness in the legal structure of the regulator – SEC. The fact of the case revealed that the SEC pursuant to government policy of multiple stock exchange and deregulation to encourage competition licensed the Abuja Stock Exchange and directed the NSE to revert to its former name of Lagos Stock Exchange so as to create a level playing field. The NSE defied the directive of SEC

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<sup>70</sup>. [www.nse.com.ng/investing/complaints](http://www.nse.com.ng/investing/complaints). accessed 17th August, 2015.

<sup>71</sup>.FHC/ABJ/CS/313/2001.

resulting in suspension of its Chairman and Director General and the NSE went to court to challenge the constitutionality of the ISA and SEC's power to issue directives under the ISA particularly in the absence of the Investment and Securities Tribunal i.e. in the absence of a grievance redress procedure.

Whilst the case was pending, the plaintiff – NSE – using its political weight obtained the intervention of the President of the Federal Republic of the Nigeria and the Federal Executive Council (FEC) in which it was decided that Abuja Stock Exchange be changed to a commodity exchange<sup>72</sup>.

## **2.5. Crime as Capital Market Dispute.**

The major working of the ISA 2007 rests with the duties and functions of the Securities and Exchange Commission as the major market regulator who ought to regulate disputes emanating from the Nigeria capital market. The IST has an appellate jurisdiction to sit on appeal against the decision of the Security and Exchange Commission. Section 289 (1)<sup>73</sup> provides that a person aggrieved by any action or decision of the commission under this act, may institute an action in the tribunal or appeal against such decision within the period stipulated under this Act. Provided that the aggrieved person shall give to the commission 14 days' notice in writing of his intention to institute an action or appeal against its decision. An appeal under this part of this Act shall be filed within a period of thirty days from the date in which a copy of the order which is being appealed against is made or deemed to have been made by the Commission and it shall be in such form and be accompanied by such fees as may be prescribed. Provided that the tribunal may entertain an appeal

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<sup>72</sup>. Idigbe A. I, (SAN) Reviewing ISA for a Vibrant and Viable Capital market Operation In Nigeria, [http://www.punuka.com/.../capital\\_mkt\\_pape](http://www.punuka.com/.../capital_mkt_pape), accessed, 17th August, 2015.

<sup>73</sup>. ISA 2007.

after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for the delay<sup>74</sup>. The IST served as an arbiter in resolving to the exclusion of any other court of law or body in Nigeria, exercise jurisdiction to hear and determine any question of law or dispute involving:

- a. a decision or determination of the commission in the operation and application of this act, and in particular, relating to any dispute:
  - i. between capital market operator;
  - ii. between capital market operator and their client;
  - iii. between an investor and a security exchange or capital trade point and settlement agency;
  - iv. between capital market operators and self-regulatory organization;
    - a. the commission and self-regulatory organization;
    - b. a capital market operator and the commission;
    - c. an investor and the commission;
    - d. dispute arising from administration, management and operation of collective investment scheme<sup>75</sup>.

The working of the act did not presupposes the jurisdiction of IST presiding over criminal and fraudulent dealings which though are constant in every human conduct as some believes in cutting corners for their own gain even though the greater mass may suffer. The Economic and Financial Crimes Establishment Act 2004, acts as an affective regulation of the capital market in several in the control of fraudulent dealings from both market investors and operators. First, the act

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<sup>74</sup>. Section 289 (2) of ISA 2007.

<sup>75</sup>. Section 284 (1) of 2007.

established the Economic and Financial Crimes Commission in section 1. The provisions of section 2(9) of the act name the Director General of the Securities and Exchange Commission (SEC) or his representative as a member of the Board of the Commission. Furthermore, the act provided for the investigation of futures market fraud as one of its basic functions. By the provisions of section 276 of the ISA noted above, criminality in the capital market is to be referred to criminal prosecuting authorities by the Securities and Exchange Commission (SEC). The Economic and Financial Crimes Commission (EFCC), with its enormous enforcement powers have become the most active investigator of capital market fraud. Furthermore, a Capital Market Fraud Unit has also been created by the EFCC with experts from the Securities and Exchange Commission (SEC) as support staff. This has greatly influenced activities in the market, sending warning signals to fraudsters who may want to ply their trade in the capital market that it is not going to be business as usual<sup>76</sup>.

### **2.5.1 The IST and Crimes.**

The IST is faced with the weakness of not sitting on criminal-related disputes as section 276 (2) (b)<sup>77</sup> provides civil jurisdiction of the tribunal. The practice where in course of trial before the tribunal a criminal element came up, the tribunal usually refers the aspect of crime to the Economic and Financial Crimes Commission (EFCC) for further investigations and prosecution. The Economic and Financial Crimes Commission has the power to go up to the Court of Appeal or even

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<sup>76</sup>. George A. E. (2008) "Legal and Institutional Framework Regulating Public Offering Of Securities in the Nigerian Capital Market". *Ahmadu Bello University, Zaria an unpublished LL.M thesis* p. 84.

<sup>77</sup>ISA 2007.

the Supreme Court in pursuit of a criminal procession of cases coming from the capital market. A classical example of a Capital market fraud case prosecuted by the EFCC is that of *State vs. Thomas Kingsley Securities Ltd and Chief Kingsley Ikpe*.<sup>78</sup> The convict, then the Managing Director of Thomas Kingsley Securities Limited, received the sum of one hundred and thirty five million naira (N135,000,000.00) from an investor Mr. Tony Ezenna, chairman of Orange Drugs Limited to invest for him in the stocks of Nigerian Breweries Plc, where he had interest in acquiring a substantial shareholding. As it turned out the man converted the money to his own use and did not perfect the client's mandate. In a suit against the man and his company by the EFCC, the man was convicted by the Lagos High Court for fraud and stealing and sentenced to several years imprisonment, as well as being ordered to refund to the investor unutilized sum of about seventy million (N 70,000,000.00). The constraint this research noted is that the ISA 2007 did not define what constitutes fraud and what stage of fraud investigation the tribunal shall refer the matter to the Economic and Financial Crimes Commission and or the Attorney General of the Federation.

The case of *CSCSLtd Anor vs. Bokolans Investment Ltd and 5 Ors*<sup>79</sup> wherein the tribunal held that the Central Securities Clearing System<sup>80</sup> is liable for the fraudulent acts of its staff for colluding with the respondents to bring in fake share certificate into the depository of the former. These led to some losses incurred by some investors in the shares of Nestle Food Plc. The IST further held the

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<sup>78</sup>. Unreported; *State vs. Thomas Kingsley Securities Ltd and Chief Kingsley Ikpe* (High Court of Lagos 2005) ID/143C/2004 Ikeja High Court 40.

<sup>79</sup>. IST/OA/O3/2003.

<sup>80</sup>. Is herein referred to as "CSCS".

respondents liable to reconstitute the CSCS Ltd for compensation it had to pay to the investor.

The Nigerian Stock Exchange established the Central Securities Clearing System (CSCS) Limited and registered it with the Corporate Affairs Commission (CAC) on 29th July, 1992. The CSCS Ltd was registered to function as “An agency for Central Depository for all share certificate of quoted securities including government stocks for safe keeping (custodian services) as well as certificates for foreign investors, a sub-registry for all quoted securities in conjunction with registrars of quoted companies, the issuance of securities identification numbers to stockholders and clearing, settlement and custodian services for local and foreign instruments”. The CSCS was licensed by the Securities and Exchange Commission as a central depository, clearing and settlement agency. The CSCS was commissioned on April 8, 1997 and commenced operational on April 14, 1997. It operates a computerized depository, clearing, settlement and delivery system for transaction in shares listed on the Nigeria Stock Exchange. The CSCS, as an institution regulating the operations of the capital markets including public offers, performs the following functions;

- a. Acts as central depository for share certificates of companies quoted on the Nigerian Stock Exchange;
- b. Acts as a sub-registry for all quoted securities (in conjunction with registrars of quoted companies);
- c. Acts as issuer of central securities identification numbers to stock brokers and investors;

- d. Perfects clearing and settlement of transactions in securities; and
- e. Maintains the safe keeping/custodian (in conjunction with member (s) for local and foreign investments).

We are aware that the main claim of Bokolans Investment Ltd was for restitution for the losses suffered. The tribunal's ruling did not refer the matter to the EFCC even though the matter was reported to the police to investigate the fraud and forgery of the share certificate, which are by its nature a criminal offence, yet the tribunal sat and even ordered the confiscation of properties without giving head to fair hearing. The judgment of the tribunal was appealed against and the Court of Appeal upheld the decision of the tribunal<sup>81</sup>. The attitude of the tribunal sitting on criminal dispute without hearing all the parties has attracted a correct and just criticism by Muktar<sup>82</sup> in the author's explanation of the case of *U. B. N. PLC (Registrar's Department) vs. S.E.C.*<sup>83</sup> While the IST directed the SEC to formally hand over the fraud aspect of the case to Economic and Financial Crimes Commission (EFCC) and to the Attorney General of the Federation for criminal prosecution on the one hand, the IST went further and directed the SEC to liaise with the EFCC or the Inspector General of Police to locate and produce one Lawrence Okwufulueze and his cohort in order to seize assets belonging to him. The IST further ordered that such confiscated assets be sold and the proceeds thereof be used

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<sup>81</sup>. Bonkolans Investment Ltd & Ors vs. Central Securities Clearing System Ltd & Ors (2009) LPELR- CA/A/213/2005.

<sup>82</sup>. Mukhtar H. (2012) op cit (fn 3).

<sup>83</sup>. (2004) 1 ISLR 1.

to compensate the investors who were defrauded. For the avoidance of doubt, the IST precisely held<sup>84</sup> thus:

The tribunal hereby directs SEC to formally handover the fraud case to the Economic and Financial Crimes Commission (EFCC) and the Attorney General of the Federation for criminal prosecution of those involved in the forgery/cloning of the share certificates. Furthermore, SEC should liaise with or request the assistance of the EFCC or the Inspector-General of Police to locate and produce Lawrence Okwufulueze and his cohort and in order to seize assets belonging to him as SEC found that he was the mastermind of the fraud. Such assets should be disposed of and the proceeds used to pay damages/compensation to the defrauded investors or any other party who had paid the compensation and is entitled to contribution.

It is submitted that the above verdict was tantamount to conviction of the appellant by the IST without trial and merely directing the SEC to execute its disguised conviction. The fact that the person convicted is a corporate body is immaterial. The fundamental right to fair hearing under the 1999 Constitution<sup>85</sup> has no barriers regardless of natural or corporate personality. The word “person” used in section 36 of the 1999 Constitution has not been defined under section 318 thereof. It is submitted that the word “person” in section 36 should be interpreted to mean not only natural person but also corporate entity, if not for any other purpose, at least, with regard to the fundamental right to fair hearing in criminal trials. Although, the jurisdiction of the IST has been clearly defined<sup>86</sup> it seems sometimes to be loath at adjudicating on matters that may conflict with administrative decisions of the SEC. In *U.B.N. Plc v S.E.C.*<sup>87</sup> the tribunal did not consider it ridiculous to say that it has difficulty with an order for restitution made by the SEC and declined to make the simple restitution order that

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<sup>84</sup>. *ibid* p. 50.

<sup>85</sup>. See Section 36 (2), (a) of the 1999 Constitution.

<sup>86</sup>. See Section 234 (1) and (2) of the ISA 1999.

<sup>87</sup>. *Supra* (fn 3).

was merely consequential. It is pertinent to quote verbatim from the judgment of the IST in that case, where the tribunal observed thus:

The tribunal has difficulty with the SEC's order of restitution/restoration, as there is no basis or formula for apportionment among the several persons found liable. Attempting the apportionment will amount to our making independent findings and inquiry into facts, which the SEC is better placed to do.

For this reason we refer this case to SEC to review its decision/order on buy-back/restoration as regards the appellant in line with this judgment and our direction.

With respect, it behoves the IST to apply the law to the relevant facts and circumstances of any case before it and make a clear and unequivocal pronouncement on every issue raised in the pleadings and evidence led thereon. Instead of reviewing the decision of SEC which was purely administrative and which the IST had the jurisdiction to do, it simply drew up the guiding principles which itself would have used to decide the matter and wrongly remitted the case to SEC to review its own decision. The learned chairman and members of the IST remarked thus:

In reviewing its decision/restoration order, SEC should consider the following factors in order to arrive at an equitable relief: The total number of shares involved in the fraud/scam; The price at which they were sold to investors and thus the total amount in naira; The investors who bought the said shares; The stockbrokers found liable by SEC, who have either restored or bought back or submitted a schedule of buy back to SEC; Any stock broking firms/persons not liable to restore/compensate investors who bought through them (any party not liable to restitution/compensation); Percentage of Nestle Foods Plc shares which should be apportioned to each party involved in the scam or found culpable; That any investor found by SEC to have been part of the fraud syndicate should not be allowed to get compensated; In the case of Nestle Foods Plc shares, UBN (Registrar's Dept.) shall bear forty per cent (40%) of the residual amount of loss as deemed proportionate to its degree of culpability.

It is pertinent to observe that the IST, like any other court of law, has not only the power but a duty to consider all issues in any case of which it is seized, and exhaustively decide on all issues properly raised before it for determination. It is submitted that restitution

order ought to be made only by the tribunal and not the SEC especially in a case in which SEC is a party. In *F.I.S. Securities Ltd vs. S.E.C*, the IST adopted the black's law dictionary meaning of restitution as follows:

Restitution is an equitable remedy under which a person is restored to his or her original position prior to loss or injury, or placed in the position he or she would have been had the breach not occurred. It also means restoration of anything to its rightful owner; the act of making good or giving equivalent for any loss, damage or injury; and indemnification.

The IST has itself observed the fundamental nature of the right to fair hearing which includes the principle of *nemo iudex in causa sua*. In *F.I.S. Securities Ltd vs. S.E.C*<sup>88</sup> the tribunal held thus: It is a fundamental principle of law that no man can be a judge in his own cause. It is not necessary for a party to establish actual bias but a real likelihood that in the circumstances of the case an adjudicator has been biased, or that a reasonable person would have reasonable grounds in the circumstance of the case to suspect bias or that justice has not been manifestly done. It is further submitted that the reference made by the IST to SEC for restitution order was a clear misdirection in law and hardly sustainable if tested on appeal. It is also further submitted that the tribunal would have called for further evidence at the trial, if the evidence upon which it could make an order for restitution was insufficient. It is always the duty of a party claiming any right, including restitution, to adduce sufficient evidence before the tribunal to show the right position it ought to have been placed by the equitable order of restitution. This may be done by showing the fact of the fraud on the party affected thereby and the position it would have been if the fraud or breach, as the case may be, had not taken place. The issue of restitution is premised on unjust enrichment which may arise either

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<sup>88</sup>. (2004) 1 165NISLR.

in contract or in tort and the guiding principles were adumbrated by the tribunal in its judgment in *UBNPlc (Registrars Dept) vs. S.E.C.*<sup>89</sup> when it observed thus:

In equity, a person who unjustly enriches himself at the expense of another is required to make restitution to the other. While in tort, restitution is essentially the measure of damages and in contract a person restitution aggrieved by a breach is entitled to be placed in the position in which he would have been if the defendant had not committed a breach. The rationale behind the principle of restitution is the need to discourage unjust enrichment. In the Nigerian case of *EboniFinance & Securities vs. WoleOjo Technical Services*<sup>90</sup>. While delivering the judgment commented on the need for employment of equity to prevent unjust enrichment thus: ‘I think the principle of unjust enrichment which unfortunately is not well developed in English Law as both in the US & Scotland should of necessity be nurtured to growth in a new and complex society like ours where people can easily at a whiff of breath resort to law to ward off debt or other enrichments they have had, at the expense of the other. This is specie of constructive trust which is an instrument which the court of equity may employ to prevent undue enrichment. I believe that when a person is holding tight that which is subject of equity he should not be allowed to hold it firmly. Therefore, where a party unjustly enriches him at the expense of the plaintiff, he must be made to disgorge it is therefore in consonance with the principles enshrined in the restitution; remedy shall be available wherever the defendant is unjustly enriched at the expense of the plaintiff. In this case, the respondent must be made to vomit out what they have taken (unjustly).

The evidential burden of proof is always on an applicant or appellant as the case may be.<sup>91</sup>The submissions and explanations of the weakness of the IST in terms of the restitutions orders made by the tribunal pursuant to the explanation of the case of *UBN PLC vs. SEC* (supra) are majorly extract from Mukta, who though is a Justice of the Court of Appeal and we found his opinion very important in further explaining the jurisdiction of the tribunal in respect crimes.

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<sup>89</sup>. (2004) INISLR 115 at 160.

<sup>90</sup>. 1996, 7 NWLR, part 461, page 464, AcholonuJCA.

<sup>91</sup>. See Section 292 of the ISA 2007.

In the Nigerian capital market, as in other capital markets, there is a continued interplay among various participants, each which play a different role. These participants can be broadly classified into the following categories: the capital market regulator;<sup>92</sup> facilitators and self-regulator's organizations<sup>93</sup>; the market operators<sup>94</sup>. These parties participate in the capital market in different capacities. The interplay among them inevitably gives rise to disagreement and disputes, and the need to resolve this dispute.

This chapter discussion on the segmatisations of capital market disputes above can be summed into disputes that arise from violations or alleged violations of the rules of the capital market as established by law regulating it. Such regulation could be by capital market operators and regulation failing to comply with policy directives or rules promulgated for such smooth conduct of business in the market, or could be by the regulator arbitrary disregard for laid down procedure in the exercise of its oversight functions on the capital market.

Primary market disputes could include the failure of an issuing house or receiving agent to remit the proceeds of a public offer to the issuer; the failure of a receiving agent to submit an investor's application forms on time in respect of an offer; or irregularities in the allotment of the securities. Secondary market disputes could include: the unauthorized sale of client's securities by stockbrokers in executing a client's mandate; misappropriation of the true position of a client's account in the register of a public company. The capital market

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<sup>92</sup>. The Securities and Exchange Commission.

<sup>93</sup>. They are primarily the Central Securities Clearing System and the Nigerian Stock Exchange.

<sup>94</sup>. They may include: issuing houses, brokers, registers, jobbers, trustees, portfolio and fund managers, investment advisers, solicitors and accountants, and investors.

dispute usually is a hybrid of alleged violations of the rules and regulations governing the capital market, while also involving the alleged infringement of private rights. However, for the purpose of an analysis of the development of the dispute resolution process in Nigeria.<sup>95</sup> We believe that the crimes or fraudulent activities or disputes are certainly not covered by the jurisdiction of the IST but are constant in most of the litigated disputes from the Nigerian capital market.

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<sup>95</sup>. <http://spaajibade.wordpress.com>. accessed 19th August. 2015.

**CHAPTER THREE**  
**THE LEGAL BASIS FOR THE INVESTMENT AND**  
**SECURITIES TRIBUNAL.**

**3.1. Introduction**

The securities market is a specialized market that opens its door to the public to trade on capital market instruments through the agency of several capital market intermediaries. This specialized market cannot be removed from the fact that dispute could also emanate from the market. But the question remains based on the specialized nature of the market, how the market can manage the disputes from the market to meet up with acceptable standard for dispute resolutions that its thrust is the attainment of justice. Justice is the pillar upon which a civilized society is founded without which there will definitely be chaos. By its very nature, man has to co- exist and maintains relationships and in the process of co-existence, conflict and disputes are bound to arise. In resolution of these conflicts and disputes, justice must be done in all ramifications for the peace, progress and stability of the society.<sup>96</sup>

A lot of dissatisfaction has been generated by the monopolistic hold of litigation in the administration of justice in common law jurisdictions. They range from the congestions of the Courts dockets, inordinate delay ranging from the inflexible, technical and cumbersome procedural system of litigation coupled with the unencumbered access by litigants to the court of first instance to the Supreme

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<sup>96</sup>. Abubakar M. D (2010) “Alternative Dispute Resolution and Restorative Justice: Challenges and prospect in Nigeria Courts”, in Aliyu I. A et al (ed) *Alternative Dispute Resolution and Some Contemporary Issues, Legal Essays in Honour of Hon. Justice Ibrahim Tanko Muhammed*. A publication of Advocate Chambers, Faculty of Law, Ahmadu Bello University, Zaria. p. 282.

Court on the flimsiest and frivolous application which may be totally unrelated to the substantive issues before the Court. Regrettably, judges watched helplessly, in deference to the hallowed principle of fair hearing and the antiquated aphorism that “a judge must not descend into the arena” with the resultant effect that the life spans of cases are unduly elongated by the years.<sup>97</sup> But then, the Nigerian courts are not alone in this quagmire. Perhaps, by virtue of our commonwealth heritage of the common law, the received English law and its accompanying adversarial system of litigation, the Nigerian Judiciary and invariably other Common law jurisdiction have been faced or facing similar problems of the dependence on this inherited systems. It is noteworthy to state that the cradle of the Common Law practice and adversarial system has not been insulated from the malaise inflicting the administration of justice system in Nigeria.

Pointedly, The Chief DeniceOdife panel recommended the setting up of a specialized court, with a specialized judge as the presiding officer to curtail the abnormally associated with the Common Law adversarial system of justice. Undoubted, the repealed Investments and Securities Act (ISA) 1999 came up with the concept of the Investments and Securities Tribunal (IST) with the thrust of resolving capital market dispute that ordinarily used to be within the jurisdiction and power of the Federal High Court.<sup>98</sup> In light of the aforesaid, the Investments and Securities Tribunal was conceived to be a specialized court with the modus operandi to adjudicate on disputes emanating from the Nigeria Capital Market. This specialized

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<sup>97</sup>. Goodluck O. O (2010) An Overview of the Modus Operandi of the Multi Door Court Houses in Aliyu I. A et al ibid p. 255.

<sup>98</sup>. Section 251 (1), (a) of the 1999 constitution of the Federal Republic of Nigeria.

court, IST is also re-affirmed for continuity by the ISA 2007 in section 274 (1)<sup>99</sup>this court is empowered with the mandate of adjudicating on all disputes arising within the Nigerian Capital Market in a speedy, informal and yet businesslike manner.

### **3.2. History of the Investments and Securities Tribunal (IST)**

The origin of the IST is traceable to the Chief Denis Odife Panel's submission on the premise that the dispute resolution mechanism adopted for the resolution of capital market dispute through the normal court system was less satisfactory and not in tune with the global best practices.

The Lagos Stock Exchange had a disciplinary committee to ensure compliance with its rules. This committee resolved disputes between stock brokers and their clients. A party aggrieved with the decision of the committee can approach the regular court for redress.<sup>100</sup>

In 1973 under the Capital Issue Commission Decree the committee was bestowed with the mandate of determining the price, time and amount of securities to be issued in the Nigerian Capital Market. Under the Decree any company making public offer may seek prior permission from Capital Issue Commission. Section 7 (2) of the Capital Issue Decree prescribed a fine and a term of imprisonment for any person that contravenes the said section. The Decree<sup>101</sup>made the decision of the Commission as final and any aggrieved party that refused to abide by the ruling of the Commission may appeal to the Commissioner of Finance whose decision was

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<sup>99</sup>. ISA 2007.

<sup>100</sup>. Agom A. R. (2007-2009) "The Legal and Institutional Framework for the Regulation of the Nigerian Capital Market" An unpublished PhD thesis. Faculty of Law, Ahmadu Bello University, Zaria. 179.

<sup>101</sup>. Capital Issue Commission Decree of 1973.

final. The Capital Issues Commission Decree barred the regular courts from entertaining any complaints after the final decision of the commissioner of fines.

Basically, this system of resolving dispute was retained under the Securities and Exchange Commission Decree of 1979<sup>102</sup>. This arrangement attracted un-spared criticism as vesting overly concentrated powers on the SEC, who could make regulations, enforce them and exercise quasi-judicial powers. The Minister of Finance who was the administrative head of the SEC was not sufficiently independent of the commission to guarantee fair hearing to aggrieved persons. The section that gave the decision of the Minister of Finance on any appeal gave room for a large door of unfair statements as been constitutional for contravening the constitution of 1979.

The Securities and Exchange Commission Decree 1988<sup>103</sup> also retained the same procedure as the earlier SEC Decree. The Federal High Court in Section 27<sup>104</sup> was empowered with the jurisdiction over offences and violation arising from capital market transactions. This jurisdiction extended to all suits brought to enforce any liability or duty created by the Decree. Thus the Federal High Court was empowered to review the decision reached by the SEC. The dispute resolution mechanism of the decree did not satisfy the desire of capital market operators, who wished for a dispute resolution system that is professionally based, quick in its resolution of dispute and simple in terms of its procedures. This is because of the slow nature of the courts that are heavily loaded with varying issues. The normal

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<sup>102</sup>. Ibid.

<sup>103</sup>. Capital Issue Commission Decree of 1973.

<sup>104</sup>. Ibid.

court takes long time and period before delivering ruling and judgments on some simple issues arising from the Nigerian Capital Market. The delay in the usual court system was aptly captured by Muhammad<sup>105</sup> thus:

... The desire of the judiciary for the quick and prompt dispensation of justice is being hampered perhaps by the ever growing litigation conscience of the criticized. Almost all the courts are flooded with cases at all times. This result in some delay before final disposal of some cases. This problem is further compounded by the unenviable fact that majority of judges in Nigeria still records courts proceedings in long hands. Beside, some basic infrastructure and facilities required to make the work of a judge less stressful are not available. Other challenges which the courts have to contend with in Nigeria include frivolous application by counsel for adjournments...

As the volumes of transaction of the capital market increased there were clamours for a specialized court to handle some of the challenges of the market. The Chief Denis Odife's Panel recommended the establishment of the Investments and Securities Tribunal. The IST established to adjudicate all dispute arising within the capital market in a speedy informal and businesslike manner. The promulgation of the Investment and Securities Tribunal by the Investment and Securities Act answered the clamor of capital market operators.

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<sup>105</sup>. Muhammad I. T (JSC as he then was) (2010) *The Judiciary and Good Governance in Nigeria*. Aliyu I.A. (ed) Op cit. p.112.

### **3.3 Reasons for the Establishment of the Investments and Securities**

#### **Tribunal.**

The capital market is a network of institutions that perform functions that are described as capital market activities. It provides operating framework for institutions that arrange for long-term financial assets, such as shares, debenture stocks, and mortgages. Within this framework are primary market institutions such as issuing houses and secondary market institutions like the stock exchange. With the diversification of the capital market by the introduction of different kinds of fundraising and dividend yield instruments and the steady involvement of Nigerian companies in the global capital market coupled with the entry of Pension Fund Managers, there was a felt need to have a well-balanced and properly constituted Tribunal whose roles as an adjudicatory body will at all times retain the investing public and industry players' confidence<sup>106</sup>. The Regulatory Institutions of the capital market in Nigeria are:

- (a) The Securities and Exchange Commission (SEC).
- (b) The Nigeria Stock Exchange.
- (c) Central Bank of Nigeria.
- (d) The Chartered Institute of Stockbrokers.
- (e) The Federal Ministry of Finance.
- (f) The Investments and Securities Tribunal

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<sup>106</sup>. J. K Gadzama & Partners Newsletter Vol. 2 Number 1 (January - March 2008).

<https://paulidornigie.org>. accessed 24<sup>th</sup> November, 2015.

These institutions with the exception of (f) exercise disciplinary actions against practitioners in the industry but in an administrative capacity or under an administrative proceeding. Securities regulation is an important element of ensuring that properly functioning capital markets exist. An effective regulatory regime fosters capital market development by encouraging the participation of investors and issuers in capital market transactions. The regulatory regime must be robust enough to protect investors without acting as a disincentive to the participation of issuers. An efficient regulatory system must achieve a balance between ensuring investor protection and enabling efficient capital formation. In addition, the regulatory process must take a reasonable timeframe so as not to discourage potential participants from using the capital markets for their fund raising. In achieving the thrust of capital formation in Nigeria by the Nigerian Capital Market, Kiyangi and Uwaifo<sup>107</sup> advocated for an efficient dispute resolution mechanism that is fast, flexible and professionally based in an effort to gain investors confidence in the market thus:

Another critical enabler is the rule of law and the recourse to a robust system for resolving disputes and providing compensation for investors where appropriate. Efficient and reliable dispute resolution mechanisms are central to securing investor confidence. With this in place, investors and other operators can be assured of secure avenues to seek redress should their rights or investments be tampered with by unscrupulous capital market operators. This promotes wider confidence and greater participation both domestically and internationally in the Nigerian capital markets<sup>108</sup>.

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<sup>107</sup>. Kiyangi S. and Uwefo E. (2015) “*Nigerian Capital Market: Legal and Regulatory Review and Recommendations*” A Collaborative Report of : the Nigerian Capital Markets Solicitors Association, and Law Society of England & Wales. p. 29.

<sup>108</sup>. Ibid. According to the World Bank’s „*Ease of Doing Business* report 2014, Nigeria ranks 140 out of 189 economies, down from 139 in 2014, on the ease of enforcing contracts and resolving commercial disputes. 30.

Agom<sup>109</sup> argued on the importance of a specialized court in the light of the capital market progression thus: The unique role of the capital market in the intermediation between the extreme of deficit and surplus units in every economy can never be overemphasized. The phenomenal growth in the Nigerian securities market has mainstreamed the issue of grievance redress in the Nigerian Capital Market into national discuss. From a market capitalization of 1.7 billion in the 1980, it prospered to 662.6 billion in 2001, N 1.359 trillion in 2003, N 2.159 trillion in 2004, and N 8 trillion in 2007, in 2008 it attained an unprecedented mark of N 15 trillion in capitalization. In this remarkable progression, differences among stakeholders in the capital market have arisen and will continue to arise as the market dilates. Proactively, how disagreement is settled within the existing structure of the market will be a crucial determinant whether present and proactive investors in the market will vote their fortunes into or out of the market. The author further observed that disputes sometimes are desirable to effect change, generate new ideas, test existing ideas and create mutual dependence and these positive effects of disputes are achievable through a dispute resolution mechanism that is flexible, time propelled, accessible and fair hearing. The Investment and Securities Tribunal (IST) was conceived as an option in this regards.<sup>110</sup> However, some scholars<sup>111</sup> reasoned differently from the position of Agom as they believe that currently, there is insufficient clarity as to the appropriate options and mechanisms for dispute resolution available to investors. Capital market disputes in Nigeria may be

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<sup>109</sup>. Agom A. R (2007 - 2009) *An Expose On the Investment and Securities Tribunal*. Op cit. p. 57.

<sup>110</sup>. *ibid*.

<sup>111</sup>. Kiyingi S. and Uwaifo E op cit (fn 12), Atieza S. A and Anthony O. U (op cit), Akume A. A (op cit).

susceptible to resolution by SEC, by the Investments Securities Tribunal (IST) or by the Federal High Court (FHC), depending on the facts of the particular case and the issues involved. The complexity in the capital market dispute resolution framework in Nigeria is summarised as follows:

- (i) The Investment & Securities Act (ISA) 2007 which replaced ISA 1999 conferred jurisdiction on the IST to resolve *all* capital market disputes, without necessitating the submission of these disputes to the SEC for resolution in the first instance. ISA 2007 granted IST appellate jurisdiction over certain decisions and determinations of SEC. Furthermore, ISA 2007 conferred on IST original and exclusive jurisdiction to adjudicate over certain other disputes (set out in section 284(1)(b) – (e) ISA) that are also the subject of exclusive jurisdiction conferred on FHC by the 1999 constitution. As a result, the statutory authority granted to IST purported to oust the jurisdiction of FHC granted by the constitution of Nigeria. Relying on the constitutional provisions, the jurisdiction of the IST has been challenged in a line of cases decided by the Nigerian Court of Appeal between 2009 and 2013, with inconsistent results. The most recent of such cases determined on 29th January 2013 is *Christopher Okeke vs. SEC & 2Ors*<sup>112</sup> the Court of Appeal was categorical in asserting that the exclusive jurisdiction purportedly conferred on IST by ISA 2007 is unconstitutional and void to the extent that it conflicts with any of the heads of exclusive jurisdiction conferred on FHC by the 1999 constitution.

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<sup>112</sup>. (2013) LPELR 20355 CA.

- (ii) The authority of SEC to adjudicate disputes is rooted in section 284(1)(a) of the ISA 2007 and the interpretation of that provision by a string of cases including the Court of Appeal decision in *EzeOkorochoa vs. United Bank for Africa Plc & 4 Ors*,<sup>113</sup> to the effect that the jurisdiction of the IST to adjudicate over the disputes set out in section 284(1)(a) above is subject to a prior determination of these disputes by SEC.
- (iii) The primary source of the jurisdiction of FHC is to be found in section 251(1) of the 1999 constitution, which confers on FHC exclusive jurisdiction in civil causes or matters arising from a list of subjects including the exclusive jurisdiction to adjudicate in (i) all matters concerning the operation of CAMA or any other enactment replacing that Act or regulating the operation of companies incorporated under CAMA and (ii) any action or proceeding for a declaration or injunction affecting the validity of any administrative action or decision by the Federal Government or any of its agencies.
- (iv) In *Christopher Okeke vs. SEC & 2 Ors*, (supra) the appellant successfully argued that it was the FHC and not IST that had exclusive jurisdiction to determine his suit because he sought declaratory and injunctive reliefs against SEC, an agency of the Federal Government and because the subject matter of the suit involved the operation of a company incorporated under CAMA.

The conflict between the ISA and the Constitution and the inconsistencies in the decisions of the Court of Appeal in this area has created confusion and provides substantial lacunae for forum shopping with litigants choosing to approach SEC, IST or FHC for the

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<sup>113</sup>. [2011] 1 NWLR, Part 1228 p. 348.

resolution of their disputes, depending on which forum they feel would best serve their interests. Litigants therefore bear the risk that whatever forum they choose to resolve their disputes there will be some substantial challenge to their decision<sup>114</sup>. With the lack of judicial clarity either by a decision of the Court of Appeal or the Supreme Court, there is need for legislative amendment of the Constitution and ISA. Forum shopping by litigants for the resolution of their disputes causes delay and results to injustice.

### **3.4 The Establishment of the Investments and Securities**

#### **Tribunal.**

The IST has attracted lots of comments in respect to its legality since the repealed ISA 1999 in section 224<sup>115</sup> introduced the IST to the Nigerian Capital Market as a dispute resolution body. Some authors<sup>116</sup> have argued that the IST is illegal because it is not a court mentioned in section 6 (5)<sup>117</sup> which provide a list of superior courts of record in Nigeria. In the case of *Okoroafore vs. Miscellaneous Offences Tribunal*.<sup>118</sup> The court of Appeal Held that it is the constitutional duty of a High Court to see that a tribunal specially created to take up some matters is indeed properly so created and it confers with the rules setting out the procedure by which the jurisdiction should be undertaken notwithstanding the conferment of exclusive jurisdiction on a tribunal, the superior court may intervene in the exercise of its supervisory jurisdiction by prohibition or

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<sup>114</sup>. Kiyingi S. and Uwaifo E op. cit (fn 12) p. 31.

<sup>115</sup>. ISA No. 45 of 1999.

<sup>116</sup>. Saka U. (2016) "A Comparative Analysis of the Dispute Resolution Mechanisms Under the Investments and Securities Act, 2007 and the Nigerian Investment Promotion Commission Act, 1995" *an unpublished LL.M dissertation, Faculty of Law, Ahmadu Bello University, Zaria*. p. 10., Azi A. I. (2011) "An Appraisal of the Dispute Resolution Mechanisms in the Nigeria Capital Market under the Investments and Securities Act 2007" *an unpublished LL.M dissertation, Faculty of Law, Ahmadu Bello University, Zaria*. p. 104 and Raji K. (2002) "Constitutional Limitation of the Investments and Securities Tribunal" op cit. p. 109.

<sup>117</sup>. The 1999 constitution of the Federal Republic of Nigeria (as amended).

<sup>118</sup>. (1995) 4 NWLR (pt 387) 59.

injunction or certiorari to quash the entire proceedings so as prevent such inferior body from setting outside that area of exclusive jurisdiction. This should be noted that the superior courts always guard jealously and would not allow their judicial power to be eroded except by a clear and express statute. In *Madikevs. Inspector General of Police*<sup>119</sup> Where the statute enacted to the jurisdiction of the court was called for interpretation, it was strictly construed and the meaning which preserved the court jurisdiction was adopted. Though section 6 (4), (a)<sup>120</sup> empowers the National Assembly to establish other courts, such other courts however shall be subordinate in jurisdiction to the High Court. They argued that section 6 (5) of the constitution has closed the gate for the creation of any court having coordinate jurisdiction with the High Court as a superior court of records.

The Investment and Securities Act in section 274 (1) established the Investments and Securities Tribunal, the said section 274 (1) provides thus: “There is established a body known as the Investments and Securities Tribunal to exercise the jurisdiction, power and authorities conferred on it by or under this Act”. The Investments and Securities Act made efforts in equating the Investments and Securities Tribunal as section 293 (3) of the ISA provides: “An award or judgment of the tribunal shall be enforced as if it were a judgment of the Federal High Court upon registration of a copy of such award or judgment with the Chief Registrar of the Federal High Court of the tribunal”

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<sup>119</sup> . (1992) 3 NWLR (pt 227) 70.

<sup>120</sup> .1999 constitution of the Federal Republic of Nigeria.

It is without argument that the combined effect of section 274 (1) and 293<sup>121</sup> stands as equating the IST with the Federal High Court. The generic interpretation of the IST having equal powers with the Federal High Court without amending section 6 (5) of the constitution attracted the criticism of Akume<sup>122</sup>, who argued:

There was no need for the creation of the tribunal. We would not have quarreled if the motive of the law makers was to fashion out an efficient and complimentary administrative body to handle matters of companies securities instead of sliding into a legislative incongruity, which we think arose either out of reckless legislative oversight or a deliberate legislative impunity.

The author is not holding the quoted view alone; Ateiza and Anthony expressed a more forceful view that the National Assembly, therefore, has no power to create any court for that matter having equal powers with a High Court or Federal High Court. But it can create subordinate courts to the High Court or Federal High Court. The creation of the tribunal is *ultra vires* the power of the National Assembly. The National Assembly is a creation of the constitution just as the constitution regards, or preserved the Investments and Securities Act within the power of the National Assembly to make, so both the National Assembly and its brain child; Investments and Securities Act cannot be taller than the constitution.<sup>123</sup>

Before, looking at the submission of some scholars that thinks the IST is legal and Constitutional; this work finds that Ateiza and Anthony<sup>124</sup> argued as if the National Assembly does not have power and right to establish a court or tribunal that its jurisdictions

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<sup>121</sup>. ISA 2007.

<sup>122</sup>. Akume A. A (2004) 'The Unconstitutionality of the Investments and Securities Tribunal in Nigeria', *Benue State University Law Journal* Vol. 3. P. 57.

<sup>123</sup>. Ateiza, S. A and Anthony O. U. (2008- 2009) *The Constitutional Status of the Investment and Securities Tribunal*. Ahmadu Bello University, Journal of Commercial Law, Vol. 4 N0. 1. p. 101.

<sup>124</sup>. *ibid.* and further see Akume A.A. *op cit.* Abugu J. E. O (2005) *Company Securities: Law and Practice* Lagos University Press p. 108.

will be co-ordinate with that of the Federal High Court. Abugu<sup>125</sup> postulated that the Act purport to vest jurisdiction over all matter under the Act in the tribunal. This is manifest in consistency and creates an absurdity in the light of the constitutional jurisdiction of the Federal High Court. It is elementary that the ISA is *protanto* void to the extent of inconsistency. The constitution is a superior law and to statute. Moreover, the ISA is an existing law on the promulgation of the 1999 Constitution; an existing law only has effect with such modification as may be necessary to bring it into conformity with the provision of the constitution.

Section 58 (1)<sup>126</sup> provides: “The Power of the National Assembly to make law shall be exercised by bills passed by both the Senate and House of Representatives and, except as otherwise provided by subsection (5) of the Section, assented to by the president”.

It is without doubt that the making of laws is within the prerogatives of the National Assembly and Section 5 of the 1999 constitution listed the courts known as superior courts of records to exercise jurisdiction on matters stated within the law creating the court. Section 6(5), (j) of the 1999 constitution provides that “such other courts as may be authorized by law to exercise jurisdiction on matters with respect to which the National Assembly may make laws; and (k) and such other courts as may be authorized by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a House of Assembly may make laws. It is our considered view that section 6 (5), (j) and (k) is not made subject to the provision of section 6 (4), (a) of the 1999 constitution. The National Assembly pursuant to his powers altered section 6 (5), (c) of 1999 constitution by creating the National Industrial Court. This

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<sup>125</sup> . Abugu J. E. O (2005) “ Company Securities: Law and Practice” op cit.

<sup>126</sup> . 1999 Constitution of the Federal Republic of Nigeria.

work, submits that the National Assembly has the power to create, enlarge the jurisdiction of the any court or tribunal.

However, some scholars believe that it is now realized that a proper adjudicatory body is needed as an integral mechanism of the capital market in order to boost and retain investors' confidence at all times, hence the establishment of the Investment and Securities Tribunal.<sup>127</sup> Afamefuna<sup>128</sup> submitted that it was under the rules of interpretation that the legislators were fully aware of the provision of the constitution and indeed intended that the subsequent seemingly conflicting provisions of the ISA to override the constitution on the matter. The two documents the 1999 constitution and the ISA was product of the same enactment process and therefore believed to be consciously done. Assuming, but not conceding, the legislators did not intend that ISA should confer jurisdiction on the Investment and Securities Tribunal steps should have been taken since May 26, 1999 to amend or replace the provision relating to the jurisdictional conflict between the Federal High Court and the Investment and Securities Tribunal. This argument has attracted firm criticism from Ateiza and Anthony who argued:

The learned commentator is tenacious about his position, this again is wrong, with due respect. This is because an act which is void *ab initio* does not need to be formally repealed or be declared to be inconsistent if it is in conflict with the constitution because it is ineffective as an attempt to put something on nothing cannot stand. The Act is a still birth legislative attempt... the argument that ISA and the constitution were enacted through the same process. This is fundamentally not correct. A proposed Act of the National Assembly is either initiated by the lower house or upper house and passes through the first reading, second reading, committee stage, third reading, report stage and then assented by

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<sup>127</sup>. Idigbe, I. A (SAN) *Reviewing ISA for a Vibrant and Viable Capital Market Operation In Nigeria*. [www.punuka.com](http://www.punuka.com). Accessed 1st September, 2015.

<sup>128</sup>. Afamefuna U. C. Ag. Deputy Director of Investigations and Compliance, Securities and Exchange Commission Abuja, cited by Akume A.A op. cit p. 59.

the President. But the constitution does not have to pass through these stages. It is only amendment of a portion of the constitution that may be subjected to this process; certainly not a Constitution, be it a fresh or new document made by the military... rather usually referendum or debate by the public is conducted, and Constituent Assembly is raised to draft the constitution.(Underlining ours for emphasis)<sup>129</sup>.

Curiously, the author did not cite any law and or status that disallowed the National Assembly from promulgating a new constitution and or that specified the National Assembly calling a referendum, public debate before a functional constitution can be made. We believe that the opinion of calling a referendum and or public debate before the making of a constitution remains their opinions and the opinion is not supported by any known law in Nigeria. Further, the authors never cited any decided case by the Federal High Court, Court of Appeal and or the Supreme Court declaring the IST illegal and void in a bid to sway capital market operators and lawyers that have been clamoring for a specialized dispute resolution mechanism and the establishment of the IST was welcome. Agom<sup>130</sup> submitted that the IST is legal and can function as a specialized court in resolving capital market dispute in Nigeria. Insightfully, the author showed the origin of this avoidable debate that remains absent in some of the other earlier cited works. The author said from a general standpoint, the source of this avoidable controversy is the government's white paper on the Final Report of the Panel on the Review of the Nigerian Capital Market. The panel recommended "the establishment of an Investment Services Tribunal (IST) to be constructed along the line of the United Kingdom (UK) Body of Tax Appeal Commissioners for the adjudication of all controversies and disputes

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<sup>129</sup>.Ateiza, S. A and Anthony O. U. (2008- 2009) "*The Constitutional Status of the Investment and Securities Tribuna*". Ahmadu Bello University, Journal of Commercial Law, Vol. 4 NO. 1. p. 103.

<sup>130</sup>. Agom A. R (2007 - 2009) An Expose on the Investments and Securities Tribunal. Op cit.

arising within the capital market in a speedy “informal” and yet business-like manner. Appeal from the IST shall lie in the first instance to the Federal High Court and thereafter to the Court of Appeal and the Supreme Court”. In the white paper government responded: “Government accepts this recommendation with the proviso that the tribunals (SIC) would be modeled after the Failed Banks Tribunals, and that the zonal courts will be established as the need arises. However, on the issues of appeal, government decided that appeals shall lie from the Investment Services Tribunal directly to the Court of Appeal and thereafter to the Supreme Court”.<sup>131</sup> On the establishment of the IST the learned author argued:

... a careful digest of section 6 (5), (j) of the same constitution shows that the judicial power of the Federation shall also vest on such other courts as may authorized by law to exercise jurisdiction on matters to which the National Assembly may make law. The ISA which came into effect on the 26/ 05/ 1999, before the enactment of the 1999 constitution on the 29/05/1999 it is an existing law, deemed passed by the National Assembly. Fully aware of its provisions before the promulgation of the 1999 constitution, ISA is deemed to convey the legislator’s intention section 240 of the constitution contemplates appeals from the tribunal been head by the Court of Appeal.(Underlining ours)<sup>132</sup>.

Agom’s submission agrees with our earlier position on the powers of the National Assembly with respect to the interpretation of section 6 (5), (j) of the 1999 constitution. But on the argument that the IST was first in time and whether it contravened any section of the constitution, the IST remains legal is not attainable in law with respect because of the following reasons;

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<sup>131</sup>. *ibid.* p. 69. See also the Federal Military Government of Nigeria: Views and Comments of the Federal Military Government on the recommendation of the Panel on the Review of the Nigerian Capital Market, November, 1996. p. 34.

<sup>132</sup>. *ibid.* p. 68.

- i. Section 1 (1) of the 1999 constitution provides that the constitution is Supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.
- ii. Section 1 (3) of the 1999 constitution provides that if any law is inconsistent with the provision of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.
- iii. Agom recognizes the supremacy of the constitution when he submitted that it is doubted if section 284 and 294 ISA 2007 which confers exclusive jurisdiction on the IST can truly limit the jurisdiction of the High Court. Subject to section 251 of the 1999 constitution, section 297 confers unlimited jurisdiction on the State High Courts. To the extent that Section 284 and 294 ISA 2007 derogates from the constitution and are inconsistent with section 272 of the constitution, they stand null and void. At best there is an overlap of the jurisdiction.<sup>133</sup>
- iv. The drafters of the constitution never by any strength of imagination intended the ISA to operate on the same power and force with the constitution as the both statutes never mention the other in any of its provision.

Having made the above points on the establishment of the IST, the legality of the IST remains both a legal and academic issue. This research is of the opinion that the establishment of the IST by the ISA is legal and the National Assembly acted within its constitutional right. This point should not be mixed, that

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<sup>133</sup>. Agom A. R op cit. p. 70.

is; establishment and jurisdiction. Section 58 (1) <sup>134</sup> enshrined the legislative powers of the National Assembly. The section allows the National Assembly to make laws and the ISA 2007 is one of the products of the legislative duties of the National Assembly. It means therefore, if the ISA is legal, the creation or establishment of IST is therefore legal. There is no known authority that has challenged the establishment of the IST but is merely challenging the jurisdiction of the IST.

A second reason why we consider the establishment of the IST legal is with reference to section 6 (5) of the 1999 constitution. The said section 6 (5) of the 1999 constitution names the list of superior courts of records in there hierarchy and not the list of courts and tribunals. The IST is a tribunal and not a court and there is a difference between a court and a tribunal. In *Central Bank of Nigeria vs. Hydro Air PTY Limited*<sup>135</sup> the Nigerian Court of Appeal gave a guide on the principle guiding the interpretation of statute that is clear and unambiguous thus:

The court is as bound to give a statute its literal and ordinary meaning. After all, the primary rule of construction is the literal construction which requires that the words used in the statute and only those words, be given their ordinary and natural meaning, omitting no words and adding non in the construction arrived at save in accordance with the recognized rule of construction...

The argument remains that Section 6 (5) of the 1999 constitution used the words courts, tribunal was never in contemplation and the absence of the mention of a tribunal does

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<sup>134</sup>. *ibid.* p. 70.

<sup>135</sup>(2015) All NWLR (PT 765) p.227 at 253 para.E to G.

not limit the status of a tribunal assuming equal powers and sanction with that of the High Court. Military Court Martial is not listed among courts in section 6 (5) of the 1999 constitution but the Court Martial is having co-ordinate jurisdiction with the High Court as the Court Martial is a specialized court, appeals from the Court Martial lies to the Court of Appeal. Section 240 of the 1999 constitution provides:

Subject to the provision of this Constitution, the Court of Appeal shall have to the exclusion of any other court in law in Nigeria, to hear and determine appeals from the Federal High Court, the High Court of the Federal Capital Territory, Abuja, High Court of a State, Sharia Court of Appeal of the Federal Capital Territory, Abuja, Sharia Court of Appeal of a state, Customary Court of Appeal of state, and from decision of a court martial, or other tribunal as may be prescribed by an Act of the National Assembly. (Underlining ours for emphases).

The third reason why we hold our considered opinion that the IST is not unconstitutional, is that the establishment provision of the IST in section 274 ISA, reads “there is established a body to be known as the Investment and Securities Tribunal (in this Act referred to as the tribunal) to exercise the jurisdiction, powers and authority conferred on it by or under this Act. This section which is the establishment provision does not contravene any constitutional provision, as the National Assembly acted within their constitutional powers. This point should not be mixed with jurisdiction of the IST. The Court of Appeal has made judicial pronouncement on the legality of the IST, in *AJAYI vs. S.E.C.*<sup>136</sup> the Federal High Court declined to hear a matter on the premise that the field is legislatively covered

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<sup>136</sup>.(2009)13 NWLR (PT 1157)1 at 28.The decision on the validity of the IST by the Court of Appeal further in *OKOROCHA vs. U.B.A. PLC* (2011)1 NWLR (PT.1228) 348 AT 374-375.

by the ISA and the IST is the tribunal clothed with jurisdiction to hear same. The appellant appealed to the Court of Appeal, Abuja Division, the Court of Appeal upheld the Federal High Court decision and dismissed the appeal.

### **3.5 Composition of the Investments and Securities Tribunal.**

Section 275(1) of the ISA provides that the tribunal shall consist of ten (10) persons to be appointed by the Minister as follows:

- a. A full time chairman who shall be a legal practitioner of not less than fifteen (15) years with cognate experience in capital market matters.
- b. Four other full time members, three of whom shall be legal practitioners of not less than ten (10) years experience and one (1) person who shall be knowledgeable in capital market matters who shall devote themselves to issues relating to adjudication and shall not exercise any administrative function.
- c. Five (5) other part-time members who shall be persons of proven ability and expertise in capital market matters.

The composition of the Investments and Securities Tribunal is an area that has attracted varying criticism. Some scholars believe giving the Minister right to appoint members of the tribunal is by its very nature subjecting the tribunal to the whims and caprices of politics.<sup>137</sup> The second group, further with their criticism believes that by its very nature of the IST being an adjudicatory arm, the issue of fair hearing cannot be upheld in any matter that involves the Federal Government and

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<sup>137</sup>.Agom A. R op cit p. 186.

market operator. Ibrahim<sup>138</sup> holds the view that the problem with this provision is that it is not consistent with the status of the tribunal which is sought to be equated with that of the Federal High Court. This is primarily because, by virtue of section 250 (3) of the 1999 Constitution, a person shall not be qualified to hold the office of Chief Judge or a Judge of the Federal High Court unless he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period not less than ten (10) years. There seems to be no clear justification for the difference in eligibility for appointment of the chairman of the tribunal and that of the Chief Judge of the Federal High Court since the ISA has equated the status of the tribunal to that of the Federal High Court.

Ibrahim's argument with due respect on the first limb never weakened section 275 of ISA as it relates to the appointment of the chairman and members of the tribunal, at best, it raised the bar that the tribunal is a specialized tribunal, established to handle capital market disputes. Commenting for the sake of highlighting the strength of ISA, section 275 (1), (b) of the ISA, pegged ten years post call experience as a precondition for appointment as member of the tribunal, that is not a contravention of section 250 (3) of the Constitution. Drawing from the composition of a general court martial that operates as court with co-ordinate jurisdiction with Federal High Court and High Court of States, section 133<sup>139</sup> provides for the composition and qualification, thus:

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<sup>138</sup>.Ibrahim S. (2001) "An Analysis of the Legal Status of the Investments and Securities Tribunal vis-a-vis the Judicature Provisions of the 1999 constitution of Nigeria". An unpublished LL.M thesis, Ahmadu Bello University, Zaria. 85.

<sup>139</sup>.Armed Forces Act LFN, 2004.

1. Subject to the provision of section 128 and 189 of this Act a court martial shall be duly constituted if it consists of the President of the court-martial, not less than two other officers and a waiting member.
2. An officer cannot be appointed to be a member of a court-martial unless he is subject to service law under this act and has been an officer in any of the services of the armed forces for a period amounting in the aggregate to not less than five years.
3. The president of court martial shall be appointed by order of the convening officer with corresponding rank having suitable qualification is not with due regards to the public service available, so however that-
4. The president of a court martial shall not be under the rank of a captain or a corresponding rank; and
5. Where an officer is to be tried, the president shall be above or of the same or equivalent rank and seniority with the accused and members thereof shall be of the same but not below the rank and seniority of the accused.
6. The members of court martial other than the president shall be appointed by order or of the convening officer or in such other manner as may be prescribed.
7. A convening officer shall appoint a judge advocate for every court martial.
8. A judge advocate shall be a commission officer who is qualified as a legal practitioner in Nigeria with at least three years post call experience or failing that shall at request of the convening officer be nominated by the directorate of the legal services of the respective services of the armed forces.

Like the court martial, the IST is created to operate as specialized tribunal with the jurisdiction of resolving capital market disputes. The ISA set, a standard that is not averse to the 1999 constitution on requirement for the appointment of high court judges as argued by Ibrahim.<sup>140</sup>

The author further analyzed that another problem with this provision is that by virtue of S.275, ISA, 2007, the tribunal shall consist of 10 persons to be appointed by the minister. The independence and impartiality of the IST can be questioned on this basis because its chairman and members are appointed by the Minister of Finance, a member of the executive arm of government who supervises the SEC whose actions and decisions the IST adjudicates. This, it may be argued contravenes S.36 of the 1999 constitution which provides 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 impartiality.

Since the Minister of Finance appoints members of the tribunal, the tribunal's independence and impartiality may be compromised in favour of the ministry. Why, one may ask, should the appointment of chairman and members of the tribunal (appeal from decision of which goes to the Court of Appeal) not be done by the National Judicial Commission (NJC) like judges of regular courts since it appears to

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<sup>140</sup>. Ibrahim S. op cit.

be a court of coordinate jurisdiction with the Federal High Court? On the other hand it may be argued that the President of the Federal Republic of Nigeria appoints the Chief Justice of Nigeria and the President of the Court of Appeal sequel to the recommendation by the recommendation of the NJC. Does it therefore mean that the judicial impartiality of these justice/judges is impugned when matters involving the President are brought before them? Furthermore, it may also be argued that the Industrial Arbitration Panel (IAP) exercises judicial function, yet its members are appointed without reference to NJC<sup>141</sup>. Despite these submissions however, one is of the view that there is still the need to make appointment of chairman and members of the tribunal by the NJC considering the importance of the tribunal and the hierarchy it occupies in the list of courts in this country. Failure to do so again calls to question, the conformity of the IST to the provisions of section 36 (1) of the Constitution on account of independence and impartiality of the tribunal.<sup>142</sup> It is our opinion that it would be easy to separate this argument in this light.

- i. The Minister of Finance appointing the members of the tribunal reduced the impartiality of the tribunal with respect to deciding disputes involving the federal government and an operator of the Nigerian Capital Market.
- ii. Recommendation by the National Judicial Commission is necessary for the tribunal to perform its duties and functions impartially.

Our reasons are placed on the premise that the tribunal is a specialized body vested with the jurisdiction of entertaining the capital market dispute. The Minister

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<sup>141</sup>.Section 9 (2) (a) and (b) Trade Dispute Act (CAP 18 LFN 2004).

<sup>142</sup>.Ibrahim S. op cit. p. 130.

of Finance is knowledgeable in finance and capital market investments. ISA stipulates the criteria the Minister of Finance, who is well knowledgeable in capital market operations and is the number one accounting officer of the Nation shall following in the appointment of members of the tribunal. The ISA in section 278 stipulate the methods of removal of a member of the tribunal that is not what the Minister of Finance can transgress. There is no known cause of the tribunal's impartiality called to question. We may agree and further the argument that the NJC should be involved in the appointment and removal of members of IST. The Minister of Finance should write to the NJC informing them of the need to appoint members so that the NJC can recommend to the Minister of Finance not necessary because the tribunal is view with the eyes of a Federal High Court but because of reducing or preventing a non-legal practitioner from being appointed for a fixed period as a member of the tribunal guaranteed by the ISA.<sup>143</sup>

For the purpose of exercising any jurisdiction conferred by the ISA, the tribunal shall be dully constituted if it consists of not less than three members of the tribunal. The chairman of the tribunal may constitute a panel. Three from its membership whenever he deems it necessary for the purpose of exercising the jurisdiction vested in the tribunal. Section 279 of the ISA has also stipulated the factors that can disqualify a member to serve as a member of the tribunal. The section further shows the method a serving member could implore to terminate his appointment as a member of the tribunal.

### **3.6 Jurisdiction of the Investments and Securities Tribunal.**

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<sup>143</sup>. Section 277 (1) the chairman of the tribunal shall hold office for a term of five years renewable for and other term of 5 years and no more. (2) and other members shall hold office for a term of 4 years and renewable for and other term of 4 years and no more.

Section 284 (1) provides for the jurisdiction of IST as follows:-

The tribunal shall, to the exclusion of any other court of law or body in Nigeria, exercise jurisdiction to hear and determine any question of law or dispute involving:

- (a). A decision of the commission in the operation and application of this act, and in particular, relating to any dispute-
  - i. Between capital market operators
  - ii. Between capital market operators and their clients
  - iii. Between an investor and a securities exchange or capital trade point or clearing and settlement agency;
  - iv. Between capital market operators and self-regulatory organizations
- (b). The commission and self-regulatory organization
- (c). A capital market operator and the commission
- (d). An investor and the commission
- (e). An issuer of securities and the commission
- (f). Disputes arising from the administration, management and operation of collective investment schemes.

In addition, section 290(3) ISA provides that the proceedings before the tribunal are judicial proceedings and the tribunal is deemed to be a court for all purpose. A major issue with respect to the Investments and Securities Tribunal is the perceived conflict with the Federal High Court.

### **3.6.1 Conflict of Jurisdiction between Federal High Court and IST.**

The issue of jurisdiction of a court is fundamental and foundational to any proceedings. It is crucial in assessing the validity of the proceedings; the jurisdiction or competence of court goes to the root of an action to sustain or nullify it.<sup>144</sup> It is

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<sup>144</sup>. .Noshtex International limited vs. Habib Bank Ltd (2007) NWLR pt 1063, 308 at 332. Cited Tayo-Oyetibo M (SAN), Jurisdiction: Defining the Investment and Securities Tribunal in the light of the Federal High Court. Unpublished article pp. 1 – 14.

crucial to elucidate the fundamental importance of the jurisdiction of a court or tribunal in any proceeding for a comprehensive understanding of the role it plays as regards the Federal High Court and the Investment and Securities Tribunal. It is established that jurisdiction is a radical and crucial question of competence. The Federal High Court and the Investment and Securities Tribunal do not share or have concurrent jurisdiction. They derive jurisdiction and power from separate laws and established for divergent purposes. There is very little literature and case law on the jurisdictional issues regarding securities regulations in Nigeria. The main reason for this is that the Nigerian capital market is in a developmental stage and no adequate amount of litigation has yet arisen. The issue of conflict of jurisdiction of the Investment and Securities Tribunal can arise in domestic disputes relating to the appropriate forum vested with the jurisdiction to entertain disputes and matters relating to securities transactions.

The effect of misunderstanding the jurisdiction of either court will certainly be fatal to any cause. A defect in competence is fatal to adjudication and renders an entire proceeding, trial and findings invalid, null and void “*ab initio*” however brilliantly they must have been conducted and concluded.<sup>145</sup> The Supreme Court in the case of *Obansanjo vs. Yusuf*<sup>146</sup> defines jurisdiction as the authority which a court has to decide matter which are litigated before it or to take cognizance of the facts presented in a formal way for its decision. The limits of the authority are imposed by the constitution, statute, charter or commission under which the court is constituted and may be extended or restricted by similar means. If no restriction or limit is

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<sup>145</sup>. *Njikoye vs. MTN Nigerian Communication Ltd* (2008) NWLR pt 1092, 339 at 365.

<sup>146</sup>. (2004) NWLR pt 877, 144 at 192.

imposed, the jurisdiction is said to be unlimited. Obaseki JSC, in *Oloba vs. Akerejo*<sup>147</sup> stated that:

The issue of jurisdiction is very fundamental as it goes to the competence of a court or tribunal. If a court or tribunal is not competent to entertain a matter or claim or suit, it a waste of valuable time for court to embark on the hearing and determination of the suit, matter or claim... there is no justice in exercising jurisdiction where there is none. It is injustice to the law, to the court and the parties so to do.

The jurisdiction of the Federal High Court is constitutionally defined. The court derives its jurisdiction generally from section 251 of the 1999 constitution of the Federal Republic of Nigeria (CFRN). Section 251 (1), (e) of the constitution puts within the jurisdiction of the Federal High Court any matter; “Arising from the operation of the Companies and Allied Matters Act or any other enactment replacing that Act or regulating the operation of companies incorporated under the Companies and Allied Matters Act”.

This provision is replicated in section 7 (1), (e) of the Federal High Court Act. Clearly and unambiguously. These provisions confer on the Federal High Court exclusive jurisdiction over any matter arising from the operation of the Companies and Allied Matters Act. Several authorities have interpreted very plainly, these provisions; the Supreme Court in *OsunState*

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<sup>147</sup>.(1998) 7 SC (pt1) at pp 11 and 12.

*Government vs. Dalamin*<sup>148</sup> stated that the provision of Section 7 apply where a dispute involves the practical application or operation of the provisions of the Companies and Allied Matters Act or any other law regulating the operation of incorporated companies. This was also stated in *Wema Bank Plc vs. ChrisrockLab Industries Ltd.*<sup>149</sup> The jurisdictional provisions on the Federal High Court are very clear and broadly cover the Companies and Allied Matters Act.

Also, section 251 (p), (q), (r) and (s) confers exclusive jurisdiction on the Federal High Court to adjudicate on issues covering:

- (p) the administration or the management and control of the Federal Government or any of its agencies;
- (q) subject to the provision of this Constitution, the operation and interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies;
- (r) any action or proceeding for an declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies; and
- (s) such other jurisdiction civil or criminal and whether to the exclusion of any other Court or not as may be conferred upon it by an Act of the National Assembly;  
provided that nothing in the provision of paragraphs (p),(q) and (r) of this subsection shall prevent a person from seeking redress against the federal government or any of its agencies in an action for damages, injunction or specific performance where the action is based on any enactment, law or equity.

On the other hand, the Investment and Securities Tribunal is established by, and derives its powers and jurisdiction from the Investment and Securities Act. Neither the 1999 constitution nor the Companies and Allied Matters Act expressly legislated for or on the tribunal. It is also noteworthy that the Investment and Securities Act established a commission

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<sup>148</sup>. (2007) NWLR pt 1038, 66 at 73.

<sup>149</sup>. (2002) NWLR pt 770, 614 at 621.

called the Securities and Exchange Commission which is saddled with the responsibility of regulating the capital market, investment and securities. In respect of the jurisdiction of the tribunal, this is expressly provided for in section 284 of the Investments and Securities Act.

The emphasis of the Investment and Securities Act is evidently for the tribunal to adjudicate exclusively on issues arising out of the act itself, the Securities and Exchange Commission, investors, self-regulatory organizations, operators, public companies and issuers in the market. The tribunal has both original and appellate jurisdiction over civil matters in the capital market. Example of capital market cases that could be brought to the tribunal include but are not limited to the following<sup>150</sup>; misappropriation of client's money by a market operator; late return of investor's money in the case of oversubscribed initial public offer; non remittance of dividends by a registrar/public Company/ stockbroker; disputes arising from the rules, regulations and such other guidelines made by the commission, or any securities exchange, unauthorized sale of client's shares; appeals against disciplinary measures by the commission such as suspension and or baring participants from the market; late transfer and or registration of shares /stock by any stockbroker; non remittance of issue proceeds by an issuing house to the issuer/ companies; and disputes/ claims arising non-disclosure, misrepresentation or false statements in offer documents or in a securities transaction.<sup>151</sup>

Ideally the issue of the jurisdiction of the Federal High Court and that of the Investments and Securities Tribunal becoming entangled or muddled should not arise. The reason is because the interpretation and application of the relevant provisions of the law allows

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<sup>150</sup>. Orji A. N. *The role of Investment and Securities Tribunal (IST) in the Resolution of Capital Market Disputes in Nigeria* being a paper presented at a seminar on "the Resolution of Capital Market Disputes in Nigeria" on Wednesday, 15th September, 2010 at the Institute of International Affairs (NIIA), Lagos.

<sup>151</sup>. Tayo-Oyetibo M (SAN), *Jurisdiction: Defining the Investment and Securities Tribunal in the light of the Federal High Court*.op. cit.

for a logical coexistence between the Federal High Court and the tribunal. Where parties and also the court construe the relevant provisions of the laws appropriately no jurisdictional issues should ordinarily arise. In *Njikoye vs. MTN*<sup>152</sup> the court stated;

In determining the jurisdiction of the court, the enabling law vesting jurisdiction on it has to be examined in the light of the reliefs sought. This is so for courts are creations of statutes and their jurisdiction is confined, limited and circumscribed by the statute creating them. A court cannot in essence give them or expand their jurisdictional horizon by misappropriating or misconstruing statutes.

There is no doubt that the Companies and Allied Matters Act is applicable to all companies incorporated under the act in Nigeria, regardless of the field the company carries on business and this obviously covers capital market operators incorporated under the Companies and Allied Matters Act. In the same vein, the Securities and Exchange Commission established by the Investment and Securities Act is a federal government agency. It is unarguable and expressly stated in the 1999 constitution that the court responsible for entertaining matters arising from the CAMA and relating to all government agencies (inclusive of the SEC) is the Federal High Court. This is trite.

Despite the foregoing, a judicious construction of the provisions of the Investments and Securities Act, illustrates that the IST as a judicial structure is built to adjudicate exclusively on any disputes or connected issues arising from the

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<sup>152</sup>. *Supra*.

Nigerian capital market. Simply put, the IST can be adequately described as the “adjudicatory arm of the Nigerian Capital Market”. This by no means takes Capital Market operators or the SEC out of the jurisdiction of the Federal High Court where the issue in dispute did not arise from the capital market. The court remains in a position to hear cases where a capital market operator has to be wound up for example. In such a situation, the IST will have no jurisdiction to entertain such a matter. A strict and overriding construction of the provision of section 251 of the 1999 constitution will certainly nullify any jurisdiction vested in the IST by the ISA. The tribunal will appear to have no jurisdiction in respect of matters relating to securities of companies operating in Nigeria Capital Market, as the constitution expressly vests exclusive jurisdiction over any such matters in the Federal High Court.<sup>153</sup>

The wordings of the ISA seemingly exclusively provides for the IST to focus and adjudicate on disputes arising out of the capital market. The act was enacted to establish the SEC, the IST and also regulate the capital market. The objective of the act is capital market regulation. Consequently and inevitably, the regulation of the capital market will be impossible without the jurisdiction of the IST covering market operators incorporated under the CAMA and the SEC which is a government agency. Importantly, while the jurisdiction of the IST allows it to interpret laws and make decisions that are binding on the capital market operators incorporated under the CAMA and specifically provided for in the constitution and the Federal High Court Act to be exclusively within the jurisdiction of the Federal

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<sup>153</sup>. Campbell D.(2010) *International Securities Law and Regulation*. Transnational Publishers Incorporated. United States p. 119.

High Court, it does not fetter the power and jurisdiction of the Federal High Court over these institutions. Where any law or body attempts to fetter the exclusive jurisdiction over issues arising out of the CAMA conferred on the Federal High Court by the 1999 constitution, the court will definitely construe it as null and void to the extent of its constituency with the constitution. In the *Attorney General of Lagos State vs. Eko Hotels Limited*<sup>154</sup>, the state government set up a tribunal of inquiry for the purpose of inquiring into the property of the sale of shares to the Respondent (Eko Hotels). The Supreme Court held that since the issue of shares is one arises of the operations of the CAMA no tribunal had jurisdiction to adjudicate and that the Federal High Court possesses the exclusive jurisdiction in such circumstances. This is a typical scenario of an attempt to fetter the jurisdiction of the Federal High Court with respect to the CAMA. In *INEC vs. Musa*<sup>155</sup> it was held that:

The acknowledged supremacy of the constitution and by which validity of the impugned provision will be tested. First, all powers, legislative, executive and judicial must ultimately be traced to the constitution. Secondly, the legislative powers of the legislature cannot be exercise inconsistently with the constitution. Where it is so exercised it is invalid to the extent of the inconsistency. Thirdly, where the constitution has enacted exhaustively in respect of any situation, conduct or subject, a body that claimed to legislate in addition to what the constitution had enacted must show that it

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<sup>154</sup> . (2006) NWLR pt 1011, 378.

<sup>155</sup> . (2003) NWLR (pt 806).

derived the legislative authority to do so from the constitution. Fourthly, were the constitution sets the condition for doing a thing, no legislation of the National Assembly or of a State House of Assembly can alter those of the constitution in any way, directly or indirectly, unless, of course the constitution itself as an attribute of the its supremacy expressly so authorized.

A question which may be raised is how the IST can validly adjudicate and deliver binding judgment on issues affecting government agency (SEC) without meddling with the jurisdiction of the Federal High Court. The answer to this question is that the IST does not violate the constitutional provisions of the Federal High Court, because it has no jurisdiction over issues covered by CAMA as designated to the Federal High Court under the constitution in section 251. Just as the Federal High Court will lack the jurisdiction to adjudicate over matters arising out of the operation of the ISA as that is exclusively within the jurisdiction of the IST. The jurisdiction of the IST only covers the SEC regarding capital market issues and disputes as contained in section 284 of the ISA. The forgoing jurisdictional provisions when considered in the light of those of section 251 of the constitution are clearly not wide. The jurisdiction of the IST over the SEC is only on disputes arising out of the capital market between SEC and institutions within the capital market and no more. Consequently, any disputes involving an individual (for example) with the commission, not arising out of the capital market will be within the exclusive jurisdiction of the Federal High Court. Just as the Supreme Court held in *NEPA vs. Edeghero*<sup>156</sup> that were a federal government agency is

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<sup>156</sup>. (2002) NWLR (pt 796). See the Supreme Court decision in *Omisade vs. Akande*(1987) NWLR pt 55.

involved in an action the Federal High Court has exclusive jurisdiction in the matter. By virtue of this, the jurisdiction of the Federal High Court over government agencies remained untouched by the jurisdictional provisions of the ISA on the IST. The jurisdictional provisions of the ISA have been carefully drafted to specifically confine the jurisdiction of the IST to the capital market. Construing section 251 of the constitution to preclude the IST from assuming jurisdiction over the SEC will inevitably tie the hands of the tribunal as it will be unable to adequately adjudicate on capital market issues and disputes.

The importance and consequences of the issue of the jurisdiction of a court means it has to be dealt with carefully and with utmost priority. The jurisdiction of the Federal High Court and the IST need to be construed in a very logical manner in order to understand how jurisdiction stands independently. The relevant provision of section 251 and section 284 of the ISA are clear and should not be misconstrued; the IST does not fetter the jurisdiction of the Federal High Court. It is clear that the jurisdiction provisions of the constitution on the Federal High Court are far reaching and may seemingly encompass those of the IST. While this is imaginable, it is not adequate and purposeful construction of the substance of the relevant provisions. Section 284 of the Investments and Securities Act confers jurisdiction on the IST to adjudicate on Nigerian capital market issues and disputes not covered by any other law. Section 251 of the constitution, from where the Federal High derives its jurisdiction is so wide reaching that it can be construed as covering the operation of the ISA insofar as it regulate the operation of companies incorporated under the CAMA, but importantly, not to the

total exclusion of the IST. The Court of Appeal in the case of *MufutaAjayivs. Securities and Exchange Commission*<sup>157</sup> held thus:

Sections 224 (1), 234 (1) and 236 (1) of the Investment and Securities Act when read together and in context, vest the adjudication arising from the operation of the Investment and Securities Act within the jurisdiction of the Investments and Securities Tribunal. That the Jurisdiction of the Investments and Securities Tribunal is not of a concurrent application with the Federal High Court. In other words, the jurisdiction vested by the section on the Investments and Securities Tribunal is exclusive. (Underline ours for emphasis).

This decision settled the doubt expressed by Agom<sup>158</sup> who submitted that it is doubtful if section 284 and 294 ISA 2007 confers exclusive jurisdiction on the IST can truly limit the jurisdiction of the High Court. Subject to section 251 of the 1999 constitution, Section 297 confers unlimited jurisdiction on the State High Courts. To the extent that Section 284 and 294 ISA 2007 derogates from the constitution and are inconstitutive with section 272 of the constitution, they stand null and void. At best there is an overlap of the jurisdiction. The exclusivity of the Investments and Securities Tribunal is in the resolution of capital market disputes in Nigeria. This position may hurriedly be countered by some who may interpret the decision of the Court of Appeal in the case of *Christopher Okeke vs. Securities and Exchange*

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<sup>157</sup>. Hon. Justice Marry Peter-Odili delivered the lead judgment in this case that centered on the disparity of the IST and the Federal High with reference to the exclusivity of jurisdiction in handling capital market dispute held in p. 26, paragraph E – G pt 1157 NWRL (2009) 13 at 28 .

<sup>158</sup>. Agom A. R op cit. p.70.

*Commission*<sup>159</sup> as unsettling the exclusivity principle of the Investments and Securities Tribunal.

### **3.6.2 Juxtaposing MufutaAjayi vs. Securities and Exchange Commission and Christopher Okeke vs. Securities and Exchange Commission.**

Discussion under this head intends to show whether the Court of Appeal contracted themselves in these cases in relation to the exclusivity of the Investments and Securities Tribunal's jurisdictions in matters arising from the Investments and Securities Act vis-à-vis section 251 of the constitution.

The summary of the facts in Christopher's case is that by an *ex parte* application filed at the Federal High Court Abuja, the applicant sought and was granted leave to seek for judicial review of the respondent's decision pertaining to him. Pursuant to the leave granted by the Federal High Court, the applicant via a motion on notice sought an order of certiorari to quash the decision and directives of the respondent in a letter issued to him by the Administrative Proceeding Committee (APC) in respect to an allegation that the applicant authorized the issue by African Petroleum Plc. a prospectus dated 30<sup>th</sup> March, 2000 containing untrue statement. The Federal High Court dismissed the applicant application, giving that reasons that the forum with jurisdiction is the Investments and Securities Tribunal. Being dissatisfied, the applicant appealed to the Court of Appeal. The applicant, now the appellant framed two grounds of appeal but the relevant ground to our discussion on the jurisdiction of Investment and Securities Tribunal is only issue one which reads: "Whether the Federal High Court was right in declining jurisdiction to entertain in the Plaintiff's suit on the ground that the Investments and Securities Act has conferred exclusive jurisdiction on the Investments

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<sup>159</sup>. (2013) LPELR 20355 CA.

and Securities Tribunal in respect of matter relating to the operation of the Act.”<sup>160</sup> Interestingly, Tayo-Oyetibo (SAN) whose paper was extensively used in our discussion on conflict of jurisdiction between the Federal High Court and the IST was the counsel to the Appellant at the Court of Appeal, filed his appellant brief dated and filed on the 28/06/06 wherein he distilled the grounds of appeal.

The appellant stated that it was not in dispute that the complaint of the plaintiff at the court below is against administrative decision of the defendant. That also, the plaintiff sought an injunction against the defendants and so by virtue of section 251 (1), (r) of the constitution, it is Federal High Court that has exclusive jurisdiction to entertain the plaintiff’s action. He stated that the respondent was established by section 1 of the Investments and Securities Act by virtue of which it is an agency of the federal government within the meaning of section 251 (1), (r) of the constitution and so the Federal High Court has the jurisdiction to entertain the Plaintiff’s case and application. The Appellant further argued that the respondent is a creation of the ISA. The act by virtue of section 224 (now 274) also established the tribunal and section 234 (now 276) of the ISA confers on the tribunal the power to adjudicate on dispute and controversies arising under the Act. The appellant concluded that the 1999 constitution being the supreme law of the country is not subject to ISA or any law at all rather, it is the act that is subject to the 1999 constitution.<sup>161</sup>

The Securities and Exchange Commission responded that section 253 (1) of the ISA empowered the respondent and the IST to proceed against the Appellant and his Company. That there is no conflict what so ever between section 234 of the ISA and section

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<sup>160</sup>.Supra. P. 18 paragraphs F – A.

<sup>161</sup>. *ibid*, p. 23. Paragraph B – E.

251 (1), (r) of the constitution. That the IST is specially created to handle all issues arising from the ISA. That it is not enough that the respondent as an agency of the Federal Government brought the matter within the Jurisdiction of the Federal High Court, instead of the IST. That it is also the law that where there is a special provision regarding a matter and a general provision on same matter the special provision should be giving priority over the general provision. The Respondent argued further that the special provision of section 234 of the ISA has empowered the IST to hear all matter arising from the ISA.<sup>162</sup> The Court of Appeal held:

Having considered issue 1 in relation to the relevant judicial principles and the enabling law, it is without doubt that this issue is answered in favour of the Respondent, that is that the proper forum is the Investments and Securities Tribunal on appeal from the Administrative Panel whose report the Appellant aggrieved over and certainly not the Federal High Court which is not endowed with the necessary power to come into that grievance, a specific judicial or quasi-judicial body such as the tribunal having being so empowered. That power it does not share with the Federal High Court, which court was correct in keeping his distance.<sup>163</sup>

This decision no doubt would have removed the clog if any on the jurisdiction of the Investment and Securities Act. But the case of *Christopher Okeke vs. SEC*<sup>164</sup> will be considered in detail in an effort to show whether the said case overruled Mufuta's case. The facts and circumstances surrounding the appeal are gleaned from the records of appeal. In June, 2003, the appellant was appointed a

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<sup>162</sup>. *ibid.* p. 24. Paragraphs F – A.

<sup>163</sup>. Per Peter-Odili, p. 28. Paragraph D – F.

<sup>164</sup>. *supra.*

non-executivedirector of CADBURY NIGERIA PLC. In June 2006, the Annual Report Accounts of Cadbury Nig. Plc. was sent to the 1st respondent. Upon reviewing the said report, the 1st respondent expressed some concerns regarding declining profitability, worsening leverage ratio, misstatements in thecompany's accounts.Consequent thereupon, the chairman of Cadbury Nig Plc. appointed an independent firm, Pricewaterhousecoopers Ltd, to investigate the said allegations.The report of Pricewaterhousecoopers was later sent to the 1st Respondent. Upon the receipt of the report, the 1st respondent constituted an in-house committee and Administrative Proceedings Committee (2nd respondent) to investigate the alleged misstatements in Cadbury's accounts. However, Cadbury, the auditors and directors thereof challenged the competence of the 2<sup>nd</sup> respondent to conduct the said investigation. Thus, an action was instituted at the Federal High Court,Abuja. The 2nd respondent proceeded with the investigation and delivered the decision thereof to the 1st Respondent on April 8, 2008. Consequent upon which, the Appellant applied to the lower court for a judicial review of the decision of the APC, thereby seeking several reliefs including:

- (a) A DECLARATION that the Respondents lacked the competence or jurisdiction to entertain or adjudicate over the allegations concerning the misstatement in the published accounts of CadburyNigeria Plc (2002 - 2005), as detailed in aHearing Notice dated May 7, 2007 reference no SEC/1&E/APC/51/Vol. 1/002A, and the Memorandum of facts attached thereto, as the allegations touched and concerned matters arising from the operations of Companies and Allied Matters Act Cap C20 Laws of the Federal Republicof Nigeria 2004, a matter reserved exclusively to the Federal High Court by virtue of section 251 (i) (e) of the constitution of the Federal Republic of Nigeria 1999.(c) A

DECLARATION that the Respondents acted *ultra vires* their powers in making their decision in respect of the alleged misstatement in the accounts of the Cadbury Nigeria Plc as contained in the Respondent's letter to the Applicant dated April 8, 2008 ref. no. SEC/1&E/APC/51/08/46 as the decision touched and concerned matters arising from the operations of Companies and Allied Matters Act Cap C20 Laws of the Federal Republic of Nigeria 2004, a matter reserved exclusively to the Federal High Court by virtue of Section 251 (i) (e) of the constitution of the Federal Republic of Nigeria 1999 and the 2nd Respondent is not constitutionally empowered to exercise judicial powers.<sup>165</sup>

The respondents' counsel filed a notice of preliminary objection challenging the jurisdiction of the lower court to entertain the suit in question. On September 26, 2008, the lower court delivered its judgment, thereby dismissing the action on the following grounds: It has been known that SEC, in order to maintain efficiency, separated the investigative committee from the hearing committee so that each committee has functions and members separate from each other and that members of the committee were drawn from the respondents and the capital market operators. There is further nothing to show that members of the in-house investigation team also sat as members of the Administrative Proceedings Committee. The crux of the appellant's argument, in a nutshell, is that the lower court ought to have resolved the issue of whether or not the APC had jurisdiction to entertain the complaints concerning misstatements of accounts of Cadbury Nigeria Plc by virtue of Section 25 (1), (i), (e) of the 1999 Constitution vis-à-vis the Companies And Allied Matters Acts. It was

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<sup>165</sup> . *ibid*, pp 8, 9 paragraphs E – F , D – G.

contended that only the Federal High Court has jurisdiction to entertain the matter to the exclusion of all other courts.<sup>166</sup>

Though the respondent argued that the lower court was right in dismissing the application and further that it was the IST that has jurisdiction over the allegation. The Court of Appeal held thus:

Now, the pertinent question raised under issue No.1, is whether the provision of Section 310 of the Investments and Securities Commission Act (supra) can override the provision of Section 251 (i), (e) of the 1999 constitution (supra). To address this fundamental question, I think there's a need to equally reproduce, in verbatim, the well set out provision of Section 251 (i) (e) of the 1999 constitution. By virtue of the serious (criminal) nature of the allegations made against the appellant, there is every cogent reason for me to hold that the 2<sup>nd</sup> Respondent lacks the jurisdictional competence to conduct the investigation, let alone make the above far-reaching incriminating findings and decisions. Undoubtedly, the 1<sup>st</sup> Respondent has no judicial power under the act to constitute a panel such as the 2<sup>nd</sup> respondent to adjudicate over causes involving the determination of legal rights of persons,

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<sup>166</sup>. *ibid*, p. 13, paragraphs C – G.

such as the instant criminal allegations levied against the appellant.<sup>167</sup>

Hon. Justice Ibrahim<sup>168</sup> held further:

Inarguably, such judicial power falls within the ambit of the exclusive jurisdictional competence of the Federal High Court. See Section 251 (1) (e) of the 1999 Constitution (supra). The provisions of Sections 331 - 333 of the CAMA impose a duty upon a company to keep proper and accurate records of accounts and the penalties for non-compliance therewith. Likewise, Sections 334 - 337 impose a duty upon Directors of the Company to prepare annual accounts. Sections 345 - 348 of the Act have equally imposed a duty on Directors to deliver financial statement, and the penalties for non-compliance there with. The phrase -"arising from the operation of Companies and Allied Matters Act or any other enactment. "as couched in Section 251 (i) (e) of the 1999 Constitution (supra), has been accorded a considerable judicial interpretation by the Supreme Court. In the notorious case of *Skenconsult vs. Ukey*<sup>169</sup> the Apex Court was recorded to have aptly, and rather authoritatively, held thus: I was inclined to agree with Chief Williams that operation of the companies can mean no more than operation of the companies Decree (now

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<sup>167</sup>. *ibid*, p. 22.

<sup>168</sup>. Hon. Justice Ibrahim Mohammed Musa Saulawa (JCA).

<sup>169</sup>. (1988) 1 SC 6.

Act) in relation to the companies incorporated there under. This includes Management of such companies and their assets. Per Idegbe, JSC at 31. In the instant case, as alluded to above, the (Criminal) allegations levied against the Appellant (and Co-defendants) by the 1st Respondent, and which were purportedly established by the 2nd Respondent, relate to the operations of Cadbury Nigeria Plc, the Management and assets thereof. The purported criminal allegations levied against the Appellant were brought pursuant to the provisions of the Investments and Securities Act (supra). Nonetheless, the purported allegations in question still remain within the league of matters that are subject to the well set out and unequivocal provisions of the Companies and Allied Matters Act (supra). It is trite, that all Companies, including Cadbury Nigeria Plc, incorporated under CAMA are subject to those provisions. See Sections 331 – 337 & 344 - 344 of CAMA (supra). I have adverted my mind to the submission (Criminal) allegations levied against the Appellant (and Co-defendants) by the 1st Respondent, and which were purportedly established by the 2<sup>nd</sup> Respondent, relate to the operations of Cadbury Nigeria Plc, the Management and assets thereof. The purported criminal allegations levied against the Appellant were brought pursuant to the provisions of the Investments and Securities Act (supra). Nonetheless, the

purported allegations in question still remain within the league of matters that are subject to the well set out and unequivocal provisions of the Companies and Allied Matters Act (supra). It is trite, that all Companies, including Cadbury Nigeria Plc, incorporated under CAMA are subject to those provisions.<sup>170</sup>

Interestingly, the Court of Appeal further held that, “The Respondent's contention that the Federal High Court lacks jurisdiction to entertain the instant case due to the Court of Appeal’s decision in *Ajayi vs. Securities Commission*<sup>171</sup> is utterly misconceived, to say the very least! Instructively, the Court of Appeal's stand in a plethora of decisions is to the effect that the Federal High Court still does have jurisdiction in matters pertaining to the provisions of Section 251 (1) (r) 1999 constitution (supra).

The point which ought to be made clear, for the avoidance of doubt, is that the exclusive jurisdiction conferred upon the Federal High Court, under Section 251 (1) (e) & (r) of the 1999 constitution as amended (supra) cannot be whittled down or taken away by an ordinary act of the National Assembly, in the absence of any amendment to the provision in question. Undoubtedly, the 1st respondent (and by extension the 2nd respondent) is an agency of the Federal Government within the purview of Section 251 (1) (r) of the 1999 constitution (supra). And by the well set out, and rather unequivocal provisions, of Section 251 (1) (r) (supra), the Federal High Court shall have and exercise jurisdiction, to the exclusion of any other court, in civil cases and any action or proceeding for a declaration or injunction affecting

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<sup>170</sup> . See Sections 331 – 337 & 344 - 344 of CAMA (supra). Paragraphs D – G. Pp. 23. Paragraphs A – A.  
<sup>171</sup>.supra.

the validity of any executive or administrative action or decision by the Federal Government or any of the agencies thereof. Curiously, under Section 284 of the Investments and Securities Commission Act 2007 (supra), the Investments and Securities Tribunal has been conferred with an exclusive jurisdiction to entertain and determine any dispute or matter regarding the 1st Respondent and capital market operators, et al, as well as disputes arising from the administration, management and operation of collective investment schemes. Instructively, by virtue of the provision of Section 6(1) - (3) of the 1999 constitution (supra), the judicial powers of the Federation or a State shall be duly vested in courts being courts established for the Federation or State. However, by virtue of the provision of subsection (4) of the said Section 6 - (4) nothing in the foregoing provisions (i.e. subsections (1), (2) & (3)) of this section shall be construed as precluding - (a) the National Assembly or any House of Assembly from establishing courts, other than those to which this section relates, with subordinate jurisdiction to that of a High Court; Thus, inarguably, it's pursuant to the above provisions of Section 6 (4) of the 1999 constitution (supra) that the National Assembly deemed it fit to enact the Investments and Securities Commission Act (supra). Whereas, by virtue of Section 274 of the said Act, the Investments and Securities Tribunal conferred with an exclusive jurisdiction to entertain and determine any dispute or matter regarding the 1st respondent and capital market operators, et al, as well as disputes arising from the administration, management and operation of collective investment schemes. Instructively, by virtue of the provision of Section 6 (1) - (3) of the 1999 constitution

(supra), the judicial powers of the Federation or a State shall be duly vested in courts being courts established for the Federation or State".<sup>172</sup>

One wonders, by the extensive analysis of the Court of Appeal's decision in Okeke's case, that the court has removed the jurisdiction of the Investment and Securities Tribunal being an arbiter in resolution of capital market dispute. The facts show that the court is right in relation to that the Investment and Securities Tribunal not having jurisdiction on criminal disputes. The other analysis is merely an *obiterdictum* that remains the court's opinion and never overruled the judgment in Mufuta's case. Bringing home our point, a consenting judgment<sup>173</sup> held thus:

I have read before now the lead judgment just delivered by my learned brother, Saulawa JCA, and I agree with him that the appeal should be allowed. He has addressed the issues canvassed, and I have nothing useful to add except to emphasize the point made that under our laws, the 2nd Respondent cannot adjudicate over any matter with criminal flavor - see *Baba vs. N.C.A.T.C*<sup>174</sup> where Nnaemeka-Agu, JSC, observes as follows - "When a person is accused of a crime, once the hearing body is anything less than a jurisdiction body vested with criminal jurisdiction, an administrative body lacks the jurisdiction and competence to try the issue. For such a body is not a Court, much less a criminal Court. Only a Court vested with criminal jurisdiction is competent to hearing and determine such an issue".

Instructively, the same Court of Appeal Justice<sup>175</sup> who in his *obiterdictum* tried to derogate the jurisdiction of the Investments and Securities Tribunal in adjudicating capital market dispute, held in the case of *Mr. EzeOkorochoa vs. UBN*,<sup>176</sup> thus:

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<sup>172</sup>. Okeke's case, pp. 28 and 29.

<sup>173</sup>. *ibid*, Hon. Justice Amina Adamu Augie (J.C.A.) p. 37.

<sup>174</sup>. (1991) 5 NWLR (Pt.192) 388.

<sup>175</sup>. Hon. Justice Ibrahim Mohammed Musa Saulawa. *Mr. EzeOkorochoa vs. UBN* (2011) 1 NWLR, (pt1228), 348.

<sup>176</sup>. *ibid*.

The phrase “ a decision or determination of the Commission” in section 284 (1), (a),(i)-(iv) of the ISA 2007 shows that the Investments and Securities Tribunal’s is subject to, first and foremost, the Commission’s or determination of any between...Contrariwise, the jurisdiction vested in the tribunal under section 284 (1), (b), (c), (d), (e), and (f) of the Act is not circumscribed by, or determination of the Commission. That is to say, the tribunal has the jurisdiction to entertain, hear and determine any question of law or disputes involving the Commission and self regulatory organizations; an investment and the Commission; an issuer of securities and the Commission; and disputes arising from the administration, management and operation of the collective investment scheme, respectively. Thus, in each of the cases in section 284 (1), (b), (c), (d),(e), & (f) of the Act, the tribunal has jurisdiction to hear and determine dispute directly instituted therein.

This research holds as its view, that the same judge on the same matter cannot be probating and reprobating but the court’s decision in Okeke’s case is in relations to the criminal jurisdiction of the Investments and Securities Tribunal that we have extensively showed that the tribunal do not have criminal jurisdiction but when matter having criminal element comes before the tribunal, the tribunal refers such matter to any of the anti-graft agencies or the Attorney General of the Federation or the Inspector General of Police for further investigation and prosecution.

The Court of appeal in a more recent judgment, in the case of *Wealthzone Ltd v SEC*<sup>177</sup> the court held on whether the IST has exclusive jurisdiction thus:

In the instant Appeal, therefore, in seeking to examine the constitutionality of the exclusive jurisdiction conferred on the Tribunal, what this simply portends in the opinion of this Court, is that the situation calls for a critical examination of the accurate interpretative intentions of the National Assembly (Legislature) when in 1999 it created the Tribunal exclusively as a specialist Court for the handling of Securities and Capital market cases. It would be recalled that the establishment of the Tribunal at the time also resulted in other collateral legislative issues, which are intricately tied to the creation of the Court and the consideration of which, tends to throw light on the clear intentions of the Legislature, nevertheless. For instance, to ensure that the Tribunal functioned and performed optimally, Section 263(1) of the Investments and Securities Act, 1999 (now ISA 2007) appropriately and expressly repealed Part XVII of the Companies and Allied Matters Act, (CAMA) 1990, which at the time regulated dealings in the Capital and Securities market and implicitly vested exclusive jurisdiction for handling disputes arising there from the Federal High Court. For having therefore expressly divested the Federal High Court of its Jurisdictional stranglehold over Capital Market matters, in the opinion of this Court by expressly expunging Part XVII of the CAMA when the Section provided thus: "263 (1) The following enactments are hereby repealed....(d) Part XVII of the Companies and Allied Matters Decree, 1990." it simply means that the National Assembly clearly intended to carve out and assign exclusively to the Nigerian Investments and Securities Tribunal as a specialist Court, its

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<sup>177</sup>. Citation: (2016) LPELR-41808(CA)

own spheres of operations whose mainstay would be the resolution of disputes arising from the operations of the Capital and Securities market away from the expansive corporate jurisdiction to which the Federal High Court has already been saddled. The clear interpretation of the act of the National Assembly in 1999 when it created the Investments and Securities Tribunal as a specialist Court simply means that the exclusive jurisdiction of the Federal High Court would no longer extend to matters affecting the operations of the Capital and Securities market, but remain limited to matters that may arise from the provisions of BOFIA and CAMA and I so hold<sup>178</sup>.

The Court of Appeal held further in Wealthzone's case thus:

The Investments and Securities Tribunal (IST), on the other hand is a Judicial Body established by Section 274 of the Investment and Securities Act 2007, formerly Section 224 of the Investment and Securities Act, 1999. The Tribunal has exclusive jurisdiction to hear and determine any questions of law or dispute involving: (a) Decisions or determination of the Securities and Exchange Commission (SEC). (b) Securities and Exchange Commission (SEC) and a Capital Market Operator. (c) An issuer of Securities and the Securities and Exchange Commission (SEC), (d) The Securities and Exchange Commission (SEC) and a market self-regulatory Organization, like the Stock Exchange, (e) An investor and the Securities and Exchange Commission (SEC) and (f) Disputes arising from the administration, management and operation of collective investment schemes. See *Mufutau Ajayi vs. SEC* (Supra) 1; *SEC vs. Kasunmu*<sup>179</sup>. It is important to note at this stage, that although clothed with these

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<sup>178</sup> . Per OHO, J.C.A. Pp.45-47, Paras. F-F.

<sup>179</sup> . (2009) 10 NWLR (PT. 1150) 509.

powers, the Investment and Securities Tribunal (IST) has no express mention in the Constitution of Nigeria 1999, the same way the Federal High Court has been mentioned. But that in the least is not to suggest that the Tribunal's creation cannot be traced to the Constitution of Nigeria, 1999 same way as the Federal High Court. The Tribunal's creation is traceable to Section 6(4), (a) of the Constitution of Nigeria, 1999 (As Amended). The National Assembly is empowered by that Section to establish Courts in Nigeria other than those to which the Section relates and which are already established and listed in the Constitution, one of which is the Federal High Court<sup>180</sup>.

Wealthzone's case being the latest of the judgment from the Court of Appeal, further authenticated this researcher's assertion that the IST has exclusive jurisdiction to entertain any dispute emanating from the Nigeria capital market.

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<sup>180</sup> .Per OHO, J.C.A. (Pp. 39-40, Paras. B-E.

## CHAPTER FOUR

### THE PRACTICE AND PROCEDURE IN RESOLVING DISPUTES

#### 4.1 Introduction

The Investments and Securities Tribunal is set up with the thrust of resolving capital market disputes in a way that will have both national and international best practices. To achieve this primary objective of the tribunal and pursuant to Section 290 (1) of ISA, the IST made rules and regulations to govern its practice and procedure known as the Investments and Securities (Procedure) Rules 2014.<sup>181</sup> The Rules of the tribunal were made devoid of the technicalities that are associated with our conventional courts' civil and criminal procedure laws, but with the view of resolving disputes by means of alternative dispute resolution mechanism that conventional court system is now generally adopting. Order 1 rules 2 and rule 4 (1) and of the Rules of the tribunal states that the tribunal is established with the overriding objectives of collaborating with litigants to deal with cases fairly and justly. Order 1 rule 4 (2) rules defined dealing with cases fairly and justly to include:

- (a) Providing a reliable, informed, expedient, flexible and affordable disputes resolution mechanism for investors, public companies, capital market operators, self-regulatory organization, and other market participants.
- (b) Promoting capital market integrity and stable economy.
- (c) Dealing with cases in ways which are proportionate to the complexity of the issues and to the resources of the parties;
- (d) Ensuring so far as practicable that the parties are on equal footing procedurally including assisting an unprecedented party in the Presentations of his or her case without advocating the course he or she should take.

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<sup>181</sup> . This shall be referred to as the "Rules".

- (e) Using the tribunal's special expertise effectively, and
- (f) Avoiding delay, so far as compatible with the proper consideration of the issues.

The tribunal is enjoined to exercise

its power and jurisdiction in such a way to give effect to the outlined objectives. Technicalities will be reduced in the practical best way possible by the tribunal in the resolution of conflict brought before the tribunal. It is worthy of note that the tribunal is less adversarial and more cooperative by vesting control on litigation on the tribunal rather than the parties.

Rule 4 of the Investment and Securities Tribunal (Procedure) Rules empowers the tribunal to facilitating alternatives dispute resolution as the first step in resolving capital market disputes. The tribunal may promote reconciliation among parties and encourage and facilitate amicable disputes resolutions of pending issues before the tribunal. The IST established the IST- ADR Centre as a means of the tribunal facilitating amicable resolutions of capital market disputes.<sup>182</sup>

The ADR centre offers;

- a. Mediations:is Mediation is negotiation carried out with the assistance of a neutral third party. The neutral third party is known as the mediator is accepted by the parties and attempts to persuade them to understand each other and reach an agreed settlement.
- b. Negotiations:It is a process involving discussions, concessions, compromises, communication, persuasions and bargaining through wish the parties in dispute reach a mutually and acceptable resolution. Negotiation entails flexible but

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<sup>182</sup> . Agom A. R. (2007 - 2009) "An Expose on the Investments and Securities Tribunal" *Journal of Private and Comparative Law Vol. 2 & 3*. p. 63.

conscientious discussions or bargaining by the parties with a view of reaching an amicable accepted compromise.

- c. Conciliation: It is the process where a neutral third party who, after discussing the case with the parties, comes up and proposes the terms he feels would be fair settlement of the dispute. In this situation the proposal of the neutral third party has no binding effect on the parties unless they agree and adopt the settlement proposed by the conciliator. And;
- d. Early neutral evaluations: This is still developing in the ADR system which allows a very experienced neutral to give his best candid opinion on the behest of the said case. If the parties to the litigation agree to the suggestion, that may put to an end the suit.

The Investments and Securities Tribunal further made the Investments and Securities Tribunal Practice Directions Pursuant to the provisions of sections 163 (2) and 237 (1) of the Investments and Securities Act 1999<sup>183</sup> in line with the tribunal's objective of ensuring speedy trial of cases. The tribunal no doubt is set and ready in assuming the role of an unbiased arbiter, disputes resolution experts and professional facilitators in the resolution of capital market disputes in Nigeria.

#### **4.2 Institution of Cases at the IST.**

The Investments and Securities Tribunal is one of the first judicial organs to adopt the frontloading of cases before the tribunal. The IST 2003 rules provided in rule 6 (3) and rules 19 of the Investments and Securities Tribunal (Procedure) 2003 Rules for the primary means of commencement of litigation before the tribunal through the frontloading of processes

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<sup>183</sup>. Now section 290 (1) and 312 (3) of the Investments and Securities Act 2007.

before the tribunal. The operational IST 2014 rules retained the front loading of the originating processes and the documents to be rely upon at the point of filling or instituting the matter in order 3 rule 2 of the rules. Order 2 rules 1 and rule 2 of the rules identifies originating applications, appeals and references as the three major means of commencing litigation before the tribunal. The 2003 IST rules had provided at the point of filing the party shall submit seventeen (17) copies of every process plus such number of copies to the named parties. This process of filing seventeen (17) copies of the process has attracted honest criticism as being too cumbersome on the litigant that intends to ventilate his grievances at the tribunal. Okonjo-Iweala<sup>184</sup>, lamented on the procedural difficulties litigants are meant to encounter at the filing of cases before the tribunal.<sup>185</sup> The IST 2014 departed from the requirement of requesting litigant to file seventeen (17) copies as did the IST 2003 rules but the 2014 rules only requires the filling of fifteen (15) copies of every process plus such number of copies to be served on the parties to the suit. The applicant shall frontload clean and clear copies of each of the document the party intend to rely.

The IST 2003 had provided that the applicant upon the filling of the originating processes shall further pay the registrar for the service of the processes and if the named party to be served is not within the jurisdiction of the tribunal, the applicant shall pay such amount as to be accessed by the registrar for courier services. The rules further provided for personal service of the originating processes by the applicant but that the applicant shall put it in writing and make eleven (11) copies of his undertaking available to the tribunal. The applicant shall furnish address within the location of the tribunal for the sake of correspondence. The IST 2014 rules made a drastic departure from the IST 2003 rules that

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<sup>184</sup> .The then Minister of Finance and the coordinating Minister of the Economy Dr. Ngozi

allows for service by courier and undertaking for personal service of the processes which it is the submission of this researcher that it is the normal methods of service of originating processes as opposed to the IST 2014 rules which provides in order 2 rule (1) thus:

Upon receiving an originating application, the Tribunal shall decide what notice are to be given whether by advertisement or otherwise to persons who appears to the Tribunal to have a direct or final interest in the proceedings and may for this purpose require the applicant to provide any information which is within his powers to provide.

But in other breath the IST rules 2014 provides order 2 rule 8 (2) of the IST 2014 rules and it provides:

“The Chief Registrar shall upon payment of the prescribe fee, send a copy of any document received from a party to all the other party to the proceedings and any person who is subsequently joined as party to that suit”.

While this research submit that rule 7 (1) and rule 8 (1) of order 2 IST rules 2014 appears to be confusing because the law remains trite that the service of originating processes must be personal and failure to serve originating processes personally can vitiate the entire proceedings no matter how well conducted. The courts have held in a number of cases on the importance of personal service, in *Hon. Frank Okiyevs. The State*<sup>186</sup> the court held:

In *Ndoba (Nig) Ltd & Anor vs Mr Orabikwe*<sup>187</sup> the court defined personal service as processes served on an individual personally by delivering a copy of the process duly certified by the Registrar or being a true copy of the original process filed. "There was no personal service in the instant case. On this fact both parties are ad idem."

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<sup>186</sup>. Citation: (2014) LPELR-22194(CA), per Ogunwumi JCA. Para. E-G.

<sup>187</sup>. (2003) FWLR Pt. 171 Pg. 1693 at 1713.

Further in *Hon. Emeka Okonjiv. Hon. Peter Onwusanya & Ors*<sup>188</sup> the court held on what constitutes personal service and the importance of personal service thus:

Personal service is personal service. It cannot be constructive or indirect service. The learned Justice (Dr) T.A. AGUDA of blessed memory, in his book: Principles, Practice and Procedure Relating to Evidence at page 71 thereof, stated that personal service means -"delivering the document to be served personally to the person". So also, in his book - CIVIL PROCEDURE IN NIGERIA, 2nd Edition at page 253, the learned author - Fidelis Nwadiakor, re-echoed the opinion of Aguda, CJ., (supra) to the effect that -"The service must be on the person to be served, so service on his wife or agent is not good service, even if the agent undertakes to take the document to the person.

This research submits unequivocally that rule 7 (1) of order 2 can be invoked when it becomes impossible to serve the originating court processes personally. It is strange that the IST 2014 rules provide for a service procedure that is more akin to service by substituted means before the provision for personal service. Substituted service of any originating court processes would only be effected where personal service fails and must be made subject to the provision for personal service. The court held in *International Committee of the Red Cross (ICRC) vs. Ismaila Tijani Olabode*<sup>189</sup> thus:

The only exception to personal service of the process is by substituted service with the leave of the court where personal service has proved abortive. See *Okereke vs Ejiolor*<sup>190</sup>. Where therefore, for any reason, personal service of court process proved abortive, substituted service can be employed which is service of a process upon a defendant by substituted means in any manner authorised by the rules of court other than personal

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<sup>188</sup> . CITATION: (2014) LPELR-22191(CA) Per YAKUBU, J.C.A. (Pp. 45-46, paras. E-A).

<sup>189</sup> . CITATION: (2009) 8764 (CA) Per ABBA-AJI, J.C.A. (Pp.36-37, Paras.E-A).

<sup>190</sup> . (1996) 3 NWLR (PT.434) 90.

service and is deemed as proper personal service on a defendant. The rules of court provide for this mode of service where it appears to the court that for any reason personal service cannot be conveniently effected on a defendant. (underlining ours for emphases)

Every motion on notice shall be served at least four days before the date fixed for hearing and every counter affidavit shall be filed at least forty eight hours before the date fixed for hearing. It becomes troublesome as order 2 rule 9 (e) of the IST rules 2014 completely remove from litigants before the tribunal to argue as of right any statutory days or periods within which to respond to any application before the tribunal as rule 9 (e) of IST rules provides that “notwithstanding anything to the contrary, the Tribunal may reduce the time required for filings any process under this rule as it deems fit to make in the circumstance”. Order 2 rule 10 (1) of the rules provides that any person who receives a copy of an originating application making a claim or seeking relief against him (referred to in this rules as “the defendant”) shall send or deliver to the Chief Registrar a memorandum of appearance and a written reply acknowledging receipt of the originating application. Order 2 rule 10 (4) of the rules provides that the memorandum of appearance and the reply shall be sent to the Chief Registrar of the tribunal not later than twenty day after the receipt of the originating processes.

Every motion shall be accompanied with written address which shall be adopted as the argument in support of the motion and or the written address in support of the counter affidavits. The application shall be accompanied with witness depositions on oath and passport of the witness attached to the witness deposition and the document(s) mentioned on the witness statement on oath shall be front loaded alongside the originating application or the defence as the case may be.

Though the procedure of commencing a proceeding before the tribunal is really troublesome as the litigant is meant to bear most of the burden, however, according to Agom<sup>191</sup>, the frontloading process enables litigants to disclose ahead of hearing of the case all evidence, documentary or oral, that they intend to rely on to prove their case. Frontloading eliminates surprises and enables the parties and the tribunal to determine whether the case is an appropriate one for alternative dispute resolution, summary judgment or other settlement. On the other hand, witness statement eliminates examination in chief which in itself would be time taking. The procedure adopted by the tribunal in itsaves time and brings in accuracy.

#### **4.3 Conduct of Cases Before the Investments and Securities Tribunal.**

The tribunal is empowered to make rules regulating its practice and procedure pursuant to section 290 (1) of the Investment and Securities Act. The tribunal in its judicial sitting is only to administer justice as a civil court with no criminal jurisdiction. The tribunal can make rules and regulations and a practice direction to govern the conduct of cases before the tribunal. The major focus of the Investments and Securities Tribunal (Procedure) Rules 2014 is to ensure that proceedings take place decently and by arrangement. This is evident in order 2 rule (3) of the Rules which provide thus: “There shall be attached to the application a proof, statement or summary of the evidence of any witness to be called by the applicant together with any document referred to it and any other document necessary to the applicant’s case including any expert report”.

For appeals, order 3 rule 2 (1) states:

A party (including a person wishing to be made an additional party to the proceedings as a respondent) shall send or deliver to the chief registrar with his or her Notice of Appeal or Originating Application or Reply, as the case may be, a copy of every certificate, report or

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<sup>191</sup>Op cit.

other document on which he or she intends to reply for the purposes of the appeal or application or reply, together with a sufficient number of additional copies of each of them to enable the Secretary to provide a copy to each of the Tribunal members and other parties to the proceedings.

As stated at the introduction of this chapter, the tribunal adopts the frontloading of all its processes at the behest of filing of all originating processes before the tribunal. Frontloading eliminates surprises and enables the parties and the tribunal to determine whether the case is an appropriate one for alternative dispute resolutions, summary judgment or other settlements. The IST- ADR center enables the tribunal to adjudicate dispense with non-contentious matter that could be dispense with by any of the mode of Alternative Dispute Resolution mechanism. The cases before the tribunal is managed in such a way that allows the tribunal to dispense with mater within a very short period of time as order 10 rule 15 of the rules provides:

When parties to an appeal or an originating application or an interlocutory application have filed their written addresses, oral address of not more than 10 minutes shall be allowed for each party to address salient issues while any reply by counsel on points of law shall be for a period not exceeding 10 minutes except the tribunal otherwise directs.

By this provision, long argument is not in contemplation of the Investments and Securities Tribunal Rules 2014. This research do not find order 10 rule 15 of the rules as a means of effectively managing time irrespective of the premise that order 10 rule 15 allocated only ten minutes for oral argument because “salient issues” may not be from a party’s written address. The Kaduna State High Court (Civil Procedure) Rules<sup>192</sup> provides in order 32 rule 4 thus: “Oral argument of not more than twenty minutes shall be allowed for each party to emphasise and clarify the written address already filed”. The distinction is that

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<sup>192</sup> . 2007. which shall be referred as “High Court Rules”.

though the High Court Rules allows twenty minutes of oral argument in expounding the address already before the court but the rules allocated ten minutes of oral argument that may or may not be contained in the written address already before the tribunal. Submit further that the rules did not completely eliminate a party to spring surprises on his opponent but the High Court Rules eliminates any surprises by a party to a proceeding.

Order 11 rule 14 of the rules provides that where any cause or matter has been struck out before judgment, whether on appeal or originating application, that cause or matter may be re-listed subject to payment by the applicant of the prescribed fees and or penalties and good and substantial reasons as well as arguable and substantial case on the merits.

Order 5 rule 3 provides on the method adopted by the tribunal in taking evidence and proceeding thus:

1. The tribunal may allow a witness to give evidence by telephone, through a video link or by any other electronic means of direct oral communication provided the tribunal is satisfied that this would not prejudice the administration of justice.
2. Subject to the provision of the Evidence Act , evidence in any proceedings may be recorded in writing by mechanical, electronic, or any other scientific means.

Order 11 rule 16 of the rules provides that all proceedings in the tribunal shall be recorded by electronic recording device save where the device is defective or unavailable. No doubt, by using electronic device in recording the proceedings before the tribunal, saves time and energy unlike our conventional court systems that still uses “long hand” in taking proceedings before the court which consumes lots of time and energy.

Adjournments are not granted as a matter of course, a party seeking adjournment must convince the tribunal that the application for adjournment is reasonable and the best option open for the tribunal at the instance of the Applicant who sought for the adjournment<sup>193</sup>.

It is without doubt that the Investments and Securities Tribunal (procedure) 2014 governs the conduct of cases before the tribunal. Before a valid appeal can be filed against the tribunals' judgment, the appellant shall pay the prescribed fees for the compilation of the record of proceedings of the tribunal to the Court of Appeal; the appellant shall file a bond stating that he shall diligently prosecute the appeal. The bond shall form part of the condition of appeal.<sup>194</sup>

#### **4.4 Case Management.**

The IST as a judicial arm of the Nigerian capital market must carry out its activities to be seen as professionally based, result oriented, vision driven, justice oriented and capital recirculation in the improvement of the national capital investment for both locals and national investors. Case management is the method adopted by IST to resolve capital market dispute. This research has shown under our discussion on conduct of cases that the primary instrument that governs the operations of the IST is the ISA and IST Rules of Procedure. Agom<sup>195</sup> submitted that the case management power of the IST cover discovery and inspection, pre-hearing review, settling preliminary issues, giving directions, group proceeding directions, class action and consolidation. A party may, in a notice of appeal or originating application or by separate application, seek interim relief such as suspension of disputed decision, further particulars, decision on preliminary points or issue, accelerated

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<sup>193</sup> . see order 6 rule 2 of the IST (Procedure) Rules 2014.

<sup>194</sup> . See order 11 rule 17 (1), (2) and (3) of the rules.

<sup>195</sup> .Agom A. R. opcit, in his PhD desertion discussed the IST case management and we shall only improve on some of his submission we see differently.

hearing, hearing in camera or documentary trial, reliance on expert witness and summoning of expert witness.<sup>196</sup>

Legal practitioners called to the Nigeria Bar have right to file a complaint on behalf of their client and under the clients' instructions to the tribunal. Section 291 of the ISA provides that a party may appear either in person or authorize one or more legal practitioner to represent it before the tribunal. Section 292 of the ISA gives a guide as to the nature of proof of cases before the tribunal as the said section provides that the onus or proving any matter before the tribunal shall be upon the applicant or appellant as the case may be.

Order 3 rule 4 if any document on which a party relies contains any matter that relates to intimate personal or financial circumstances or is commercially sensitive or consist of information communicated or obtain in confidence or concern national security and for that reason the party seeks to restrict his disclosure the party shall inform the chief registrar of that fact and for the reasons for seeking such a restriction and the chief registrar shall send the copies as provided in this rule only in accordance with the direction of the tribunal. Order 4 rule (2), (1), (a) of the rules provide that the tribunal has power to order or give direction requiring a party to deliver to the tribunal any document or other material which the tribunal may require and which is in the power of that part to deliver and the party shall send or deliver to the chief registrar sufficient number of copies of such document or other materials, to enable the chief registrar provide sufficient copies to each member of the tribunal and other parties to the proceedings.

According to order 4 rule 4 (1) of the rules states that if any proceedings may be facilitate by holding pre-hearing review, the presiding chairman shall on the application of a party or on his own initiative give direction for a review to be held. The chief registrar shall

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<sup>196</sup>. Agom A. R op cit. p. 179.

give the parties not less than 7 days notice or a shorter notice if the parties agree, of the time and place of the pre-hearing review.

The prehearing review shall be in public unless the Chairman otherwise direct. At the prehearing review, the parties may apply in person or otherwise through a legal practitioner of their choice. At the prehearing review the chairman shall in accordance with the overriding objective of the IST, give all direction which appears necessary or desirable for the conduct of the case. The chief registrar shall fix the date, time and place of the oral hearing and where appropriate, set a time table for the hearing and not less than 7 days before the date fixed (or a shorter time if agrees by the parties), send to each party a notice that the hearing is to be on that date and at that time and place and the details of any timetable for hearing. The tribunal may alter the date time or place of any hearing and the chief registrar shall give the parties not less than 3 notice or such shorter time if the parties agrees<sup>197</sup>.

The prehearing review is also employed by the tribunal to dispose of preliminary issue and issues the tribunal feels it has no jurisdiction and power to entertain. In *UBN PLC vs. SEC*<sup>198</sup> at the prehearing review the Applicant brought a preliminary objection challenging the jurisdiction of the IST to entertain the suit. The tribunal overruled the application and the four appeals culminating to the suit that is Bonkolans, Okwofuleze, Nestle Food PLC share scam were consolidated for hearing.

The tribunal has the power to consolidate cases before the tribunal and further can order Group Proceeding Directives. The tribunal can group together cases rising common and related issues of fact or law register them in a group register. The tribunal has the inherent right to set the standard of cases grouped in the group register. The cases of the

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<sup>197</sup> . see order 6 rule 1 and 2 of the rules.

<sup>198</sup> . (2004) 1 ISLR p. 1.

register are further classified according to the facts and the issues of law. Based on the classification, test cases that will help determine the Different Group Proceeding Direction are selected and tried. The decision on the test cases is binding on parties with similar issues relating to that particular GPD. This GPD is a useful tool for managing complex class action suits.

The benefit of GPDs is to effect that it prevents multiplicity of action and conflicting orders by the tribunal. In the capital market, millions who may have suffered a loss due to a scam may not want to file action independently but may rather file under the broad GPD due to the fact that they may be investors in the shares of the company.<sup>199</sup> These cases may present common related issues of fact or law and could provide case management difficulties for a court or tribunal.

Order 3 rules 20 and 21 of the rules provides for consolidation of cases at the IST. Consolidation of cases occurs in instances where the several cases are filed by several parties but on a central fact. The order for consolidation may be by a party to the dispute or the tribunal *suomotu* may deem it fit order the matter to be consolidated.

Witness statement on oath is usually frontloaded at the point of filing the case, there removing the issues of examination in chief during the hearing of a case. The tribunal in its opinion may despite the front loading of the witness deposition order a witness to appear before the tribunal for the purpose of being examined in chief to further authenticate the statement on oath already front loaded before the tribunal. The tribunal may allow a witness to give evidence by telephone, through video link, or by any other means by direct oral

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<sup>199</sup>. See Bonkolans scam (2004) 1 NISLR.

communication provided that the tribunal is satisfied that it would not prejudice the administration of justice.<sup>200</sup>

Order 5 rule 16 (1) of the rules empowers the tribunal to call an expert either through an application by a party to dispute or the tribunal *suomotu* order for the calling of expert in a matter the tribunal thinks in its opinion requires expert opinion to narrow the issue before the tribunal. The expert has an overriding duty to the tribunal and not to the party that may have called on the expert. The testimony of the expert must be within the expert best knowledge.

The tribunal at the begging of hearing present the mode the tribunal would adopt in the just determination of the suit before the tribunal. The Chairman of the tribunal would state the burden and standard of proof and rules of evidence applicable. The tribunal would adopt the methods most suitable in the just determination of the case before the tribunal and in line with the overriding objectives of the tribunal.

The parties shall be entitled to give evidence, call witnesses and address the tribunal. The tribunal at any stage of the proceeding may require the personal attendance of any person whose testimony in form of deposition or deponent of affidavit or an expert whose opinion has been frontloaded to appearing before the tribunal for the sake of clarifying the content of the frontloaded document. The tribunal is empowered to distil the issues for determination and streamline the issues distilled sequel to the fact that the prehearing review has expanded the knowledge of the fact of the case to the point that the tribunal could eliminate issues that are not necessary.<sup>201</sup> The tribunal further may isolate the area that may require clarifications and parties will be enjoined to call witnesses in a bid to clarify the issues raised by the tribunal from the disputed fact of the case.

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<sup>200</sup> . Order 5 rule 3 of the rules.

<sup>201</sup> . Order 4 rule 5 of the rules.

The tribunal's decision may be unanimously or by majority of member of the tribunal. The tribunal shall record whether the decision was unanimously arrived at or it was by majority of members of the tribunal. Where the tribunal is constituted by even number of members, the chairman shall have a casting vote. The decision of the tribunal shall be in writing which given either immediately after the completion of hearing or reserve but the tribunal states the reason for the decision.<sup>202</sup> The decision of the tribunal shall be signed by the chairman and copies sent to each party by the Registrar.

Order 7 rule 4 of the rules empowers the tribunal to vary his earlier decision, set aside the decision on the application of a party or on its own initiative if the tribunal is satisfied that:

- a. its decision was wrong because of an error on the part of the tribunal or its staff; or
- b. a party, who was entitled to be heard at a hearing but failed to be present or represented, had a good reason for failing to be present or represented; or
- c. the decision of the tribunal was obtained by fraud; or
- d. new evidence to which the decision relates has become available since the conclusion of the proceedings and its existence could not reasonably have been known or foreseen before then; or
- e. otherwise the interest of justice requires, the tribunal may review or set aside or vary the relevant decision.

Rule 4 of order 7 of the rules to say the least is making the tribunal to sit on appeal in its own judgment. The law remains, there must be an end to litigation, rule 4 of order 7 may

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<sup>202</sup>. Order 7 rule 1 rules.

defeat the whole essence of time limit within which a party may enjoy the fruits of his labour as an aggrieved party or the tribunal itself may set aside a valid judgment on the premise that the justice of a case requires. The only reason when a court or tribunal can in law review its own decision is as contained in paragraph “c” of order 7 rule 4 of the rules and ancillary issues connected thereto; which may include:

- a. if the judgment is obtained by fraud or deceit.
- b. If the judgment is a nullity such as when the court itself is not competent
- c. If the court was misled into giving the judgment under a mistaken Belief that the parties had consented to it.
- d. If the judgment was given in the absence of jurisdiction.
- e. If the procedure adopted was such as to deprive the decision or judgment of the character of a legitimate adjudication<sup>203</sup>.

Pointedly, even when a party intend to make fraud a ground for the setting of the judgment, the onus is on the party that assert to prove. Not as in the case of the tribunal that the tribunal can just wake up and set aside its own judgment without any application is to the mind of this researcher, a bad law because at the point of judgment, the court is *functus officio*<sup>204</sup>.

A party dissatisfied with the decision of the tribunal could appeal against such decision to the Court of Appeal within thirty (30) days from the date the judgment was entered by the tribunal.<sup>205</sup> The notice shall clearly state all the ground(s) by which the Appellant appeal is

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<sup>203</sup>. Bessoy Limited v. Honey Legon (Nig) Limited & Anor Citation: (2008) LPELR-8329(CA).

<sup>204</sup>. B-line Communications Limited & Orsv. Access Bank Plc & Anor Citation: (2013) LPELR-22451(CA).

<sup>205</sup>. Order 8 rule 2 (3) of the IST rules 2014.

based. It is without doubt that the emergence of the IST has expounded the landscape of the capital market.

Jurisprudence as the tribunal has given some land mark judgment.<sup>206</sup> One scholar summarizes some modest achievement of the tribunal thus:

The tribunal has also recovered over seventy billion naira investors' money that could otherwise be lost to scam or defalcation in the market. The tribunal has directed the NSC and SEC to set up Investors Protection Fund and publish guideline that will enable victims of defalcations in the capital market to receive some succor in the nature of compensation.<sup>207</sup>

The birth of IST no doubt has widened the jurisprudence of securities law and practice as capital market disputes could be determined in a professional and flexible means of resolution of dispute.

#### **4.5 Exercise of Original Jurisdiction by the IST.**

Section 234 of the ISA 1999, which specified the jurisdiction of the IST did not signify an element of exclusiveness but Section 284 of the ISA provides that the tribunal shall to the exclusion of any court of law or body in Nigeria exercise jurisdiction to hear and determine any question of law or disputes: a decision or determination of the Commission in the operation

and application of this Act, and in particular, relating to any dispute, between capital market operators; between capital market operators and their clients; between an investor and a securities exchange or capital trade point or clearing and settlement agency; between capital market operators and self-regulatory organization; the Commission and self-regulatory organization; a capital market operator and the Commission; an investor and the

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<sup>206</sup> . *Blue Chip Acquisition vs. Zenith Bank Plc & 3 ors* (2005) NISLR p. 72; *CSCS vs. SEC* (2004) 1 NISLR p. 39.

<sup>207</sup> . Agom A. R. op cit. p. 184.

Commission; an issuer of securities and the Commission; and disputes arising from the administration, management and operation of collective investment schemes.

The tribunal shall also exercise jurisdiction in any other matter as may be prescribed by an Act of the National Assembly. In exercising its jurisdiction, the tribunal shall have the power to interpret any law, rules or regulation as may be applicable.<sup>208</sup>The matters enumerated under section 284 is civil in nature as the Act mandates the commission if in the course of its investigations discovers the evidence of criminality to inform the appropriate prosecuting authority.<sup>209</sup>It is therefore evident from a combined reading of Sections 284 and 304 that it is not stipulated that the tribunal shall assume jurisdiction over criminal matters but only in respect of civil jurisdiction.

In *Okeke vs. SEC*,<sup>210</sup>the appellant was appointed in June 2003 as a non-executive director of Cadbury Nigeria Plc. In June 2006, the annual account report of the company was sent to the first respondent and on reviewing the report expressed some concerns regarding declining profitability, worsening leverage ratio misstatement in the account, et al. consequent upon the chairman of the company appointed an independent firm, Price Water House Coopers Ltd to investigate the said allegations. The report of Price Water House Coopers was later sent to the 1<sup>st</sup> respondent who constituted an in-house committee and administrative proceedings committee (2<sup>nd</sup> respondent) to investigate the alleged misstatement of the company's account. However, the company, its auditors and directors challenged the competence of the 2<sup>nd</sup> respondent to conduct the investigation by instituting an action at the Federal High Court, Abuja. The 2<sup>nd</sup> respondent proceeded with its investigation and delivered

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<sup>208</sup>.See Section 284 (1) (a) - (f), (2) and (3).

<sup>209</sup>.See Section 304 of the Act.

<sup>210</sup>.(2013) LPELR 20355 (CA).

its findings to the 1<sup>st</sup> respondent on April 28<sup>th</sup> 2008. Consequent upon the appellant applied to the Federal High Court for a judicial review of the decision of the 2<sup>nd</sup> respondent on grounds of jurisdiction among others. The suit was dismissed by the Federal High Court for lack of jurisdiction. On appeal the Court of Appeal, the court while dismissing the appeal and affirming the ruling of the lower court in part held that the 2nd respondent cannot adjudicate over any matter with criminal flavour.<sup>211</sup>

Proceedings of the tribunal may be held in camera as and when deemed appropriate in the interest of the public. In *Osigwevs. B. P. E.*<sup>212</sup> the IST relied on the provision of section 234 (1)<sup>213</sup> and guided by the parameters of its jurisdiction in the notorious case of *Madukoluvs.Nkemdilim*<sup>214</sup> and held thus:

We find that based on the facts and circumstances of this case ... and the totality of all authorities cited, the tribunal has power and also competence to examine complaints of this nature and to decide one way or the other.

The fact in *Osigwe*<sup>215</sup> is that the applicant/respondent initiated the action before the IST, by an originating application dated 10th November 2003, and supported by a five paragraph statement of evidence, pursuant to the IST 1999 and Rule 31(1) of the IST (Civil Procedure) Rules 2003 on his behalf and as a representative of the classes of all persons other than the applicants/ respondents and the class they represent who have registered to purchase shares in public companies under the Privatization Share Purchase Loan Scheme (PSPLS) claiming, *inter alia*, as follows:

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<sup>211</sup>. Per Amina Adamu Augie JCA. See Okojie E. A. and Enakemere L. E. (2014) A Critical Analysis of the Jurisdiction of Nigeria's Investment and Securities Tribunal V. 6, *Mustang Journal of Law & Legal Studies*, P. 58.

<sup>212</sup>. (2007) 2 NISLR 201.

<sup>213</sup>. ISA 1999.

<sup>214</sup>. (1962) 2 SCNLR 341 at 358.

<sup>215</sup>. *supra*.

Issuance of an order directing the respondent to suspend the share acquisition scheme as presently structured until the 1st Respondent (BPE) complies with the relevant provisions of the I.S.A. 1999 and the Rules/Regulations promulgated there under; In the alternative, An Order directing the respondents to immediately comply with provisions of the ISA 1999 and the underlying Rules and Regulations with respect to the PSPLS by ensuring that the relevant registration statement/prospectuses are duly filed with and effectuated by the SEC.

The originating application was accompanied by a statement of evidence and pleadings thus: The applicant's evidence during trial principally will centre on proving the fact that the respondent's scheme is aimed at conditioning the capital market and overvaluing of the shares of non-performing public enterprises – NITEL and Niger-dock Plc. during the initial public offering of shares of such enterprises. That the respondent practiced fraud on and deceived the applicant and his class by deliberately failing to disclose to the applicant the financial statement of the public enterprises whose shares is offered to the applicant. That the applicant's evidence will show that the respondents deliberately and without reasonable excuse or cause avoided making adequate disclosures concerning the return potential of the underlying securities offered for sale especially NITEL and Niger-dock Plc. The evidence of the applicant shall point to the fact that the respondents offered shares to the public without compliance with the ISA 1999 and the SEC Rules by not registering their prospectuses with the SEC. The applicant's evidence at trial will also seek to prove that the respondent's advertisement, billboards, publications, brochures and websites qualify as prospectus pursuant to the ISA 1999 and ought to have been registered thus disclosing facts material to the exercise of a reasonable investment decision. The applicant is not presently in possession of the aforesaid publications as the defendants have possession of them. The applicant will demand from the defendants' copies of these documents at trial. A preliminary objection

dated 7th January 2004 was filed on the 29th January 2004 challenging the tribunal's jurisdiction *inter alia* to hear and determine the originating application as presented by the respondents.

Dismissing the preliminary objection on the issue of competence of the respondent's originating motion, the IST held,<sup>216</sup> *inter alia*, that it has jurisdiction to hear and determine all the issues rose in the originating motion. The IST referred to section 234(1) of the ISA 1999 and unequivocally pronounced on the scope of its jurisdiction<sup>217</sup> as follows:

The tribunal shall have power to adjudicate on disputes, and controversies arising under this Act and the rules and regulations made there under. The tribunal shall in particular adjudicate on matters relating to: The interpretation of any law, enactment or regulations to which this Act applies; Disputes between the commission and a Securities Exchange or Capital Trade Point; Disputes between capital market operators and the Securities Exchanges or Capital Trade Point; Disputes between capital market operators; disputes between capital market operators and their clients; and Disputes between quoted companies and the regulators or the Securities Exchanges.

The overriding objective of this Tribunal as stipulated in order 1 rule 2 (a) of the Investments and Securities Tribunal (Procedure) Rules 2014 is to provide a reliable, informed, expedient, flexible and affordable dispute settlement mechanism for investors, public companies, capital market operators, self-regulatory organizations and other market participants with a view to promoting capital market integrity and stability in the economy.

#### **4.6 Exercise of Appellate Jurisdictions of the IST.**

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<sup>216</sup> . See Samuel Osigwevs B.P.E at p 96, *supra*.

<sup>217</sup>. bid at pp. 228-229 paras. B-A.

The tribunal also exercises appellate jurisdiction and further lays down the procedures for the appeal process. It provides that a person aggrieved by any action or decision of the Commission under this Act, may institute an action in the tribunal or appeal against such decision within the period stipulated under this Act with a proviso that the aggrieved person shall give to the Commission fourteen days' notice in writing of his intention to institute an action or appeal against its decision.<sup>218</sup> The Act further provides that such appeal under the Act shall be filed within a period of thirty days from the date on which a copy of the order which is being appealed against is made, or deemed to have been made by the Commission and it shall be in such form and be accompanied by such fees as may be prescribed, provided that the tribunal may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for the delay.<sup>219</sup>

On receipt of an appeal the tribunal may, after giving the parties an opportunity of being heard, make such orders thereon as it deems fit, confirming, modifying or setting aside the order appealed against.<sup>220</sup> The tribunal shall cause a copy of every order so made to be forwarded to the parties to the appeal and to the Commission. The tribunal, shall in the exercise of its powers under this Act, conduct its proceedings in such manners as to avoid undue delays and shall dispose of any matter before it finally within three months from the date of the commencement of the hearing of the substantive action.<sup>221</sup>

Aggrieved persons who are dissatisfied with a decision of the tribunal may further appeal against such decision to the Court of Appeal if; the decision was taken in the exercise

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<sup>218</sup> . Section 289 (1) of the Act.

<sup>219</sup> . Section 289 (2) of the Act.

<sup>220</sup> . Section 289 (3) of the Act.

<sup>221</sup> . Section 289 (4) of the Act.

of its appellate jurisdiction, on points of law only;<sup>222</sup> or on points of mixed law and facts if it is a final decision taken in the exercise of its original jurisdiction,<sup>223</sup> or on point of law only; if it is an interlocutory decision of the tribunal.<sup>224</sup> The Act finally provides that without prejudice to the power of the tribunal to review its own decision, only persons who participated in the proceedings of the tribunal may appeal against the decision of the tribunal.<sup>225</sup> This subsection has attracted criticism thus:

We humbly submit that this subsection may prove to be too narrow in interpretation as it may appear that the same persons before the tribunal are the only persons with a right to appeal to the Court of Appeal. This is because, for instance, problems may arise when ownership of stock or bond (which is affected by the decision of the tribunal) has changed. What now happens to the new owners who may want to challenge the tribunal's decision at the Court of Appeal? Or when one of the parties dies before the decision is appealed against, can't such a person be substituted by the person upon whom the propriety right devolves? Section 295(2) therefore seems to act as a legal disability against such persons because although they now have an interest in the dispute, but because they were not involved at the proceedings of the tribunal they cannot appeal against same at the Court of Appeal. We therefore recommend that the word "persons" be amended to read parties in order to avoid confusion.<sup>226</sup>

Section 295 (2) of the ISA empowers the tribunal to set aside its own decision and order 7 rule 4 of the rules of the IST have the same rendering. Agom<sup>227</sup> argued with respect to the 2003 ISA rule which is in the same fours with order 7 rule 4 of the ISA 2014 rules that allows the tribunal on application of a party or *suomotu* to review, set aside and vary its decision. This goes beyond known principle of law on which a judicial body can review its

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<sup>222</sup>.Section 295(1)(a) of the Act.

<sup>223</sup> . Section 295 (1) (b) of the Act.

<sup>224</sup>.Section 295 (1) (c) of the Act.

<sup>225</sup> . Section 295(2) of the Act.

<sup>226</sup> . Okojie E. A and Enakemere L. E.A (2014) *Critical Analysis of the Jurisdiction of Nigeria's Investments and Securities Tribunal* IV. 6, Mustang Journal of Law & Legal Studies, p 64.

<sup>227</sup> . Op cit.

own decision. After judgment, a court can rectify its record for minor slip only.<sup>228</sup> The boundaries of the review power contained in the Rules clearly allow the tribunal to preside over its judgment. Thus it can review its own decision when, in law the judgment is erroneous, a party entitled to be heard is not heard, the decision of the tribunal is obtained by fraud, or against the interest of justice. These are clear grounds on law on which the tribunal's decision can be challenged or appealed.

#### **4.7 The Place of Alternative Dispute Resolution (ADR) by the IST.**

Alternative Dispute Resolution is an avenue created by parties and statutes for the resolution of dispute without the full adoption of technical litigation. ADR being the acronym for Alternative Dispute Resolution is encouraged because of the immense benefit ADR provides parties and the court or tribute that adopts its application with respect to deciding cases on time and without pains for the parties that subscribe for the resolution of disputes through ADR. ADR developed not out of choice but due to the technical delay litigant and legal practitioners and judges suffer from court congested litigation and the window open for step by step appeal via interlocutory appeals. One of the leading proponents of ADR, though a judge described the common law judicial system thus:

Our courts are overflowing with cases. Congestion in the courts has generated more anger, more agony in the parties. Each Honourable Judge has not less than three hundred cases pending before him with new ones on a daily basis. We must not forget that proceedings are still being recorded in long hand and with other various technical problems, some cases last over 10 years from the date of filing. For instance, in my

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<sup>228</sup>. *Shittu Onigbede & Ors vs. Samuel Balogun & Aor* (2002) 2 SCNJ 219. *Charles Udegbonam vs. FCDA & Anor.* (2003) 5 SCNJ 131.

court, I have over 20years' old cases inherited by me from retired judges. The said cases that have gone before two or three Judges before coming to my court. I remember vividly that suit No. LD/469/77, A. J. *Lawal&Anor vs.Santosis* 26 years old, Suit No. LD/89/74 *Mrs. S. A. Abudu vs.Alhaja T. Ogunbambi&Anoris* 29 years old, while suit No. LD/4/78 *Sipeolu&Anor vs. AIICO Eng. Group Nig. Ltd.* is 25 years old. I have about 50 cases that are more than 10 years old and 140cases that are over 5 years old.<sup>229</sup>

ADR provides an opportunity to resolve disputes creatively and effectively, finding the process that best handles a particular dispute. It is useful for resolving many disputes that never get to court, as well as providing a means of settling 90 to 95% of the cases that are filed in courts. The IST Rules provides a window for ADR as the tribunal may promote reconciliation amongst the parties to an action and facilitate amicable settlement of pending issues before the IST. Schedule IX of the SEC Rules and Regulation provides that disputes among capital market operators must first be referred to the relevant self-regulatory organization established for the resolution of disputes between its members, before such dispute can be referred to the APC, and thereafter to litigation. Article 125 of the NSE Rules and Regulations authorizes the NSE to adjudicate on disputes between its members, members and clients, and members and management of the NSE. To encourage ADR method of resolving disputes emanating from the Nigerian capital market, the IST in 2006 established the IST- ADR center. This center presents an avenue for parties to mutually resolve their disputes. The IST-ADR center has mediated on over sixty seven cases since its establishment. The center is designed to provide various avenue sessions of any of the ADR method the parties may have resolved in the resolution of their dispute. The method is

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<sup>229</sup>. Oke, O.O, 'Decongesting the Courts: The Place of the LMDC', September 30, 2003. Extract from Muktar H. op cit. p. 312.

expeditious, private and generally cost saving, harmonious and confidential. Parties whose claims are less contentious may key into the mediation, conciliation of the ADR center adopts for the resolution of the dispute.

#### **4.8 Judgment of the tribunal/ appeal from the decision of IST.**

Judgment in its ordinary usage connotes the resolution by a person with respect to a cause of action between competing alternatives. In its technical sense in which it is used in judicial proceedings, the supreme had held in *Osafilevs.Odi*(No.1)<sup>230</sup> that:

The word 'judgment' connotes a binding decision of a court or tribunal in a dispute between two persons and that the determination is enforceable by the exercise of the coercive jurisdiction of the court at the instance of the party in whose favour the judgment has been made. A judicial decision is decision after consideration of the fact and the law; especially, a ruling, order, or judgment pronounced by a court when considering or disposing of a case. It is a court's final determination of the rights and obligations of the parties in a case.

In the Indian case of *BharatBank Limited, Delhi vs. Employees of the Bharat Bank Ltd, Delhi*,<sup>231</sup> the Indian Supreme Court laid down what judicial decision or judgment presuppose, thus: "A true judicial decision presupposes an existing dispute between two or more parties and then involves four requisites; (1) The presentation (not necessarily orally) of their cases by the parties in the dispute; (2) If the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence. If the

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<sup>230</sup>.14 (1990) 3 NWLR (part 137) page 130. See section 6(1), (5) (i) of the 1999 Constitution.

<sup>231</sup>. Quoted in Rajeesh Gupta (2008) *Karkara's Art of Writing Judgments*, Delhi Law House Publishers, 2nd Edition, p. 1.

dispute between them is a question of law, the submission of legal argument by the parties.

(4) A decision which disposes of the whole matter by a finding upon the facts in dispute and application of law of the land to the fact so found, including where required, a ruling upon any disputed question of law”. In an attempt to provide a nexus between what ‘judgments’ is *vis-à-vis* the ISA, three provisions of the Act readily come to mind. Section 293(1) and (2), section 295(1),(a), (b), (c) and section 289(5). The sections provide as follows: 1. Section 293 (1) says the tribunal shall(i) give its judgment in writing and may make orders as to fines, suspensions, withdrawal of registration or licenses, specific performance, or restitution as it may deem appropriate in each case. ii) A certified true copy of the decision of the tribunal shall be supplied to the parties upon request. iii) An award or judgment of the tribunal shall be enforced as if it were a judgment of the Federal High Court upon registration of a copy of such award or judgment with the Chief Registrar of the Federal High Court by the tribunal.

Section 295(1) ISA 2007 says: any person dissatisfied with a decision of the tribunal may appeal against such decision to the Court of Appeal if; a. the decision was taken in the exercise of its appellate jurisdiction, on point of law only; or b. it is a final decision taken in the exercise of its original jurisdiction, on point of law; or mixed law and fact; or c. it is an interlocutory decision of the tribunal, on points of law only. Subsection (2) of section 295 ISA 2007 says without prejudice to the power of the tribunal to review its own decision only persons who participated in the proceedings of the tribunal may appeal against decision of the tribunal. 2. By virtue of S.289(5) of the ISA, the IST shall in the exercise of its powers, conduct its proceedings in such a manner as to avoid undue delays and shall dispose of any

matter before it finally within 3 months from the date of the commencement of the hearing of the substantive action.

This is a commendable provision since quick disposal of matters before the tribunal will guarantee confidence of investors in the Nation's capital market. The provision may however be criticized if the intention of the legislature is to expedite the disposal of cases by the tribunal only. Whereason the one hand the provision is capable of unclogging the machinery of justice as litigants can be assured that their cases would not drag on for too long as is the trend in our regular courts today, on the other hand justice must not be sacrificed on the altar of quick dispensation of justice. It makes not only good law but good sense as well that justice delayed is justice denied but justice hurried may also be justice denied. In the case of *Unilever Nigeria Plc. vs. International Standard Securities*<sup>232</sup>, an application dated 22nd Feb, 2005 was filed Pursuant to S.236 (5) of the ISA 1999<sup>233</sup> and under the inherent jurisdiction of the tribunal seeking the order of the tribunal to strike out the entire suit against the Applicant/Respondent for want of competence of the tribunal. The ground for the application was that the action had commenced on 17th Nov 2004 and ought to have been disposed of by the three months statutory period of 17th Feb 2005 and by *effluxion* of time of three months as stipulated under S.236 (5) of ISA 1999 the tribunal ceased to have competence. Delivering his ruling on the matter the tribunal held thus:

The subject here is the capital market which is a sensitive market. Arguing that matters which have not suffered undue delay but go beyond the three months from the date of filing instead of from the date of hearing should be struck out and parties should file the action again will affect the sensitivity of the market. The object of the legislature is to ensure quick dispensation of justice where

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<sup>232</sup> . *Unilever Nigeria Plc vs. International Standard Securities* (2007) 2 NISLR 267.

<sup>233</sup> . Now S. 289 (5) ISA 2007.

technicalities do not bog down the proceedings of the court; and where there is expeditious hearing, not necessarily to shut out parties before they were even heard.

The Supreme Court has put this argument to perfect rest in *Chairman NPC vs. Chairman Ikare Local Government Area*<sup>234</sup> where Ayoola JSC held:

Notwithstanding that the procedure adopted by the commission may have been good intentioned in an effort to dispose of as many complaints as possible within a limited time, proceedings cannot be hurried at the expense of justice. Justice delayed, it is often said, is justice denied but it is equally true that justice hurried may be justice buried.

Before coming into effect of the IST, the apex capital market regulator; the Securities and Exchange Commission (SEC) and the Self-Regulatory Organization (SROs) like the Nigerian Stock Exchange (NSE) and the Chartered Institute of Stock Brokers (CIS) were inundated with cases from the marketplace. But without the powers of a court, the SEC and the SROs had been limited in their enforcement abilities. With the coming of the IST it is on record that through specific performance<sup>235</sup>, misappropriated client's money by market operators have been recovered by the tribunal and cases of non-remittance of issue proceeds by Issuing Houses to the issuer/company has been **enforced**<sup>236</sup>. The tribunal has expanded the frontiers of capital market's jurisprudence in Nigeria with its decisions. These decisions as reported in the volumes of the Investments and Securities Law Reports (ISLR) have positively changed the routine way of doing things in the Nigerian capital market.

#### **4.8.1 Enforcement of Judgment of the IST.**

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<sup>234</sup>.(2001) 13 NWLR (pt 731) 540 at 559 Para A – H.

<sup>235</sup>.*Chief Ezemegbe Livinus vs. Nigeria Stock Exchange & Anor.*(2009) 3 N.I.S.L.R. 113.

<sup>236</sup> . *F.I.S. Securities Limited vs. Securities Exchange Commission (SEC)* (2004) 1 N.I.S.L.R. 116. See also *Lighthouse Assets Management Company Limited vs. SEC.* (2004) 1 N.I.S.L.R. 81.

The tribunal on hearing the parties may confirm, modify or set aside an order of the Commission. Section 293 (1) of the Act also provides that the tribunal's judgment shall be in a written form and may impose sanctions such as fines, suspensions, withdrawal of license, order specific performance or restitution. The award or judgment of the tribunal is not self-executing but becomes effective upon its enrolment or registration at the registry of the Federal High Court by the successful party. This goes further to confirm that the tribunal is a superior court of record although an appeal against its decision does not lie on the Federal High Court or the High Court of a State but to the Court of Appeal. On the contrary, registration and enforcement of its award by the Federal High Court confirms and puts the tribunal on the same pedestal as the Federal High Court.<sup>237</sup> A dissatisfied party may bring an application before the Federal High Court to refuse the enrolment or registration on the ground that the trial was vitiated by one form of irregularity or the other. This may be a regular objection when one bears in mind that some of the members of the tribunal are not legal practitioners.<sup>238</sup> A judge versed in the ways of civil procedure may likely accept such argument and hold that it will amount to abuse of judicial process if he has to give validity to such award or judgment.

#### **4.8.2 Appeal from the Decision of IST.**

Appeal refers to a proceeding to have a decision reconsidered by a higher authority, especially the submission of a lower court or agency's decision to a higher court for review and possible reversal.<sup>239</sup> The nature of an appeal is such that it is not an inception of a new case and it is generally regarded as a continuation of the original suit rather than an inception of a new case, the Appellant, that is the person not satisfied or aggrieved with the judgment of

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<sup>237</sup>. See Section 293(3) of the Act.

<sup>238</sup>. Okojie E.A and Enakemere L. E. op cit.

<sup>239</sup>. Black's Law Dictionary 8th Edition (West Group) 2004 page 105.

the tribunal call on the Court of Appeal to reconsider the facts and law in an effort to further reveal whether the tribunal's decision being appeal against meet the end of justice.

Under the ISA 2007, appeal from decision of the IST shall lieto the Court of Appeal. Section 295 (1) of the Act providesthat any person dissatisfied with a decision of the tribunalmay appeal against such decision to the Court of Appeal if:a) the decision was taken in the exercise of its appellate jurisdiction on points of law only, or “b”) if it is a final decision taken in the exercise of its original jurisdiction on point of law ormixed law and fact, or “c”) if it is an interlocutory decision of the tribunalon points of law only.It is clear from the above provision that there is no right of appeal against anydecision of the tribunal, be it interlocutory or final in the exercise oforiginal or appellate jurisdiction, on points of facts only. One wonders ifthere could be any decision of the IST on points of fact *simplicita*. A right ofappeal could only be exercised on points of law in respect of interlocutoryor appellate decision of the IST, while an appeal in respect of final decisionsof the tribunal in the exercise of its original jurisdiction may be made onmixed facts and law.The ISA, however, went further to make another provision on the right offurther appeal from the Court of Appeal to the Supreme Court.<sup>240</sup>

Muktar<sup>241</sup> submitted that section 297 of the ISA that grant a further appeal to a party who is aggrieved of the decision of the Court of Appeal's decision to the Supreme Court is not only superfluous but unnecessary fortwo reasons.First the right of appeal from the Court of Appeal to the Supreme Court isconstitutionally enshrined.<sup>242</sup> The Constitution provides<sup>243</sup> thus:The Supreme Court shall have jurisdiction to the exclusion of any other court

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<sup>240</sup> . 297 of the ISA.

<sup>241</sup> . Op cit. p. 285.

<sup>242</sup> .Section 233 of the 1999 Constitution.

<sup>243</sup> . Section 233 (1) of the 1999 Constitution, *ibid*.

of law in Nigeria, to hear and determine appeals from the Court of Appeal. It is therefore needless for any other law to re-enact the same provisions especially when Constitution makes a very clear provision. Secondly the Act establishing the IST and defining its jurisdiction has no business to define the jurisdiction of the Supreme Court in respect of appeals from the Court of Appeal. The limit to which the Act could define jurisdiction should have ended by the provision<sup>244</sup> that gives the Court of Appeal exclusive jurisdiction to hear and determine appeals from the IST. Once an appeal emanates from decision of a court or tribunal whose jurisdiction has been defined in the Constitution, it is unnecessary and superfluous for the Act to restate same.

It is pertinent that the Investment and Securities Tribunal enjoys an exclusive jurisdiction on matters in respect of which it has been established. The Act also regulates award of cost in appeal cases by section 296 of the ISA thereof which provides that 'each party to an appeal shall bear its own cost.' This provision seems to be novel. In judicial proceedings, cost is a matter of discretion of the court, which is, however exercised judicially and judiciously and it follows events. A court or tribunal exercising judicial function has an absolute and unfettered discretion to award or refuse costs depending on the circumstances of each case in *N.B.C.I v Alfijir (Mining) Nig Ltd*<sup>245</sup> the Supreme Court commenting on the power of court in awarding cost held thus:

A court has an unfettered and absolute discretion to award or refuse costs in any particular case, but that discretion must be exercised judicially and judiciously. Thus, the assessment of the amount allowed in terms of an award of costs is the responsibility of the court, which determines what is reasonable in the circumstances. And when the court, in exercise of its discretion, orders the costs payable and does so without being capricious, in the

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<sup>244</sup> . Section 295 of the Act, *ibid*.

<sup>245</sup> .(1999) 14 NWLR (pt 638) 176 at 203, paras A-B.

sense that it is ordered in honest exercise of discretion, it will not be questioned. The Court of Appeal in the case of *Delta Steel (Nig) Ltd vs. A.C.T. Inc.*<sup>246</sup> similarly held thus: Cost follows the event. Thus, a court in awarding costs will always take into consideration all expenses reasonably incurred by the successful litigant in the ordinary course of the prosecution of the suit. Extraordinary or unusual expenses are never taken cognizance of.

One wonders why the law makers blindly repeated section 244 of the ISA 1999 that disrobes the IST of its discretion to award costs only in respect of appeal matters. If the IST could award cost in respect of first instance matters, it is difficult for one to see reason why it has been stripped off a parallel discretionary power in appeal cases. One gets a very dim view on why these provisions were blindly transplanted from the ISA 1999 into the Act. It is the opinion of this researcher with due respect to Muktar<sup>247</sup>, that the learned author and Justice of the Court of Appeal misconstrue the whole essence of the ISA being specific in the nature of appeal and the cost accruable to parties that ventured into the legal testing of the decision of the IST on the following reasons.

- a. The ISA claimed that the IST is a specialized Tribunal with specific jurisdiction on capital market disputes and its jurisdiction is not generic. The legislators are right to have legislated that the appellate jurisdiction of the IST extends to the Supreme Court. to stop at the Court of Appeal and or extend the appellate jurisdiction of the IST to the Supreme Court like in the case of the Legislators limiting the appellate jurisdiction of decision of the National and State Houses of Assembly Election Petition Tribunal to the Court of Appeal and not the Supreme.<sup>248</sup> The Legislator could likewise legislate and limit,

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<sup>246</sup>. (1999) 4 NWLR (pt 597) 53 at 68, para G.

<sup>247</sup>. op cit.

<sup>248</sup>. Section 246 (3) of the 1999 Constitution.

expand the appellate jurisdiction of the IST as correctly done in section 297 of Isa that appeal could further lie to the Supreme Court.

- b. it is not all costs that require the discretion of the trial court as most rules of court fix the payment of some costs that may be accruable to the judiciary like in the case or an instance when a party fails to file a process within a specific time frame. Order 9 Rule 5 of the Kaduna State High Court Civil Procedure Rules 2007 provide that if a defendant file an appearance after the time file in the originating process, the defendant shall pay to the court an additional fee of #200.00. (Two Hundred Naira) for each day of default. The Court of Appeal in Case of *Ogbuehi Sylvester and Two Other vs. Theophilus Oguajuo Ohiakwu*<sup>249</sup> states: “There is no doubt when a mandatory word like “shall” is used in the rules to prescribe a particular result, it means that the legislature intended only that result and no other and if a permissive word like “may” is used in prescribing a result, it means the legislature does not intend that such result must occur”.

This section did not give discretion to the Court Judge for the award of cost. But the statute fixed the cost accruable in certain situation. It means therefore that cost is not wholly the discretion of the judge. The legislature has the right to fix and refuse cost as section 292 of the ISA has correctly refused payment of cost to party who intends to appeal against the decision of the of Tribunal.

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<sup>249</sup>. (2013) WRN Vol. 49.P. 87.at 121 lines 15 to 45.

## CHAPTER FIVE

### SUMMARY AND CONCLUSION

#### 5.1. Summary.

The capital market subsector is a part of the financial sector though not governed by the Banks and other Financial Institution Act but governed by the Investments and Securities Act. This sector is structured in making funds available to other sectors with the intention of medium and long-term loan facilities. The major thrust of the market is to encourage both local and foreign investors to invest in the several real time investments the capital market offers. But, investors do not just put in their hard earned monies without the investor being sure of accruable interest from their investment. Disputes, being normal phenomenon may occur in the human relation either due to mistake or deliberate human idiosyncrasy between the market regulators, market players and or market investors. In a bid to curb the long stay of cases in our regular courts which may span for upward to ten or twenty years depending on the number of pending suits and interlocutory appeal, the Investment and Securities Act 1999 introduced the Investments and Securities Tribunal with a view of resolving capital market disputes in a fair, timely and professional manner with justice in view.

This research is centered on the appraisal of the law and practice of the Investments and Securities Tribunal in resolving capital market disputes in Nigeria. This research traced the genesis of the Investments and Securities Tribunal and the underpinning reasons that led to the establishment of the Investments and Securities Tribunal as the judicial organ of the Nigerian capital market.

The Investments and Securities Tribunal resolves capital market disputes by adopting litigation procedures and practice which outlaws technicalities in every segment at quest in resolution of the capital market disputes in Nigeria. The Investments and Securities Tribunal adopts procedures in line with international best practices that are fast, just and professional arbiters. The Tribunal, as a means of ensuring that capital market operators and investors, are given adequate opportunity to resolve their disputes without the said dispute filed before the Tribunal, establishes the Alternative Disputes Resolution Center that encourages parties to opt for any of the ADR methods of resolution of disputes before these disputes end in the Tribunal if the parties are unable to resolve their quarrels. No doubt, both market investors, regulators of the market and capital market litigation experts have applauded the Investments and Securities Tribunal for the establishment of the capital market ADR center.

This research has shown that the Investments and Securities Tribunal adopts the frontloading system of parties intending that the Tribunal resolve their disputes to frontload every document and witness statement on oath that a party intend to rely on during the hearing of the case before the Tribunal. The frontloading system saves times, of both the members of the Tribunal and the litigants as the issue of examination in chief has been extinguished because the witness had frontloaded the written statement on oath beforehand. Some aspects of the Tribunal's rules has attracted a myriad of criticisms like the situation wherein the Tribunal is expected to dispense with cases before the Tribunal three months from the date of hearing to the final judgment of the case. This is because justice rush may be justice crush which may leave the litigant unsatisfied with the decision of the Tribunal.

This research work extensively discussed on the jurisdictional conflict between the Investments and Securities Tribunal and the Federal High Court with respect to section 294 of the ISA. This conflict is born out of the premise that section 251 of the 1999 Constitution donated to the Federal High Court exclusive jurisdiction to deal with matter relations to companies and most of the dealings in and out of the market are from registered companies. Flowing from that line, the capital market falls under the exclusive jurisdiction of the Federal High Court but this research has shown that the Investments and Securities Tribunal has exclusive jurisdiction to resolve capital marketdisputes as the Investments and Securities Act has empowered the IST with that exclusive jurisdiction of determination of capital marketdisputes but the Federal High Court still has exclusive jurisdiction in instances if the matter involves winding up, but not on issues relating to investments in the Nigeriancapital market.

## **5.2 Findings.**

The Investments and Securities Tribunal remains a welcome development to every capital market litigation expert. But despite these noted beautiful developments brought into the securities law and practice in Nigeria with the introduction of the Investmentsand Securities Tribunal, the following findings flows from the establishment of the Investments and Securities Tribunal:

1. The first finding of this research is the problem of section 275, 281 and 315 of the Investments and Securities Act (ISA) saddling the Minister of Finance with the responsibility of appointing and removal of the Chairman and Members of the IST without recourse to the National

Assembly or the National Judicial Council. By the provisions of sections 275, 281 and 315 of the ISA, the IST would hardly be impartial in deciding any issue involving the Federal Government of Nigeria and a market operator.

2. Section 289 (5) of the ISA provided three months from the date of commencement of hearing to the date of judgment. This aspect of the modus operandi of the Tribunal may affect substantial justice due to time constraint to resolve all legal issues and it goes with the popular saying that justice rush may be justice crush. This is further place on the scale of the right of a litigant pursuant to section 240 and 241 of the Constitution, that grants right of appeal on any ruling of the tribunal that may affect the right of a litigant.
3. by virtue of section 293 (3) of the Investment and Securities Act, the Tribunal does not have the mechanism of enforcing its judgment but a reliance on the Federal High Court which may stand as a reason for delay of enjoyment of judgment by litigants, as the Chief Registrar of the Federal High Court cannot be compelled by the Tribunal to register the judgment of the Tribunal as that of the Federal High Court. The registration of IST's judgment at the Federal High Court may lead to forum shopping, as litigants that wants to challenge an improper execution of judgment would be faced with the issue of which of the two courts to approach.

4. The development of modern scientific and computerized businesses in Nigerian is not alien to the Nigerian capital market. These wide beneficial modernizations have also brought with it a wide range of dangers that may lead to crime. Section 290 (3) of the ISA qualifies the IST as mere civil court without criminal jurisdiction. The danger of vesting the IST as having only a civil jurisdiction lends investors and some market operators to the failure of not effectively covering the cybercrimes or cyber related criminal transaction that could also occur at the Nigerian capital market. The absence of criminal jurisdiction and power of the IST have inhibited the IST to fully cover all operations in the Nigerian capital market as a specialized court. Cyber criminals and or cybercrimes are left to the regular courts, the Economic and Financial Crimes Commission and the Attorney General of the Federation to prosecute such offenders even though the main or genealogy of the crime emanates from the Nigerian capital market.

### **5.3 Recommendations.**

This research recommends as follows:

1. This research recommends that section 275 of the ISA should be amended by the National Assembly and the said section should read; the Tribunal shall consist of ten members who shall be appointed by the Minister of Finance on the recommendation of the National Judicial Council. The appointment of the chairman and members of the IST by the

Minister of Finance should be subject to the recommendation of the National Judicial Council.

2. Section 289 (5) of the ISA should be amended by the National Assembly to read: “The Tribunal shall, in the exercise of its powers under this Act, conduct its proceedings in such manners as to avoid undue delays and may dispose of any matter before it finally, *if practicable*, within three months from the date of the commencement of the hearing of the substantive action”.
3. There is the need to delete section 293 (3) of the ISA and the National Assembly should enlarge the power of the Chief Registrar of the IST to the extent of enforcing the judgment of the IST without recourse to the Chief Registrar of the Federal High Court. Or, in the alternative, the National Assembly should enact sub-section (4) of Section 293 of the ISA to read “Failure of the Chief Registrar to register the judgment of the Tribunal within 14 days from the date of the payment of appropriate filling fees, the Tribunal shall mandate the Chief Registrar of the Federal High Court and shall award adequate cost against the Chief Registrar”.
4. Section 290 (3) of the ISA should be amended and the National Assembly should delete the word “civil court” from the said section. The IST should be allowed to assume criminal jurisdiction only when the criminal matter and or case emanates from a matter that is before the Tribunal.

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