

**THE REGULATORY ENVIRONMENT FOR FOREIGN INVESTMENTS IN
NIGERIA**

BY

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TABLE OF STATUTES

NIGERIA

Attorneys Act 53 1979
 Banks and other Financial Institutions Act 1991 (BOFIA)
 Brewing Regulations, Legal Notice.68, 1959
 Central Bank of Nigeria Act 2007
 Collective Investment Schemes Control Act 45 2002
 Companies Act (South Africa) 2008
 Companies and Allied Matters Act 1990 (CAMA)
 Companies Income Tax Act 1990 (CITA)
 Customs Airport (Re-designation Order) L. N. 31, 1967
 Customs and Excise Management Act 1990
 Drawback Customs Regulations, Legal Notice 70, 1959
 Estate Agency Affairs Act 112 1976
 Export (Incentives & Miscellaneous provisions) Act 1990
 Family Economic Advancement Programme Establishment Act 1997 (FEAP)
 Finance (Miscellaneous Taxation Provisions) Decree, No 32, 1996
 Financial Advisory and Intermediary Service Act 45 2002
 Financial Intelligence Centre Act 38 of 2001
 Foreign Exchange (Monitoring and Miscellaneous Provisions) Act 1995
 Immigrations Act Cap I 1 Laws of the Federation of Nigeria 2004
 Immigrations Regulations L.N. 93 1963
 Industrial (Income Tax Relief) Act 1990
 Industrial Development (Income Tax Relief) Act 1990
 Investments and Securities Act (2007) Laws of the Federation of Nigeria
 Long Term Insurance Act 1998
 Medical Schemes Act 131 1998
 Money Laundering Prohibition Act 2004
 National Gambling Act 1996
 Nigeria Investment Promotion Commission Act 1995 (NIPC)
 Nigerian Financial Intelligence Unit: Anti-Money Laundering/Combating the Financing of Terrorism (AML/CFT) Reporting Guidelines 2012

Petroleum Profit Tax Act 1990 Cap P13 Laws of the Federation of Nigeria 2004
Postal Services Act 124 1998 Regulations: Related services. Unreserved postal services
Securities Services Act 2004
Short-Term Insurance Act 1998

SOUTH AFRICA

The Banks Act of South Africa 94 1990 (As amended) including all amendments up to and including the Banks Amendment Act 2003 Act No 19 of 2003
The Constitution of the Federal Republic of Nigeria 1999 as (Amended)
Trust Property Act 57 1988

LIST OF ABBREVIATIONS

AML	Anti-Money Laundering
BOFIA	Banks and other Financial Institutions Act
CAMA	Companies and Allied Matters Act
CFT	Combating Financing Terrorism
CITA	Companies Income Tax
FEAP	Family Economic Advancement Programme Establishment
FICA	Financial Intelligence Centre Act
ISA	Investment and Securities Act
MLPA	Multi-lateral Peering Agreement
NIPC	Nigerian Investment Promotion Commission

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THE REGULATORY ENVIRONMENT FOR FOREIGN INVESTMENTS IN NIGERIA

ABSTRACT

Foreign investment is one of the key elements of economic development in Nigeria. Yet the process of regulating it is challenging and problematic, particularly in the northern parts of Nigeria where people prefer informal investments and tend to ignore the necessary laws governing investments. Today in Nigeria as in most African countries, there are many investors, most of them from Asia, who are very insensitive to the rule of law. They invest and carry out business in Nigeria and particularly northern Nigeria often in breach of investment laws. Nigerian investment regulatory laws were made to provide security and protection of investors' interests, but these laws are ignored due to their technicality. There is no doubt that the regulatory environment for investment will work better and more securely when there is a system of compliance. The dissertation will focus on the theoretical and practical analysis of investment security laws in Nigeria, and not the root of investment as a concept itself which is beyond the scope of this work.

CHAPTER ONE

1.1

Background

The basic factors that attract and enhance investment are numerous. Basically, they include abundance of human and natural resources, large market, political stability, free market economy, private sector participation, free flow of investment, attractive incentives, skilled and low cost labour, fast growing financial sector and infrastructure.¹The above requirements have been taken care of by Nigerian legislation in respect of investment to ensure a free and secured environment for people to invest. The Constitution of the Federal Republic of Nigeria, 1999 (as amended) promotes free enterprise. The Companies and Allied Matters Act 1990 was enacted to repeal the old companies Decree and to enable people to incorporate and formalise their businesses and investments. The Investments and Securities Act 1999 that was repealed by Investments and Securities Act 2007² provide similar and more protective measures for investors. The National Investment Promotion Commission Act 1995 similarly set up a commission, conferred with the functions and powers to ensure compliance with investment regulations. The Companies Income Tax Act 1990 regulates the mode in which foreign investors and others are taxed. The Industrial Development Tax Relief Act 1990 was enacted primarily for encouraging foreign investors to invest in Nigeria because it provides a wide range of incentives by way of waivers and reliefs. Other laws include Custom and Excise Management Act 1990, the Bank and other Financial Institutions Act 1991, also the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act 1995 and the Immigration Act 1990 which are summarised later in this chapter.

1.2 Aims and Objectives

The dissertation seeks to analyse the legal frame work of Nigeria's investment legislation in the context of informal investment in Nigeria especially northern Nigeria. In doing so the dissertation highlights the benefits provided by legislation to investors who

¹ Ten reasons to invest in Nigeria. Available at <http://www.nipc.gov.ng/whyng.html>, accessed on 23 June, 2014.

² Investments and Securities Act No 29 (2007) Laws of the Federation of Nigeria.

comply with the laws. The dissertation also considers the consequences of non-compliance with these laws. It also examines the loopholes in the regulation of investment process by foreign merchants and businesses in Nigeria, to determine whether this is informed by the preference for informal ways of doing business in Northern Nigeria.

1.3 Justification

It has become imperative to undertake this research to examine compliance with investment laws in Nigeria in the light of the predominance of informal business and the growth of foreign investment in northern Nigerian and the country as a whole. It seems some investments fail and businesses collapse due to non-compliance with the investment laws and inadequate judicial and administrative remedies for affected persons to resort to. It is obvious that non-compliance with the appropriate laws contributes to making investment and business unsafe, insecure and makes it difficult to access judicial and administrative protections and remedies.

1.4 Methodology

The research is doctrinal. Materials were sourced from the library and the internet. These materials include case law, legislation, articles, books, newspaper articles, treaties and agreements and resolutions of commissions, bodies and organs established for investment purposes.

1.5 Outline of Dissertation

Chapter one presents the introduction, background and a summary of relevant laws. Following this, chapter two gives an overview and highlights of the investment legislation in force in Nigeria. In chapter three, the provisions of other jurisdictions on the movement of investment funds are examined. Chapter four discusses the efficacy of the legal frame work of investment legislation in Nigeria while chapter five makes conclusions and recommendations.

1.6 Summary of Business Laws in Nigeria

The goal of investment is to achieve the investors' required rate of return and the return should repay investor for the time, the perseverance, the risk and the pains of uncertainty during which funds are committed, speculated rate of inflation and the uncertainty of the

incoming financial benefit expected from the investment.³ In the spirit of protecting this goal, the law comes to play a key role in ensuring that it is achieved. The Nigerian Constitution provides that the state shall as nearer as possible of the ideals and objectives for which provisions are made in the laws of nation dispense the resources of the nation and promote prosperity in the interest of the nation and create an efficient, a dynamic and self-reliant economy and also protect the right of citizens to invest and engage in any business activity.⁴ The state is obliged by this law by way of policy the principles of promoting a planned and balanced economic development. It is made obligatory that the economy is not operated in such a manner as to create the concentration of wealth or the means of production and investment in the hands of few number of people or particular ethnic, tribal or religious sect and lastly allows alien or foreign participation.⁵ Following is a summary of key business laws in Nigeria.

1.6.1 Companies and Allied Matters Act 1990

The Companies and Allied Matters Act 1990 (CAMA) which was promulgated to revolutionarise the company law of the country is the most comprehensive law in respect of company matters ever passed in the country. First, it created the Corporate Affairs Commission (CAC) to implement the provisions of various company laws.⁶ The Corporate Affairs Commission, (CAC) is a body corporate that has everlasting entity and a common seal, capable of suing and being sued in its entity and capable of acquiring and holding any property movable or otherwise to enable it executes its duties and functions.⁷ The Commission (i.e. CAC) has apart from its head office in Abuja (the Federal Capital Territory) established zonal and state offices in the thirty six states (36) of the Federal Republic of Nigeria. The Corporate Affairs Commission, (CAC) replaced the Companies Registry system which made incorporation of companies an extremely difficult and chaotic venture. Secondly,

³ Johan Marx, *Investment Management* (Third Edition 2009), Van Schaik Publishers, Hatfield, Pretoria, pp 10-15.

⁴ Section 16 (2) (a) Constitution of the Federal Republic of Nigeria, 1999 as (Amended).

⁵ Section 16 (2) (b) the Constitution of the Federal Republic of Nigeria, 1999 as (Amended).

⁶ Section 1 (1) and (2) Companies and Allied Matters Act, 1 1990 cap C 20 2004, subsequently referred to as CAMA.

⁷ Section 1 (1) CAMA.

it created an audit committee constituted as an independent body to keep an eye on the directors of companies.⁸ The aim of the creation of the audit committee was to ensure transparency in the operation of the public companies. Thirdly, prior to the promulgation of the Companies and Allied Matters Act 1990 (CAMA), the 1968 Companies Act did not make provision for the prescribed least share capital but the Companies and Allied Matters Act 1990 (CAMA) provided for N10,000 and N500,000 for private limited company and public limited company respectively.⁹ The idea was to stop fraudsters from incorporating companies indiscriminately and curb the incorporation of what is popularly known as “briefcase companies”. The Companies and Allied Matters Act 1990 (CAMA) when it was promulgated was an ambitious law made with a view to helping the development of companies in the country. Some principles of common law and equity were integrated into the same law. Moreover for the first time the regulations of companies, business names registration and regulations and incorporated trustees laws were contained in a single enactment.¹⁰ The Companies and Allied Matters Act provides that non-Nigerian or foreign company may join while incorporating a company subject to the laws regulating the rights and capacity of non-Nigerians to engage in trade or business in Nigeria. Every foreign company prospecting to carry on business in Nigeria shall ensure all steps necessary are taken to obtain incorporation as a distinct entity in Nigeria and until so incorporated the foreign company shall not have an abode of business in Nigeria for whatever reason other than the receipt of notifications and other documents as required prior to incorporation.¹¹

However, a foreign company may apply to the Federal Executive Council for exclusion from the need to register indigenously if it belongs to any of the following: foreign companies brought into Nigeria by or with the approval of the Federal Government to carry out any specific loan project; foreign companies which are in Nigeria for the execution of

⁸ Section 357 CAMA.

⁹ Section 27 (2) (a) CAMA. The N10, 000.00 minimum share capital for a private company in Nigeria is equivalent of 656.82 ZAR of South Africa and the minimum share capital of N500, 000.00 for a public company in Nigeria is equivalent of 32,841 ZAR of South Africa, as at 28th day of August 2014.

¹⁰ Companies and Allied Matters Act 1990 Cap C 20 2004, (CAMA) arrangement of sections, part (A) incorporations of companies, part (B) registration of business names and part (C) registration of incorporated trustees and non-profit organisations.

¹¹ Section 20 (4) CAMA.

specified individual loan project on behalf of the donating country or international organisation; companies patronised by foreign governments contracted solely in export promotion engagements; and engineering consultants and technical experts contracted on any individual specialist project under contract with any of the government in the federation or any of their agencies or with any other person where the consent to such engagements has been endorsed by the federal government of Nigeria.¹²

1.6.2 Nigerian Investment Promotion Commission

A non-Nigerian or foreign investor is now at liberty to invest and partake in the exercise of any enterprise in Nigeria except enterprise in the “negative list” (production of arms and ammunitions and service uniforms, production and dealing in drugs etc).¹³ The foreign investor or alien may carry out business alone or jointly with Nigerians by means of a company which must first of all be formed and registered by the Corporate Affairs Commission.¹⁴ Thereafter the foreign investor is to register with the Nigerian Investment Promotion Commission.¹⁵ A foreign investor not wishing to incorporate a company or joint venture with Nigerians for doing business in Nigeria may purchase shares in a Nigerian company in any convertible Foreign/Nigerian currencies.¹⁶

Investment can be effected with foreign currency brought into Nigeria through an authorised dealer and converted to naira at the official foreign exchange market.¹⁷ The authorised dealer is bound to give a certificate of capital importation. Imported capital is guaranteed unconditional transferability and repatriation of funds with respect to both the earnings and capital.¹⁸ The Nigerian Investment Promotion Commission will act as liaison

¹² Section 56 (1) CAMA.

¹³ Section 17 Nigerian Investment Promotion Commission Act 1995 Cap N117 LFN 2004, subsequently referred to as NIPC Act.

¹⁴ Section 19 CAMA.

¹⁵ Nigerian Investment Promotion Commission Act 1995 Cap N117 LFN 2004.

¹⁶ Section 21 NIPC Act.

¹⁷ Sections 12, 13 and 15, Foreign Exchange (Monitoring and Miscellaneous Provisions) Act 1995 Cap F 34 2004, subsequently referred to as FOREX Act.

¹⁸ Section 15 (4) FOREX Act.

between the foreign investor and the relevant government departments and agencies particularly with respect to issuance of permits and other correspondence.

1.6.3 Tax Laws

The Companies Income Tax Act¹⁹ provides the modes through which the foreign investor may be taxed differently and distinctly from others. Under this law, a long range of incentives and reliefs were specified by the federal government to encourage foreign investment. Another similar law designed and promulgated to complement the Companies Income Tax was the Industrial Development (Income Tax Relief) Act,²⁰ limited and emphasises on agricultural and industrial productions export. Agricultural production and export have been on the priority list of successive governments in Nigeria since independence and a lot has been done in that regard to support both production and export to generate national income.²¹

1.6.4 Customs and Excise Management Act

The Customs and Excise Management Act 1990²² has made much impact on the foreign investment environment in Nigeria. For example brewing regulations when read together with other subsidiary laws under the main Act, provide the framework for foreign investment in consumable goods.²³ Furthermore, the Customs Airport (Re-Designation) Order²⁴ designates specific places i.e. Kano and Lagos to be areas of landing and departure of customs aircraft for the purposes of the application of the enactment to customs aircrafts. The Customs Ports (Re-designation) Order²⁵ also designates several areas named in the order put together with approved wharves adjacent thereto as places of arrival and departure in Nigeria of ships by sea for customs purposes and the categorisation of those places in the customs ports order shall

¹⁹ Section 23 Companies Income Tax Act 1990 Cap C21 Laws of the Federation of Nigeria 2004, subsequently referred to as CITA Act.

²⁰ Industrial Development (Income Tax Relief) Act 1990 Cap 17 Laws of the Federation of Nigeria 2004, subsequently referred to as IDA Act.

²¹ *Ibid*

²² Customs and Excise Management Act 1990 Cap 117 Laws of the Federation of Nigeria 2004.

²³ Brewing Regulations L.N. 68 1959.

²⁴ Customs Airport (Re-designation Order) L.N. 31 1967.

²⁵ Section 1 (1) Customs Airport (Re-designation Order) L.N. 31 of 1967.

continue in force.²⁶ The Drawback (Customs) Regulations; provide that part of these regulations shall apply in relation to the grant of a drawback of customs duties paid on the import of any goods which are re-exported in the same manner as that in which they were imported.²⁷

1.6.5 Financial Institutions and Foreign Exchange Laws

Other laws such as Banks and other Financial Institutions Act²⁸ and Foreign Exchange (Monitoring and Miscellaneous Provisions) Act²⁹ have provisions that are relevant to and important for foreign investment. The two Acts play a key role in the transfer of business capital from foreign accounts to Nigerian domiciliary accounts to make it more formal and secure. The Foreign Exchange (Monitoring and Miscellaneous Provisions) Act³⁰ regulates the interest rate to be charged on such accounts for the purpose of encouraging investors. The Act establishes and regulates the autonomous foreign exchange market and dealings in the market where dealings in foreign exchange shall be in accordance with the provisions of the Act. It provides the instrument of transaction in the market. The transactions in the market shall be carried out in any convertible foreign currency.³¹ It further provides that apart from transacting in any convertible foreign currency, transaction in the market shall also be carried out through the usual money market instruments that is foreign bank notes, foreign coins, travellers cheques, bank draft, mail and telegraphic transfers and such other money market instruments as the Central Bank of Nigeria may, from time to time with the consent of the Minister, determine.³² Under this law the person executing transactions is adequately guaranteed privacy in the market, he shall not be asked and if asked shall not be under duty, to disclose the sources of the foreign currency to be sold in the market.³³ The foreign currency

²⁶ *Ibid.*

²⁷ Section 1 (2) Drawback (Customs) Regulations L.N. 70 of 1959.

²⁸ Bank and Other Financial Institutions Act (1991) 25, as amended.

²⁹ Foreign Exchange (Monitoring and Miscellaneous Provisions) Act, 17 (1995) Cap F 34, 2004, subsequently referred to as FOREX Act.

³⁰ Section 16 FOREX Act.

³¹ Sections 10 and 11 FOREX Act.

³² Section 20 FOREX Act.

³³ Section 22 FOREX Act.

brought in pursuance to this Act shall be liable to being seized or forfeited or subjected to any form of expropriation by the Federal or State Government except in accordance with the provision of this Act.³⁴

The Act went further to make provision for the appointment of authorised dealers and authorised buyers. The Central Bank of Nigeria may appoint, as an authorised dealer or authorised buyer of foreign currency, any bank or non-banking corporate organisation which shows evidence of sufficient capital and capacity to operate in accordance with the provisions of this Act.³⁵ The authorised dealer or authorised buyer operates in the market subject to terms and conditions impose by the Central Bank of Nigeria and as may specify in the letter of appointment.³⁶ The transaction in the market shall be an inter-bank system that is between the public and authorised dealers appointed under the Act.³⁷ Transaction in the market shall be prescribed, from time to time by the Central Bank of Nigeria.³⁸ The Central Bank exercises supervisory role and monitor the operation of the market to ensure the efficient operation of the market. The Minister may from time to time, issue such directives not inconsistent with this Act as he may deem fit or appropriate for the efficient operation of the market.³⁹

1.6.6 Immigration Act 1963

The Immigration Act⁴⁰ also has key implications for a foreign investor as no foreigner shall on his own account or in joint-venture with any other person operates a profession or set-up or takeover any company with limited liability for any such reason without the written approval of the Minister of Internal Affairs.⁴¹ Therefore any person intends entering into Nigeria for any of the reasons above shall produce the Minister's approval to an immigration officer; and failure to do so shall be an offence under the immigration laws and any person

³⁴ Section 2 FOREX Act.

³⁵ Section 5(1) FOREX Act.

³⁶ Section 5 (2).

³⁷ Section 7(1) FOREX Act.

³⁸ Section 7 (2) FOREX Act.

³⁹ Section 8(2) FOREX Act.

⁴⁰ Immigration Act1963 Cap I 1 Laws of the Federation of Nigeria 2004.

⁴¹ Section 8 (1) (b) Immigration Act 1990.

who commits and convicted of such an offence shall, be liable on conviction, to deportation as a prohibited immigrant.⁴²

The entry into Nigeria for business purpose is on the authorisation of the Minister, the authorisation of entry for the setting of a profession, investment or trade in Nigeria shall, subject to such terms as the Minister may impose, take the form of a business permit prescribed in the form of the Immigration Regulations.⁴³ Nothing, however, in any business permit shall give the holder of such permit to enter and remain in Nigeria except such a person has a valid residence permit and in the case of a foreign investor, a valid visa for residential purposes as the case may be.⁴⁴ A business permit may, at any time be revoked, changed, or cancelled by the Minister and every person having such a permit shall notify the Minister of Interior or the Director of Immigration of any change whatsoever in the name or address of the business or trade.⁴⁵

The next chapter gives an overview of Nigerian business laws that apply to foreign investment. The benefits of these laws to foreign investors and local people who deal with them as well as the problem of non-compliance with these laws and the consequences thereof will also be examined in subsequent chapters.

⁴² *Ibid.*

⁴³ Section 3 (2) Immigrations Regulations L.N. 93 1963, Commencement 1st August, 1963.

⁴⁴ Section 4 (1) Immigrations Regulations L.N. 93 1963, Commencement 1st August, 1963.

⁴⁵ Section 4 (4) Immigrations Regulations L.N. 93 1963, Commencement 1st August, 1963.

CHAPTER TWO

AN OVERVIEW OF CURRENT LEGISLATION APPLICABLE TO FOREIGN INVESTMENT IN NIGERIA

2.1 Company Incorporation

Nigerian investment legislation is generally favourable to everyone wishing to invest and do business in the country. The relevant statutes made adequate provisions to accommodate the current socio-economic challenges facing investment security and went further to provide simple and unambiguous procedures for foreign investment. A foreigner or an alien desiring to invest in Nigeria must comply with a number of statutes which are discussed in this chapter. The Companies and Allied Matters Act (1990) CAMA provides that a foreign investor or an alien can establish a business according to the provisions of any law governing the rights and status of an alien or a foreign company to join in forming a company. Here there are different types of companies for an investor to choose from, depending on what he intends to do.⁴⁶

CAMA provides that an incorporated company in Nigeria may be a company with the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them (in this Act termed “a company limited by shares”)⁴⁷ or a company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up (in this Act termed “a company limited by guarantee”)⁴⁸ or a company not having limit on the liability of its members (in this Act termed “an unlimited company”).⁴⁹ A company of any of the foregoing types may either be a private company or a public company.

⁴⁶ Section 54 Companies and Allied Matters Act (1990) Cap C 20 Laws of the Federation of Nigeria 2004 subsequently referred to as CAMA.

⁴⁷ Section 21 (1) (a) CAMA.

⁴⁸ Section 21 (1) (b) CAMA.

⁴⁹ Section 21 (1) (c) CAMA.

A private company is the company which in its memorandum and article of association clearly stated to be a private company. A private company shall by its articles restrict transfer of its shares. The total number of members in a private company shall not exceed 50, not including members who are bona-fide in the employment of the company and have continued after the determination of that employment to be members of that company. Where one or two persons hold one or more shares in a company jointly they shall be treated as a single member in order to maintain the statutorily required maximum number of a private company.⁵⁰ A private company shall not, unless authorised by law invite the public to subscribe for any shares or debentures of the company or deposit money for a fixed period or payable at call or not bearing interest.⁵¹ A private company is restricted from acting in the way a public company does. For example where a company defaults in complying with the statutory requirements in respect of a private company, the company shall cease to be entitled to the privileges and exemptions conferred on private companies by or under the Companies and Allied Matters Act and the Act shall apply to the company as if it were not a private company.⁵² However, if the court on the application of the company or any person interested in the company is satisfied that the default or failure to comply with statutory provisions above was accidental or due to inadvertence or to some other sufficient cause or that on other grounds it is just and equitable to grant relief, the court may on such terms and conditions as may be deemed just and expedient, order that the company be relieved from the consequences of the default or non compliance.⁵³

A public company is any company other than a private company and its memorandum shall state that it is a public company. The most distinctive feature distinguishing a public company from a private company is the membership, not exceeding 50 persons in the case of a private company and the unlimited number of members in respect of a public company. Furthermore, there are no restrictions on transfer of shares of public companies unlike in the private companies.⁵⁴

⁵⁰ Section 20 (2) CAMA.

⁴⁸ Section 5 (a) CAMA.

⁵² Section 5 (b) CAMA.

⁵³ Section 27 CAMA.

⁵⁴ *Ibid.*

An unlimited company is a company with unlimited liability to its members in the event of its being wound up. Where a company is unlimited, the members are liable to pay personally the total liability of the company unlike a limited liability company where members are only liable to the amount of shares they subscribed in the memorandum of association of the company in the event of its being wound up. Before the promulgation of the Companies and Allied Matters Act 1990, unlimited companies were not registered with a share capital but as from the commencement of the Companies and Allied Matters Act in 1990, an unlimited company shall be incorporated having a share capital. Where an existing unlimited company is not registered with a share capital, it shall, not later than the fixed day, alter its memorandum in order to become an unlimited company with a share capital not below the minimum share allowed under the Companies and Allied Matters Act.⁵⁵

A company limited by guarantee is formed for the purpose of enhancing commerce, art, science, religion, sports, culture, education, research, charity, or other similar objects, and the profit and property of the company are to be invested in the promotion of its objects and no portion thereof is to be paid or transferred directly or indirectly to the members of the company except as allowed by the Companies and Allied Matters Act.⁵⁶ The company shall not be registered as a company limited by shares, but may be incorporated as a company limited by guarantee. A company limited by guarantee shall not be incorporated with a share capital and with the coming into effect of the Companies and Allied Matters Act 1990, every existing company limited by guarantee and having a share capital shall, not later than the day appointed by the Companies and Allied Matters Act 1990, change its memorandum in order to become a company limited by guarantee and without a share capital.⁵⁷ In the case of a company limited by guarantee all the relevant provisions in the memorandum or articles of association or in any resolution of the company purporting to give any person a right to participate in the divisible profit of the company otherwise than as a member or purporting to share the company's undertaking into shares or interests shall be void.⁵⁸

⁵⁵ Section 21 (6) CAMA.

⁵⁶ Section 26 (4) CAMA.

⁵⁷ Section 26 (2) CAMA.

⁵⁸ Section 26 (3) CAMA.

A company limited by guarantee shall not be registered with the object of doing business in order to profits for distribution to its members. The memorandum of a company limited by guarantee shall not be accepted and registered without the express permission of the Attorney-General of the Federation of Nigeria. Where any company limited by guarantee carries on business for the purposes of sharing the profits, all directors and members thereof who are aware of the fact that it is so doing business shall be jointly and severally liable for the payment and discharge of all the debts and liabilities of the company and every such officer and member shall be liable to a fine not exceeding hundred Naira (N100) for everyday which it carries on such business.⁵⁹

2.2 Securities and Investment Regulations

The Investment and Securities Act 2007 and subsidiary legislation provide rules and regulations governing the registration of securities exchange and capital trade points.⁶⁰ The Act, amongst other things, provides for (a) the establishment of the Securities and Exchange Commission;⁶¹ (b) the repeal of the Investments and Securities Act 1999;⁶² (c) the enlarged powers and functions of the Commission over the capital market ;⁶³ and (d) a set of new market infrastructures and wide-ranging system of regulation of investment and securities business in Nigeria, especially in the area of mergers, acquisitions and take-over, and collective investment schemes, where new provisions were made.⁶⁴ No securities exchange or capital trade point starts business until is registered with the Securities and Exchange Commission in line with the provisions of this Act and the rules and regulations made there under.⁶⁵ An application for registration as a securities exchange or capital trade point shall be made to the Commission in the outlined form and in such manner prescribed in this Act.⁶⁶ The

⁵⁹ Section 26 (6) CAMA.

⁶⁰ Investments and Securities Act 2007 Laws of the Federation of Nigeria subsequently referred to as ISA.

⁶¹ Section 1 (1) and (2) ISA.

⁶² The Long Title of the Investments and Securities act, 2007.

⁶³ Sections 13 and 14 ISA.

⁶⁴ Sections 117 - 131 of Investments and Securities Act and Explanatory Memorandum, the Investments and Securities Act 2007 (ISA).

⁶⁵ Section 28 ISA.

⁶⁶ Section 28 (2) ISA.

Commission may consider the applicant for registrations as a securities exchange or capital trade point if it is satisfied that the rules of the body corporate are met, in this case the Companies and Allied Matters Act 1990. In granting its approval under the Investment and Securities Act, the Commission shall comply with the rules that the interest of the public is served by granting such approval.⁶⁷

Another key institution is the Nigerian Investment Promotion Commission (NIPC) which was established to facilitate and support investment in the Nigerian economy. The Nigeria Investment Promotion Commission Act 1995 provides a list of eligible enterprises for registration. A foreign investor may invest and partake in the operation of any of the listed enterprises in Nigeria. An enterprise in which foreign companies are allowed under this Act shall, prior to commencement of its activities, apply to the NIPC for enlistment.⁶⁸ The NIPC is under a duty within fourteen (14) working days on the receipt of an application of interest, consider and register the enterprise upon being satisfied that all required documents for registration have been duly completed and submitted or otherwise advise the applicant accordingly.⁶⁹

A foreign company may hold shares of any Nigerian company in any convertible foreign currency. There is a wide range of incentives available for special investments. Such incentives are made for the purpose of supporting identified strategic or major investments. The NIPC shall liaise with appropriate government agencies in order to specify the incentives and packages for the support and promotion of investment as the NIPC may specify.⁷⁰

The NIPC shall among other things regulate investment and securities transactions in Nigeria in accordance with Investment and Securities Act 2007, register and issue regulations for securities exchange, capital trade points, futures, options and derivative exchanges, commodity exchange and any other recognised investment exchange in Nigeria.⁷¹ It shall also register and issue regulations for securities for sale to the public; offer assistance in all aspects

⁶⁷ Section 29 (3) ISA.

⁶⁸ Sections 20 and 27, Nigeria Investment Promotion Commission Act 1995 Cap I 17 Laws of the Federation of Nigeria 2004, subsequently referred to as NIPC Act.

⁶⁹ Section 21 NIPC Act.

⁷⁰ Section 28 NIPC Act.

⁷¹ Section 27 NIPC Act.

that cover fund assistance as may be essential to promoters and investors with prospect of establishing securities exchange and capital trade points.⁷² The Nigeria Investment Promotion Commission prepares adequate guidelines, organises sensitisation programmes and disseminates information essentially for setting up of the securities exchange and capital trade points.⁷³ It registers and regulates legal entities and individual capital market operators as defined by the Investment and Securities Act 2007; registers and regulates the workings of venture capital funds and collective investment schemes including mutual funds.

The Investment and Securities Act 2007 facilitates the establishment of a national system for securities trading in Nigerian capital market for the protection of investors and having fair and orderly markets.⁷⁴ The Act also facilitates the linkage of markets' securities through modern communications and data processing facilities in order to foster efficiency, promotes competition and increase the information availability to brokers, dealers and investors.⁷⁵ The Act requires the Commission to keep and operate a different register of foreign direct investment and to maintain fair and orderly markets and to this end put in place national trust scheme for compensating investors' loss not covered under the investors' protection funds run by the securities exchange and capital trade points.⁷⁶

In respect of foreign investors, the Securities and Exchange Commission shall put in place and sustain a different register of foreign direct investments and foreign portfolio investments, ensure the protection of the integrity of the securities market against arbitrariness as a result of insider practice trading and act as highest controlling agency for the capital market, including the promotion and registration of a self-regulatory organisation for the capital market and capital market trade Unions to which the Commission may give its powers.⁷⁷

⁷² Section 15 (4) Foreign Exchange (Monitoring and Miscellaneous provisions) Act, 17 (1995) Cap F 34, 2004, subsequently referred to as FOREX Act.

⁷³ *Ibid.*

⁷⁴ Section 20 Investment and Securities Act 2007 (ISA).

⁷⁵ *Ibid.*

⁷⁶ Section 13 (k) ISA.

⁷⁷ *Ibid.*

The Commission under its powers examines, gives approval and issue regulations of mergers, acquisitions and all forms of business combinations.⁷⁸ It also collates information from and undertakes, inspects, conducts findings and audits of the securities exchange, unit trusts, mutual funds, capital trade points, futures, options and derivative exchange and their agencies and self-regulatory institutions in the securities industry.

The Securities and Exchange Commission also conducts research into all or any aspect of the securities industry to curtail fraud and unfair practices relating to the securities industry and disqualifies improper persons from being engaged anywhere in the securities industry.⁷⁹ It liaises with the regulating authorities and those responsible for the supervision of other financial institutions locally and overseas and performs such other duties and exercises such other powers as conferred by the Investment and Securities Act as are essentially required for giving full effect to the provisions of the Act.⁸⁰

Lastly, for the purpose of providing security to the capital market environment, the Securities and Exchange Commission is empowered to use its specialised departments, to liaise with capital market operators that include legal entities, securities exchange and individuals, professional firms, who carry out investment business as investment advisors and consultants.⁸¹

2.3 Taxation Regulations

The Companies Income Tax Act 1990 provides incentives and reliefs. A series of incentives and reliefs have been specified by the Federal Government of Nigeria to boost foreign investment particularly in respect of industrial and agricultural products for export. These include pioneer status certificate issued by the Nigerian Investment Promotion Commission to the effect that the company is exempted from payment of tax for three (3) to five (5) years.⁸² With regard to pioneer status industries, where the President through the Council having been satisfied of any industry's business is not in line with the interest of

⁷⁸ Section 13 (p) ISA.

⁷⁹ Section 13 (r) and (z) ISA.

⁸⁰ Section 13 (y) ISA.

⁸¹ Section 13 (dd) ISA.

⁸² Section 1 Industrial (Income Tax Relief) Act (1990) Cap 17 Laws of the Federation of Nigeria 2004.

Nigerian economy, or that there are suitable prospects of further development in Nigeria of any industry or that it is suitable in the public interest to enhance the development or setting of any industry in Nigeria by declaration such an industry to be a pioneer industry and any product of the industry to be a pioneer product, the Council (National Council of Ministers) may issue directives for publication in the official gazette of a list of such industries and products upon publication as aforesaid, but subject to the provisions of this Act,⁸³ application may at any time thereafter be made under this Act, for the issuance of pioneer certificate to any company in relation to any such pioneer industry or pioneer products and the Council may in accordance with the provisions of this Act, issue the certificate to the company in any proper case.⁸⁴ An application pursuant to this Act for the inclusion of any industry to the list of pioneer industries and pioneer products provided the prescribed conditions are met. Any application under this section of the Act may be made by a company registered in Nigeria or by a group of persons on behalf of a company which is to be so incorporated.⁸⁵

The certificate of pioneer status for the purpose of tax relief can operate retrospectively. Where a certificate of pioneer status is to be backdated, then any act or thing which has been done or which has happened for the purpose of the principal Act⁸⁶ since that date, but which would not have been done or happened if the pioneer certificate had been in force at that date, shall, whenever essential for the purpose of this Act, be treated as not having been done or not having happened, and if the act consists of a payment, that tax shall, as soon as may be made after the expiration of three months from production day of that company, be repaid to the company.⁸⁷

2.3.1 Tax Relief

Under the Companies Income Tax Act,⁸⁸ entities and activities exempted from taxation include co-operative societies, religious/charitable organisations, and sporting

⁸³ *Ibid.*

⁸⁴ Section 1 (1) (b) Industrial (Income Tax Relief) Act (1990) Cap 17 Laws of the Federation of Nigeria 2004.

⁸⁵ Sections 2 and 3 Industrial (Income Tax Relief) Act (1990) Cap 17 Laws of the Federation of Nigeria 2004.

⁸⁶ Section 5 Industrial (Income Tax Relief) Act (1990) Cap 17 Laws of the Federation of Nigeria 2004.

⁸⁷ *Ibid.*

⁸⁸ Companies Income Tax Act Cap C21 Laws of the Federation of Nigeria, 2004, subsequently referred to as CITA.

activities.⁸⁹ Similarly the profit of any Nigerian company in respect of exports from Nigeria is exempted from taxation, provided that the proceeds from such exports are brought back to Nigeria and are invested specifically in buying of raw materials, plants, equipments and spare parts.⁹⁰

2.3.2 Double Taxation Treaties

If a Nigerian company, in this case a foreign company registered in Nigeria in accordance with the Companies and Allied Matters Act has paid or is liable to pay tax, and proves that it has paid the tax in a commonwealth or another country that has double taxation agreement with Nigeria, then such a company will be qualified for a relief from tax paid or payable by it in accordance with any dual taxation reliefs agreement (between the Federal Republic of Nigeria and the governments of other countries).⁹¹ If any foreign company has paid, by deduction or otherwise, or is liable to pay, tax under this Act for any year of assessment on any part of its profits, sufficiently proves to the Board that it has paid, by deduction or otherwise, or is liable to pay, commonwealth income tax for that year in respect of the same part of the same profits, it shall be qualified to relief from tax paid or payable by it under this Act on that part of its profit at a rate to be determined in accordance with the provision of the Companies Income Tax Act.⁹² If the foreign rate is less than that of Nigeria, the rate of the relief would be one half of the foreign rate. But if the foreign rate is more than the Nigerian rate, the relief will be equal to the amount by which the foreign rate exceeds the Nigerian rate.⁹³ For these purposes, there are agreements of dual taxation reliefs between the Federal Republic of Nigeria and the governments of Canada, France, Pakistan, Belgium, Netherlands, United Kingdom of Great Britain and Northern Ireland.⁹⁴

⁸⁹ Section 23 CITA.

⁹⁰ Finance (Miscellaneous Taxation Provisions) Decree No 32, 1996.

⁹¹ Section 44 (1) CITA.

⁹² Section 44 (2) (a) & (b) CITA.

⁹³ Section 45 CITA.

⁹⁴ Section 45 (2) CITA.

2.3.3 Interest Free Foreign Loan

Reliefs are provided in respect of interest on foreign loans obtained by an investor or investors in the course of investment in the Nigerian economy. Foreign loans obtained in order to boost agricultural activities enjoy tax relief. No tax is charged on interest in relation to a foreign agricultural loan or any facilities advanced to a company contracted in agricultural activities, the installations of local plant or machinery or a loan used as circulating capital for cotton industry established under the Family Economic Advancement Programme Act.⁹⁵

Accounts of foreign companies for deposit of capital for investment and domiciled accounts of a foreign non resident company are exempted from tax, provided the accounts consist mainly of foreign currencies imported into Nigeria on or after the 1ST day of January 1990 through the Central Bank of Nigeria or any of the authorised banks.⁹⁶ Bank loans and facilities for export manufacturing, interest payable on any loan granted by a bank for the purpose of manufacturing goods for export, shall be exempted from tax upon the presentation of a certificate issued by the Nigerian Export Promotion Council that the percentage of export specified has been achieved by the company.⁹⁷ A company is deemed to be engaged in manufacturing for export if the Nigerian Export Promotion Council certifies that no less than one half of its manufactured goods disposed of in its year of account is sold and exported outside Nigeria and is not re-imported to Nigeria.⁹⁸

2.3.4 Imports and Exports

Customs and Excise Management Act⁹⁹ provides a duty drawback/suspension scheme. The scheme made provisions for repayment of hundred percent import duties on raw materials and packaging materials used in manufacturing goods that are exported. Free paper processed for the production of tools supplied for educational purposes to educational institutions

⁹⁵ Family Economic Advancement Programme Establishment Act (1997) Cap F3 Laws of the Federation of Nigeria 2004.

⁹⁶ Section 23(1) (m) CITA.

⁹⁷ Section 11(10) CITA.

⁹⁸ *Ibid.*

⁹⁹ Customs and Excise Management Act Cap C 45 Laws of the Federation of Nigeria 2004.

specified by the Federal Adviser on Education to the President enjoys hundred percent import duty relief.¹⁰⁰

The drawback regulations classify the reliefs into the following namely: the first part of the regulations applies in respect to the award of drawback of customs duties payable on importation of any goods. The second part applies in respect to the award of drawback of customs duties paid on the import of goods which are subsequently exported in the same state as that in which they were imported and the last part applies in respect to the award of drawback duties paid on the import of goods which are used in any process of manufacture in Nigeria.¹⁰¹

Export incentives are available to Nigerian and non Nigerian exporters, individuals or corporate bodies to encourage investment in Nigeria. The exporter now retains the proceeds realised in the course of export in foreign currencies in a bank account in Nigeria.¹⁰² The retained foreign currency by the exporter saves the exporter from buying foreign currencies for the payment of such export related expenses as may be prescribed by the rules made by the Nigerian Export Promotion Council in consultation with the Central Bank of Nigeria.¹⁰³ The Nigerian Export Promotion Council is charged with the responsibility of issuing guidelines and administering the incentives contained in this Act.¹⁰⁴

2.3.5 Incentives to Companies engaged in the Utilisation of Associated Gas under the Petroleum Profit Tax Act (PPTA)

The Petroleum Profit Tax Act (PPTA) provides for the taxation of the profits for the duration of any company contracted in petroleum activities for the duration of the contract in accordance with the provisions of the Act.¹⁰⁵ However, certain incentives apply to companies contracted in the utilisation of associated gas, that is, companies investing in processes

¹⁰⁰ Drawback Customs Regulations Legal Notice 70 1959.

¹⁰¹ Section 1 (2) Draw back Customs Regulations Legal Notice 70 1959.

¹⁰² Section 1(1) Export (Incentives & Miscellaneous provisions) Act Cap E 19 Laws of the Federation, 2004.

¹⁰³ Section 3 Export (Incentives & Miscellaneous provisions) Act Cap E 19 Laws of the Federation of Nigeria 2004.

¹⁰⁴ Section 3 (2) Export (Incentives & Miscellaneous Provisions) Act Cap E 19 Laws of the Federation of Nigeria 2004.

¹⁰⁵ Petroleum Profit Tax Act Cap P13 Laws of the Federation of Nigeria 2004.

required to separate crude oil and gas from having the same treatment from reservoir into usable products. This is regarded as part of oil field development in the wake of the Nigerian government's effort to create a diversified economy and reduce over-dependence on crude oil. Capital investment in facilities and equipment to deliver associated gas in usable form at utilisation or designated custody transfer points shall be treated different and distinct for tax purposes, as part of the capital allowances and operating expenses. In this case, the evaluation and assessment of tax is subject to the provisions of PPTA Act and the incentives under the revised memorandum of understanding between the concerned company and the relevant tax authority.¹⁰⁶ The incentives specified above, are applicable within the purview of these terms:

- i. The condensates extracted and re-injected in to the crude oil stream shall be treated under the relevant tax arrangement;¹⁰⁷
- ii. the company pay taxable amount charged on the basis of the incentives by the Minister in the affairs of petroleum resources for any gas flared by the company; and
- iii. Where possible, the company keep the expenses incurred on crude oil operation separate and only expenses not able to be separated shall be allowed against crude oil income of the company under this Act;¹⁰⁸
- iv. Expenses identified as incurred exclusively in the utilisation of associated gas shall be regarded as gas expenses and be allowed against the gas income and profit to be taxed under the Companies Income Tax Act 1990.
- v. Lastly, only companies with substantial investment in natural gas and liquid extraction facilities to supply gas in usable form to downstream projects, including aluminium smelter and methanol, methyl tertiary butyl ether and other associated gas utilisation projects shall benefit from the incentives.

However, all capital investment in the areas of gas liquids facilities shall be treated as chargeable capital allowance and recovered against the crude oil income. Gas transferred

¹⁰⁶ Section 11 (1) (a) Petroleum Profit Tax Act Cap P13 Laws of the Federation of Nigeria 2004.

¹⁰⁷ Section 11 (2) (b) Petroleum Profit Tax Act Cap P13 Laws of the Federation of Nigeria 2004.

¹⁰⁸ Section 11 (2) (c) Petroleum Profit Tax Act Cap P13 Laws of the Federation of Nigeria 2004.

from the natural gas liquid facility to the gas-to-liquid facilities shall bear a zero percent royalty.

2.4 Financial Institutions

The Banks and Other Financial Institutions Act, 1991¹⁰⁹ empowers the Central Bank of Nigeria to invest the money deposited with the Central Bank in pursuance of this Act in treasury bills or in other forms of securities pending the Governor of the Central Bank of Nigeria pleasure who shall decide whether or not to grant a licence, and where the licence is refused, the Bank is to refund the sum deposited to the applicant together with investment profit after deducting administrative charges and tax on the income.¹¹⁰ The Act directly affects investors in the banking sector and other financial institutions. It empowers the Governor of the Central Bank of Nigeria to approve or otherwise the operations of foreign banks in Nigeria or a foreign investor having prospect to operate in banking services in Nigeria. The Act obliges the Central Bank of Nigeria to act as intermediary in receiving the capital reserved by the foreign investor for investment in banking.¹¹¹

Investment other than in the banking sector can be done with foreign currency freely brought into Nigeria by an authorised dealer and converted to Nigerian currency at official foreign exchange market rate.¹¹² The authorised dealer by which the foreign currency or capital for the investment is imported into Nigeria shall cause the issuance of a certificate of capital importation to the investor who shall, within prescribed time thereafter, make returns to the Central Bank of Nigeria giving proper documentations as the Central Bank of Nigeria may direct.¹¹³ In this case the Central Bank of Nigeria is not a direct receiver of investment capital as it would be if the capital were for banking and other financial institutions. The authorised dealer mentioned in the Act can be other commercial banks and corporate bodies recognised by the Central Bank of Nigeria. The Minister of Finance shall on timely basis be

¹⁰⁹ Banks and other Financial Institutions Act 1991 Cap C 95, Laws of the Federation of Nigeria 2004.

¹¹⁰ Section 4 Banks and Other Financial Institutions Act 1991 Cap C 95 Laws of the Federation of Nigeria 2004.

¹¹¹ Section 1 (4) Banks and Other Financial Institutions Act 1991 Cap C 95 Laws of the Federation of Nigeria 2004.

¹¹² Sections 12 and 13 FOREX Act.

¹¹³ Section 14 (2) FOREX Act.

furnished by the Central Bank of Nigeria, detailed reports on the returns furnished to the Central Bank of Nigeria under this Act¹¹⁴ for information and statistical purposes only.

The foreign currency brought into Nigeria and invested in any business in pursuance of this Act¹¹⁵ shall be guaranteed unconditional repatriation of funds, by an authorised dealer in freely convertible currency relating to the dividends or profits (net of taxes) attributable to the investment payments in respect of loan servicing where a foreign loan has been obtained and the remittance of proceeds (net of all taxes) and other obligations in the event of sale or liquidation of the enterprise or any interest attributable to the investment.¹¹⁶

The Central Bank Act 1958 established the Central Bank of Nigeria and subsequently the Central Bank of Nigeria Act 1991¹¹⁷ set up an investment advisory board and project development firm in Nigeria and called for more investment in private equity and venture capital. The aim of establishing the project development firm is to encourage more investment in the private equity sector and venture capital to make more funds available for entrepreneurs in Nigeria and inspire real economic growth, especially in the informal sector. According to the Deputy Governor of the Central Bank of Nigeria,

“Private equity venture is a stake that belongs more to the Securities and Exchange Commission (SEC) and some other parts of the financial system. There is no question that this country is in outright reliance on banking for finance and bank lending is short term in this part of the world. It is either three, four or five years. So, the real growth in the financial sector in our economy lies in reducing the dominance of banks and expanding other aspects of finance, including private equity and venture capital”¹¹⁸

Venture capital firms are now linked in a network by their joint investments in portfolio companies. Through the connections in that network, they exchange resources with one another. The most important of those resources, namely, opportunity to invest in a portfolio

¹¹⁴ Sections 15 and 16 FOREX Act.

¹¹⁵ Section 25 FOREX Act.

¹¹⁶ *Ibid.*

¹¹⁷ Central Bank Act 1991 Laws of the Federation of Nigeria 2004, replaced by the Central Bank Act 2007.

¹¹⁸ <http://privateequity.com/tag/kingsley-moghalu/>, Accessed on the 25TH June 2014.

company (good investment prospects are always scarce), the spreading of financial risk and the sharing of knowledge are what the Central Bank Act 2007 is set to achieve.¹¹⁹

2.5 Business Permits and Approvals

No corporate person or an individual other than a Nigerian either on his own or with any other person (Nigerian or non Nigerian) operates a corporate business or establish or take over any company as limited liability for whatever reason without the express permission of the Minister of Internal Affairs. A non Nigerian wishing to enter Nigeria and accepting an employment contract apart from employment in the mainstream of the federal or state government of Nigeria, but in pursuance of promoting, incorporating and placing a foreign company in Nigeria, shall forward his written application under the Immigration Act for an expatriate quota along with a business permit.¹²⁰ The expatriate quota is of two types namely: permanent until reviewed, usually for the post of chairman of the company's board of directors or the managing director. The temporary permit is for directors and other employees of the company. The minimum number of years granted in the first instance is five years renewable for a further period of two years. It is the duty of the company and not the employee, to apply for an expatriate quota.¹²¹

A foreign investor with prospect of investing in Nigeria must obtain a residence permit. This led to the introduction of the "Combined Expatriate Residence Permit and Alien Card" (CERPAC) in 2002. The scheme was introduced to provide for foreigners (except ECOWAS Citizens, accredited diplomats and children below the age of fifteen 15 years) working or living in Nigeria to carry CERPA Card. The scheme was intended to simplify the process of acquiring a residence permit and an alien registration certificate. It provides a computerised unit at various points of entry such as airports that is linked to a central database centre containing information on every foreigner residing in Nigeria. The residence permit allows a foreigner and his or her dependants or family to reside in Nigeria. Thus, in addition to a valid visa requirement, every foreigner resident in Nigeria or visiting with the intention to remain in Nigeria for more than fifty six days (i.e. eight weeks) is required to register, but

¹¹⁹ Dr.Kingsley Moghalo, (Deputy Director Central Bank of Nigeria) Keynote address "Annual Workshop on Economic Outlook" held in Lagos, 2014.

¹²⁰ Section 8 (1) (a) Immigration Act (1990) Cap I 1 Laws of the Federation of Nigeria 2004.

¹²¹ *Oilfields Supply Centre v Johnson* (No2) (1987) Nigerian Weekly Law Report part 625.

unlike a residence permit, the foreigners' registration certificate is essentially a movement chart under the CERPA scheme. Registration is valid for one year after which application for revalidation must be made.¹²²

In the next chapter, the legal framework for monitoring financial transfers in Nigeria and other jurisdictions will be examined as this is a key process in relation to investments.

¹²² Section 9 (1) (a) Immigration Act (1990) Cap I 1 Laws of the Federation of Nigeria 2004.

CHAPTER THREE
REGULATION OF CROSS-BORDER TRANSACTIONS IN NIGERIA IN
COMPARISON WITH OTHER JURISDICTIONS

3.1 Introduction

Having carried out an overview of current investment legislation in Nigeria in the previous chapter, this chapter examines the regulation of monetary transfers in Nigeria as well as other jurisdictions with a view to highlighting useful practices for Nigeria. Cross-border transactions constitute the key vehicle for international investment. Specifically, the impact of the Financial Intelligence Centre Act 2001 (FICA)¹²³ as a regulatory framework for financial dealings and investment in South Africa is examined while the implications of the Act for foreign investors in South Africa are highlighted.¹²⁴ Both the Financial Intelligence Centre Act 2001 and the Nigerian Financial Intelligence Unit have the same background. They both came into being as a result of the G7 Summit meeting in 1989 which has laid to the establishment of an inter-governmental body known as the Financial Action Task Force (FATF) to evaluate the effectiveness or otherwise of local and international money laundering control structures. In addition the Financial Action Task Force was established with setting standards and promoting effective implementation of legal, regulatory and operational measures in the fight against money laundering, terrorist financing and the like threats to the integrity of the international financial system.¹²⁵ These standard setting, regulatory and operational measures of the Financial Action Task Force are reflected in both the Financial Intelligence Centre Act (2001) of South Africa and Nigeria's Financial Intelligence Unit

¹²³ Financial Intelligence Centre Act 38 of 2001 subsequently referred to as FICA. In 2001 the Financial Intelligence Centre Act 38 of 2001 (FICA) was adopted. This Act established the Financial Intelligence Centre and created money laundering control obligations for financial institutions and certain professions. The Act, read with the Prevention of Organized Crime Act 1998, created modern international money laundering control framework for South Africa. This system was judged to be of a sufficient standard for South Africa to join the Financial Action Task Force as its first African member in 2003.

¹²⁴ Goredema, C. (2007) "Confronting Money Laundering in South Africa: An Overview of Challenges and Milestones" in Charles Goredema (ed) *Confronting the Proceeds of Crime in Southern Africa: an introspection*, (ISS African Futures Monograph 132 at page 73).

¹²⁵ Force, F. A. T. (2012). *International standards on combating money laundering and the financing of terrorism & proliferation: the FATF recommendations*. FATF/OECD, Recommendations 1 and 2 of Financial Action Task Force.

regulations. Also discussed in this chapter is the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the proceeds from Crime and on the Financing of Terrorism.¹²⁶

3.2 South African Financial Intelligence Regulations

The focus of this section is the Financial Intelligence Centre Act 38 of 2001 (hereafter referred to as FICA) as it affects foreign investors. According to the preamble of the Act, it is envisaged to address the accumulation and appropriation of the proceeds of unlawful activities. FICA establishes two main organs, namely a Financial Intelligence Centre (hereafter referred to as the Centre) and a Money Laundering Advisory Council (hereafter referred to as the Council). These organs are charged with distinct responsibilities to regulate financial operations to facilitate the detection of offences. The main function of the Council is to render related advice to the Centre, and to serve as a conduit through which the Centre, associations, state agencies and supervisory financial bodies keep in consultation.¹²⁷ It is important to note that the term “multinational investors” under South African investment legislation is the equivalent of the term “foreign investors” used in Nigerian investment legislation. As earlier mentioned pressure from the Financial Action Task Force and the international community to meet the setting standard of money-laundering control led to the enactment of the Financial Intelligence Centre Act 2001.¹²⁸ FICA aimed at providing a legal framework for effective money laundering control, which in essence is intended to prevent criminals from being able to integrate their ill-gotten gains into the South African credible banking systems. FICA therefore brings South Africa in line with international standards in the fight against financial crime by aligning with similar legislation in other countries designed to reveal the movement of monies derived from unlawful sources and thereby checking money laundering and other criminal activities.

¹²⁶ Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, *Warsaw*, 16.V.2005.

¹²⁷ Preamble, FICA 2001.

¹²⁸ Bester, H., de Koker, L., & Hawthorne, R. (2004). *Access to Financial Services in South Africa: A brief case study of the effect of the implementation of the Financial Action Task Force Recommendations* (Doctoral dissertation, Fin Mark Trust), at page 7.

South Africa's commitment to the implementation of the Financial Action Task Force recommendations codified in the Financial Intelligence Centre Act 2001 meant that South Africa became pioneer African country to become a fully-fledged member of the Financial Action Task Force. South Africa was accepted as a member of the Financial Action Task Force in June 2003 after it was evaluated and found to have developed a comprehensive legal structure to combat money laundering activities. In terms of FICA, all financial institutions (such as banks) have specific duties to help prevent money laundering. One of such duties is to perform a "Know-Your-Customer" (KYC) check on all existing customers by certain deadline dates provided by the Act.¹²⁹ As a regulatory instrument, the main empowering clause of the Act,¹³⁰ provides that an accountable institution may not establish a business relationship or conclude a single transaction with a client unless the accountable institution has taken the prescribed steps: (a) to establish and verify the identity of the client; (b) if the client is acting on behalf of another person, to establish and verify: (1) the identity of that other person; and (2) the client's authority to establish the business relationship or to conclude the single transaction on behalf of that other person.¹³¹

3.2.1 Know-Your-Customer (KYC) for Existing Customers

The Financial Intelligence Centre in terms of the Know-Your-Customer (KYC) requirements of FICA requires financial institutions to keep records of particulars of their customers, individual or corporate. First National Bank is required to go back to all of its existing customers, who opened bank accounts prior to 1 July 2003, in order to validate their information.¹³² The original deadline for South African banks to re-examined and re-identified all of their existing customers was 30 June 2004, but was extended by the Minister of Finance to various dates between 31 October 2004 and 30 September 2006. The new deadline differed for different customers in terms of guidelines and/or rules that had to be applied as a condition of the extension. These guidelines and/or rules are based on a

¹²⁹ The original deadline of 30 June 2004 for South African banks to have re-identified all of their existing customers was extended by the Minister of Finance to various dates between 31 October 2004 and 30 September 2006.

⁸ Section 21 FICA 2001.

¹³¹ Section 27 FICA 2001.

¹³² Section 22 (5) FICA 2001.

combination of factors, including the category or type of customer, the types of products used and/or transactional behaviour and/or transactional value.¹³³ (For example trusts and partnerships were given a deadline of 3rd October 2004).

3.2.2 Know Your Customer requirements (KYC) for Foreign Companies

The Know Your Customer requirements to establish, obtain and verify (i.e. validate) information for foreign companies outlined in the regulations of the Financial Intelligence Centre Act 2001 (FICA). Branches of foreign companies that own immovable property in South Africa are required to register as 'external companies' in terms of the Companies Act 2008.¹³⁴ These 'external companies' are regulated by the South African Registrar of Companies. Know your customer requirements for these types of companies are the same as those for South African companies. FICA provides exemption from certain Know Your Customer obligations in respect of public companies that are listed on an approved Securities Exchange.¹³⁵ There are also different kinds of Know Your Customer requirements for foreign companies that are also listed as local companies.

Other specific know your customer (KYC) requirements in terms of FICA are as follows: registered name, official documentation reflecting the registered name and registration number of the foreign company, as well as proof of registration of any name changes since incorporation (if any).¹³⁶ Registered address, official documentation reflecting the registered address of the foreign company's business name in South Africa and if the business name (i.e. operating name) and/or business address (i.e. operating address) is/are different to the registered address, an approved document to verify physical address, reflecting at least the business name (i.e. operating name) and (physical) business address.¹³⁷ The foreign company's business address in South Africa, and if the head office address is different from the registered address and/or business address (i.e. operating address), an approved

¹³³ Government Gazette Republic of South Africa Vol. 438 Cape Town 3 December 2001 No. 22886. The Presidency No. 1262 3 December, 2001.

¹³⁴ Section 34 Companies Act (2008).

¹³⁵ Section 28 FICA 2001.

¹³⁶ Section 9 FICA 2001.

¹³⁷ Section 10 FICA 2001.

document to verify physical address, reflecting at least the business name (i.e. operating name) and (physical) head office address.¹³⁸ Names of all shareholders who hold twenty five percent, or more, of the voting rights at an annual general meeting of the foreign company should be deposited with the Centre.¹³⁹ A letter from the foreign company's accountant/auditor/company secretary listing all shareholders who hold twenty five percent or more of the voting rights at an annual general meeting of the foreign company is required by their bankers for know your customer purposes.

3.2.3 Connected persons to Foreign Companies

The Know your Customer requirements for foreign companies also requires all banks to establish and verify information in respect of individual persons and non-individual persons that are connected to and/or who represent the foreign company.¹⁴⁰ These "connected persons" are as follows: individuals (that is natural persons) who are South African citizens and/or South African residents; persons who are not South African citizens, but South African residents for the purpose of operating a foreign company only;¹⁴¹ non-individuals (i.e. businesses and legal persons); all shareholders that hold twenty five percent, or more, of the voting rights at an annual general meeting of the foreign company, which are not individuals.¹⁴²

i. Individuals

The Know Your Customer requirements, for individuals (i.e. natural persons) who are connected to foreign companies, and are not South African citizens and residents are as follows:¹⁴³ For individuals who are connected to the foreign company (i.e. the manager, shareholders of twenty five percent, agents etc.) information and personal bio-data are required for proper documentation. South African citizens and residents who are connected to foreign companies are issued with green bar-coded identity document for the same purpose.¹⁴⁴

¹³⁸ Section 10 (2) FICA 2001.

¹³⁹ Section 9 (2) FICA 2001.

¹⁴⁰ Section 11 FICA 2001.

¹⁴¹ Section 12 FICA 2001.

¹⁴² Section 27 FICA 2001.

¹⁴³ Section 27 (5) FICA 2001.

¹⁴⁴ Section 29 FICA 2001.

ii Non Individuals

The Know Your Customer requirements for non-individuals (i.e. businesses and legal persons) that are connected to foreign companies depend on the category or type of non-Individual concerned. The general Know your Customer requirements are as follows:¹⁴⁵ non-Individuals (i.e. business and legal persons) that are connected to the foreign companies shall obtain and fill the relevant legal forms and founding documents (i.e. documents used to register or incorporate the non-individual entity, including registered name and address. Registered business name (i.e. operating name) is also required.¹⁴⁶

3.2.4 Accountable Institutions in South Africa

In South Africa the Financial Intelligence Centre Act 2001 has in several places mentioned that the Centre holds accountable institutions responsible for feeding the Centre with information on suspicious financial transactions in respect of individual and corporate bodies in compliance with the Financial Intelligence Centre Act.¹⁴⁷ The term “accountable institutions” is defined as a person or organization referred to in Schedule (1) of the Financial Intelligence Centre Act 2001 that carries out the business of any entity listed.¹⁴⁸

The following are the financial institutions within the scope of the Financial Intelligence Centre Act 2001:

- i. A practitioner who practices as defined in the Attorneys Act.¹⁴⁹
- ii. A board of executors or a trust company or any other person that invests, keeps in safe custody, controls or administers trust property within the meaning of the Trust Property Control Act.¹⁵⁰
- iii. An estate agent as defined in the Estate Agency Affairs Act.¹⁵¹

¹⁴⁵ Section 3 FICA 2001.

¹⁴⁶ <http://www.efccnigeria.org/efcc/>, Accessed on 19th June, 2014.

¹⁴⁷ Section 4 (1) (c) FICA 2001.

¹⁴⁸ Items 18 and 19 schedule 1 FICA 2001.

¹⁴⁹ Section 10 Attorney Act 53 (1979).

¹⁵⁰ Section 5 Trust Property Act 57 (1988).

- iv. An authorized user of an exchange as defined in the Securities Service Act.¹⁵²
- v. A manager registered in terms of the Collective Investment Schemes Control Act 2002,¹⁵³ but excludes managers who only conduct business in Part VI of the Collective Investment Schemes Control Act 2002.¹⁵⁴
- vi. A person who carries on the ‘business of a bank’ as defined in the Banks Act.¹⁵⁵
- vii. A mutual bank as defined in the Mutual Banks Act 1990.¹⁵⁶
- viii. A person who carries on a ‘long-term insurance business as defined in the Long-Term Insurance Act 1998.’¹⁵⁷
- ix. A person who carries on the business of making available a gambling activity as contemplated in the National Gambling Act 1996 in respect of which a license is required to be issued by the National Gambling Board or a provincial licensing authority.¹⁵⁸
- x. A person who carries on the business of dealing in foreign exchange, a person who carries on the business of lending money against the security of securities, a person who carries on the business of a financial services provider requiring authorization in terms of the Financial Advisory and Intermediary Services Act 2002¹⁵⁹ to provide advice and intermediary services in respect of the investment of any financial product

¹⁵¹ Section 43B FICA 2001 and accountable and reporting institutions manual form, item 240 of annexure “A” list estate agencies institutions operating under Estate Agency Affairs Act 112 (1976).

¹⁵² Securities Services Act 2004 Amendments: Rules of the Bond Exchange of South Africa (Notice 112 of 2007).

¹⁵³ Section 22 Collective Investment Schemes Control Act 45 (2002) and section 6 (1) FICA 2001.

¹⁵⁴ Section 20 (5) Collective Investment Schemes Control Act 45 (2002).

¹⁵⁵ Section 10 the Banks Act 94 (1990).

¹⁵⁶ The Banks Act 94 1990 (As amended) including all amendments up to and including, the Banks Amendment Act, 2003 (Act No 19 of 2003).

¹⁵⁷ Long Term Insurance Act 52 (1998).

¹⁵⁸ National Gambling Act 33 (1996).

¹⁵⁹ Financial Advisory and Intermediary Service Act 45 (2002).

(but excluding a short term insurance contract or policy referred to in the Short-term Insurance Act 1998¹⁶⁰

- xi. A health service benefit provided by a medical scheme as defined in the Medical Schemes Act 1998.¹⁶¹
- xii. A person, who issues, sells or redeems travellers' cheques, money orders or similar instruments. The Post bank referred to in the Postal Services Act 1998.¹⁶²

In addition to accountable institutions, the Financial Intelligence Centre Act 2001 affects all clients or consumers entering into either a single transaction or a business relationship with these institutions.¹⁶³ Clients and customers according to FICA include: natural persons, natural persons acting on behalf of another, or foreign national close corporation, South African companies, foreign companies, legal persons, partnerships and trusts.¹⁶⁴

Chinese diplomacy in Africa, and South Africa in particular that is carried out by the ministries of foreign affairs and trade, has focused on bilateral relationships and investments with African governments which, in the case of South Africa, are also reported to the Centre.¹⁶⁵ In addition, several states owned banks and other financial institutions backing China's presence in Africa are equally accountable to the Centre in respect of their activities in South Africa. These include Export and Import Bank of China (Exim Bank) which was established in 1994 to promote Chinese exports and foreign direct investment (FDI)

¹⁶⁰ Short-Term Insurance Act 53 (1998).

¹⁶¹ Medical Scheme Act 131 (1998).

¹⁶² Postal Services Act 124 (1998) Regulations; Related services. Unreserved postal services.

¹⁶³ Schedule 1 Item 7 FICA (2001).

¹⁶⁴ Section 5 (2) Trust Property Act 57 (1988).

¹⁶⁵ Hay F., Milelli, C. & Shi Y. (2009). Chinese Firms enter Europe: Some Empirical Evidence. Pp. 198-214 in Wu, Z. (Ed.) Financial Sector Reforms and the International Integration of China, London: Ro Kaplinsky, R., & Morris, M. (2009). Chinese FDI in Sub Saharan Africa: Engaging with Large Dragons. *European Journal of Development Research*, 21(4): 551-569. Kogut, B., & Singh, H. (1988). The effect of national culture on the choice of entry mode. *Journal of International Business Studies*, 19: 411-432. Larçon, J.-P. (2009). Chinese Multinationals, Sin.

specifically in the infrastructure sector: roads, power plants, pipelines, telecommunications, etc.

3.3 Nigerian Financial Intelligence Regulations

The pressure from the international community and international financial institutions, including the World Bank, on Nigeria and the recommendations of the Financial Action Task Force led to the passing of the Economic and Financial Crimes Commission Act 2004 (EFCC) into law.¹⁶⁶ The Nigerian Financial Intelligence Unit is a sub unit under the Economic and Financial Crimes Commission,¹⁶⁷ a commission established to combat corruption and corrupt practices. The unit was not established principally by an Act, but it was made under subsidiary legislation of the Economic and Financial Crimes Commission (EFCC) Act 2004.¹⁶⁸

3.3.1 Nigerian Financial Intelligence Unit (NFIU)

The Nigerian Financial Intelligence Unit is a national agency at the centre in Nigeria, saddled with the responsibility of receiving, analysing and disclosure of financial transactions (currency transaction reports and suspicious transaction reports) and for the dissemination of intelligence generated there from, to competent authorities. The Nigerian Financial Intelligence Unit is therefore a child of circumstance in fulfilment of the requirement by the Financial Action Task Force, a policy operative under the Economic and Financial Crimes Commission (EFCC). The location of the Nigerian Financial Intelligence Unit within the Economic and Financial Crimes Commission (EFCC law enforcement agency) is not strategic, given the peculiarities of the Nigerian economy.¹⁶⁹ The aim of the Nigeria Financial Intelligence Unit is to provide a legal framework for effective money laundering control and combating financing terrorism which in essence is intended to prevent criminals from being able to invest their gains into Nigeria's financial institutions so that credibility is maintained. However, the placing of the unit as a subsidiary unit under the Economic and Financial

¹⁶⁶ Obuah, E. (2010). Combating Corruption in Nigeria: The Nigerian Economic and Financial Crimes (EFCC). *African Studies Quarterly*, 12(1), 127-132, issue 1 at page 18.

¹⁶⁷ Section 1 (2) (c) Economic and financial crimes Commission Act 2004, also referred to as EFCC Act 2004.

¹⁶⁸ Section 7 (1) Economic and financial crimes Commission Act 2004, also referred to as EFCC Act 2004.

¹⁶⁹ <http://www.efccnigeria.org/efcc/>, Accessed on 26 June, 2014.

Crimes Commission does not bring Nigeria in consonance with the practice around the globe in the fight against financial crimes.¹⁷⁰

The “Commission” is the term recognized under the Money Laundering Prohibition Act 2011 and not the Nigeria Financial Intelligence Unit (NFIU), even in areas where the NFIU is the only recognized entity to perform those functions related to the receipt of suspicious transaction reports. As such, the law is defective and the NFIU is constantly confronted with situations where such reports are rendered to various units of the Economic and Financial Crimes Commission, in clear breach and departure from the rationale for the establishment of the NFIU. A good example is Section 6 of the Money Laundering (Prohibitions) Act 2011 as amended in 2012.¹⁷¹

In the late 1990s the international community placed Nigeria in the list of pariah states not because there are high levels of money laundering but also because of advance fee fraud involving Nigerians. This state of affairs prompted the blacklisting of Nigeria as a non-cooperative country having weak legal and regulatory mechanism to tackle money laundering and financing of terrorism by the Financial Action Task Force (FATF). In response to this, the Nigerian Financial Intelligence Unit (NFIU) was set up to meet the requirements of the Financial Action Task Force (FATF) and was established in June 2004 by the then president Olusegun Obasanjo.¹⁷² Apart from being the coordinating unit for the receipt and analysis of financial disclosure of currency transaction reports and suspicious transaction reports in line with Nigeria's anti-money laundering and combating the financing of terrorism (AML/CFT) regime, the Nigerian Financial Intelligence Unit also disseminates intelligence gathered thus to competent authorities including the Economic and Financial Crimes Commission and other law enforcement agencies.¹⁷³

The Nigerian Financial Intelligence Unit (NFIU) responsibilities are derivatives of the special recommendations by the Financial Action Task Force (FATF), as the global

¹⁷⁰ <http://www.efccnigeria.org/efcc/index.php/nfiu>, Accessed on 26 June 2014.

¹⁷¹ Section 6 of Money Laundering Prohibition Act, 2011 as (Amended) 2012, made reference to “Commission” (i.e. EFCC) and not the NFIU.

¹⁷² <http://www.efccnigeria.org/efcc/index.php/nfiu>, Accessed on 26 June 2014.

¹⁷³ *Ibid.*

coordinating body for anti-money laundering and combating the financing of terrorism (AML/CFT) efforts. It also derives its powers from the Economic and Financial Crimes Commission (Establishment) Act 2004¹⁷⁴ and the Money Laundering (Prohibitions) Act 2004.¹⁷⁵ The financial and designated non-financial institutions are obliged (for example estate agents) to submit records of financial transactions to the Nigerian Financial Intelligence Unit.¹⁷⁶ The Unit is domiciled at the Economic and Financial Crimes Commission, being a law enforcement agency, and has three central roles which are: receiving, analysis of financial intelligence and dissemination of such intelligence to end-users.¹⁷⁷ Additionally, the Nigerian Financial Intelligence Unit engages in the following: monitoring compliance with anti-money laundering and combating financing terrorism requirements to ensure compliance and reporting entities' and individuals' financial transactions to the relevant statutorily established law enforcement agencies to enhance the knowledge base of stakeholders and aid anti-money laundering and combating financing terrorism policy formulation.¹⁷⁸

The Nigerian Financial Intelligence Unit is also required to enhance public awareness on anti-money laundering and combating financing terrorism through publicity in the print and electronic media, publication of newsletters etc.¹⁷⁹ In its advisory role, the Nigerian Financial Intelligence Unit provides input that helps to fine-tune extant anti money laundering and combating financing terrorism policies, regulations and laws based on findings from topology studies on money laundering and terrorism financing.¹⁸⁰

Generally, the Nigerian Financial Intelligence Unit expands the frontier regarding the coordination, implementation and awareness of anti-money laundering and countering terrorism financing. The NFIU partners with government, the legislature and international organizations including other intelligence agencies in the separation of financial and non-

¹⁷⁴ Section 1(1) and (2) EFCC Act 2004.

¹⁷⁵ Section 1(5) Money Laundering (Prohibition) Act 2011 as (Amended) 2012.

¹⁷⁶ Section 1(2) (c) EFCC Act 2004.

¹⁷⁷ Section 6 EFCC Act 2004.

¹⁷⁸ Section 1(2) (c) EFCC Act 2004.

¹⁷⁹ Section 6 (p) EFCC Act 2004.

¹⁸⁰ Section 6 (g) EFCC Act 2004.

financial sectors for national and international investments.¹⁸¹ Presently, the Nigerian Financial Intelligence Unit is a member of the Egmont Group of financial intelligence units and the coordinating Financial Intelligence Units in the West African sub-region as it helps the Intergovernmental Action Group against Money Laundering in West Africa in the enforcement of its anti-money laundering and combating financing of terrorism regime.

3.3.2 Reporting requirements

The Central Bank of Nigeria anti-money laundering/combating financing terrorism regulations provides compulsorily record-keeping and reporting by designated non-financial institutions, professions and businesses, banks and other financial institutions to regulatory authorities.¹⁸² Relevant provisions of the law and regulations were designed to help identify the source, volume and movement of currency and other monetary instruments transported or transmitted into or out of Nigeria, or deposited in financial institutions as the case may be.¹⁸³

The enabling Act and regulations under reference seek to achieve the objective by requiring individuals, banks and other financial institutions to render politically exposed persons' returns and currency transaction reports (CTRs) to the Central Bank of Nigeria (Anti-money Laundering/Combating Financing Terrorism office in the Financial Policy and Regulation Department) and to the Nigerian Financial Intelligence Unit (NFIU). Financial institutions are also required to properly identify persons conducting transactions and to maintain a paper trail by keeping appropriate records of their financial transactions.¹⁸⁴ Should the need arise, these records will enable law enforcement and regulatory agencies to pursue investigations of criminal, tax and regulatory violations, and provide useful evidence in prosecuting money laundering and other financial crimes.

¹⁸¹ Section 6 (j) (iv) EFCC Act 2004.

¹⁸² Central Bank of Nigeria Anti-Money Laundering/Combating Financial Terrorism Regulations (2009) and <http://www.punchng.com/business/money/cbn-introduces-anti-money-laundering-regulations>, Accessed on 27 August 2014.

¹⁸³ Section 5 (1) j (i) and (ii) EFCC Act 2004 and section 7 Money Laundering (Prohibitions) Act 2011 as (Amended) 2012.

¹⁸⁴ Section 41 Central Bank of Nigeria Act 2007.

Under the new anti-money laundering and combating financing terrorism legal regime, financial institutions (FIs) and designated non-financial institutions (DNFIs) are required to file the following reports to the NFIU:

- (a) Currency transaction reports under the Money Laundering (Prohibition) Act 2004;¹⁸⁵
- (b) Suspicious transactions report on money laundering and
- (c) Suspicious transactions report on financing of terrorism.

Reporting entities (i.e. financial institutions and non-designated financial institutions) are also required to render other regulatory returns as contained in various anti-money laundering and combating financing terrorism regulations, issued by financial sector regulators and other competent authorities.¹⁸⁶ Except for the suspicious transaction report (STR) all other statutory and regulatory reports are to be generated and forwarded to both the regulators and the Nigerian Financial Intelligence Unit on the approved standard formats designed by the respective regulators in conjunction with the Nigerian Financial Intelligence Unit.¹⁸⁷

3.4 Multi-lateral Peering Agreement (MLPA) and Central Bank of Nigeria Anti-money Laundering/Combating Financing Terrorism Regulations

3.4.1 Multi-lateral Peering Agreement (MLPA)

Multi-lateral peering is peering negotiated and established between potentially many parties via a shared route server. It allows for mutual financial information sharing between agreed parties and there is a need of mandatory (MLPA) within the financial institutions around the globe.¹⁸⁸

The multi-lateral peering agreement (MLPA) and Central Bank of Nigeria's Anti Money Laundering/Combating Financing Terrorism Regulations apply equally to all banks, other financial institutions and organs that are under the regulatory purview of the Central

¹⁸⁵ Section 7(b) Money Laundering (Prohibition) Act 2011 (as amended in 2012).

¹⁸⁶ Section 6 (1) EFCC Act and Section 6 (2) (a) money laundering (Prohibitions) Act 2011 as (Amended) 2012.

¹⁸⁷ *Ibid.*

¹⁸⁸ Weiss, M. B., & Shin, S. J. (2004). Internet interconnection economic model and its analysis: Peering and settlement. *Netnomics*, 6(1), 43-57, at 45.

Bank of Nigeria.¹⁸⁹ The law also made it punishable criminally that persons and financial institutions that wilfully assists in the laundering of money or fail to report suspicious transactions conducted through it. The Central Bank of Nigeria's anti money laundering/combating financing terrorism regulations also oblige financial institutions to establish and maintain procedures reasonably designed to ensure and monitor compliance with the reporting and record-keeping requirements of the multi-lateral peering agreement (MLPA).¹⁹⁰ The laws and the regulations provide for financial institutions to have an Anti Money Laundering/Combating Financing Terrorism (AML/CFT) program; for civil and criminal penalties for money laundering to be imposed; for the Central Bank of Nigeria to impose sanctions for AML/CFT infractions by institutions and persons in the course of transactions; for financial institutions to facilitate access to records and give prompt response to regulatory requests for information; and for financial institutions to consider their AML/CFT records while receiving notifications of mergers, acquisitions and other procedures for business combinations.¹⁹¹

3.4.2 Suspicious transactions report

Financial institutions are required to render a suspicious transactions report (STR) to the Nigerian Financial Intelligence Unit and inform the Central Bank of Nigeria of same whenever they detect a known or suspected criminal violation of a multi-lateral peering agreement or a suspicious transaction related to money laundering or a violation of other laws and regulations.¹⁹² The Economic and Financial Crimes Commission Act 2004 made the financing of terrorism a criminal act. Central Bank of Nigeria anti-money laundering/combating financing terrorism regulations has also augmented the existing multi-lateral peering agreement (MLPA) legal structure by emphasizing customer identification mechanism, restricting financial institutions from contracting in business with foreign partners banks, asking financial institutions to have due diligence procedures (in some cases, have

¹⁸⁹ Esoimeme, E. E. (2014). A Comparative Study of the Money Laundering Laws/Regulations in Nigeria, United States and United Kingdom (Part 1). (May 23, 2014) at page 4 accessed at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2459694 on 10 September 2014.

¹⁹⁰ *Ibid.*

¹⁹¹ The Financial Action Task Force (FATF): International Standards on Combating Money Laundering and the financing of terrorism and proliferation,(The FATF Recommendations) 2012, Recommendations 20 - 23.

¹⁹² Section 6 (2) Money Laundering Prohibition Act 2011 (as amended) 2012.

enhanced due diligence (EDD) procedures for foreign correspondent and private banking accounts) and improving information sharing between financial institutions and the law enforcement agencies and regulators.¹⁹³

The Nigerian Financial Intelligence Unit has not made any provision in respect of foreign investment unlike the Financial Intelligence Centre Act of South Africa. However, the Nigerian Financial Intelligence Unit holds financial institutions in Nigeria accountable in respect of their financial transactions with their foreign counterparts while dealing with foreign investors.

3.5 Regulatory Agencies in the Nigerian Financial Sector

A number of regulatory bodies have the primary duties of supervising the various financial institutions investing in Nigeria, including the subsidiaries of foreign-owned Nigerian banks and other financial institutions. While the Corporate Affairs Commission (CAC) is charged with the registration of corporate entities, banks and other financial institutions,¹⁹⁴ the Central Bank of Nigeria is responsible for licensing them.¹⁹⁵ The Securities and Exchange Commission and the National Insurance Commission license the capital market operators and insurance businesses, respectively. The enabling statutes of these regulators require them to review the anti-money laundering/combating financing terrorism (AML/CFT) compliance program at each examination of the regulated institutions.¹⁹⁶ They are also empowered by the enabling statutes to enforce compliance with appropriate rules and regulations, including compliance with AML/CFT regulations.¹⁹⁷

These organs mandated each institution under their supervisory purview to establish and maintain an anti-money laundering/combating financing terrorism compliance program.

¹⁹³ Section 6 (1) (d), Money Laundering Prohibition Act 2011 (as amended) 2012, See also the Central Bank of Nigeria (Anti-Money Laundering and Combating the Financing of Terrorism in Banks and Other Financial Institutions in Nigeria) Regulations.

¹⁹⁴ Section 7 (1) (a) Companies and Allied Matters Act (1990) Cap C20 Laws of the Federation of Nigeria 2004, subsequently referred to as CAMA.

¹⁹⁵ Section 2 (d) Central Bank of Nigeria Act 2007.

¹⁹⁶ Section 4 (1) (a) The Investments and Securities Act 2007 and Section 7 (a) National Insurance Commission Act (1997).

¹⁹⁷ *Ibid.*

The exercise prevents money laundering and terrorist financing transactions and ensures the rules and regulations governing money laundering and financing terrorism are observed. Financial institutions are mandated to observe utmost adherence to the rules and regulations in combat money laundering and terrorist financing and reduce their vulnerability to the risks associated with such activities.¹⁹⁸

All efforts are aimed at adding value to investigations by providing data relating to designated non- financial institutions (DNFIs), which will facilitate an enabling environment for the promotion of investment in Nigeria. In an effort to sanitize the business environment, the Nigerian Financial Intelligence Unit (NFIU) and Special Control Unit against Money Laundering (SCUML) collaborate with key stakeholders such as self-regulatory organizations (SROs), non-profit organizations, the National Planning Commission (NPC), the Corporate Affairs Commission (CAC) in an effort to have a free and safe environment for investments.¹⁹⁹

3.6 Cross-border cash movement in Nigeria

In spite of the many safeguards and precautionary measures available in the legal environment for investment in Nigeria, there are numerous cases of money-laundering and free cash movement in and out of the country. The Economic and Financial Crimes Commission on the 24TH day of October, 2013 arraigned four accused persons at the Federal High Court of Katsina State of north west Nigeria on money-laundering offences.²⁰⁰ The accused persons were arrested by the officials of the Nigerian Customs service at a border on their way to Niger Republic with N15,160,000 (fifteen million, one hundred and sixty thousand Naira) cash.²⁰¹ On this premise they were jointly charged to court by the Economic

¹⁹⁸ Section 2 Central Bank of Nigeria Act 2007.

¹⁹⁹ Nigerian Financial Intelligence Unit: Anti-Money Laundering/Combating the Financing of Terrorism (AML/CFT) Reporting Guidelines 2012, Paragraph 2.

²⁰⁰ Section 12 of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act Cap F34 Laws of the Federation of Nigeria 2004, section 2(3) of the Money Laundering (Prohibition) Act 2011 and section 2(5) of the Money Laundering (Prohibition) Act 2011 as amended by the Money Laundering (Prohibition) (Amendment) Act 2012.

²⁰¹ <http://efccnigeria.org/efcc/index.php/news/632-money-laundering-efcc-arraigns-four-suspects-in-katsina>, Accessed on the 26 July 2014.

and Financial Crimes Commission (EFCC) for money laundering and other related financial crimes under the money laundering (Prohibition) Act 2011 and the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act 1995.²⁰²

In spite of the above provisions, illicit movement of cash continues and on the 27th September 2012 one Abubakar Sheriff Tijjani was arrested by the official of Nigerian Customs Service and was subsequently handed over to the Economic and Financial Crimes Commission (EFCC) who was found in possession of \$7,049,444 (Seven million, forty nine thousand, four hundred and forty four United States Dollars) money above the maximum amount prescribed by law to be laundered to Dubai, United Arab Emirates at the Murtala Mohammed International Airport Lagos. He was arraigned at a Federal High Court sitting in Ikoyi, Lagos for the offence of money laundering on Friday 19th October, 2012.²⁰³

When the twenty five year-old man was arrested, he made the declarations of a total sum of \$4.5million, but thorough screening and search revealed that he is in possession of \$7,049,444. He confessed that he was a courier for twenty individuals who hired him to convey the money to Dubai. Sheriff was docked under Section 12 of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act 1995 and Section 2(5) of the Money Laundering Prohibition Act 2011.²⁰⁴

3.7 Council of Europe Convention

The aim of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the proceeds from Crime and Financing of Terrorism (the convention) is to foster cooperation among its member states for the pursuit of a common object by putting a criminal policy aimed at the protection of society, through the fight against serious financial crime which has become the order of the day and which calls for the application of modern

²⁰² Case Number: FHC/1/75c/13, *Federal Government of Nigeria v Bashir Abdullahi & 2 others*.

²⁰³ Case Number: FHC/1/168c/13, *Federal Government of Nigeria v Abubakar Sheriff Tijjani*.

²⁰⁴ <http://efccnigeria.org/efcc/index.php/news/159-7million-bulk-cash-courier-court-convicts-suspect-orders-forfeiture-of-25-undeclared-sum-to-govt>, Accessed on the 26 July 2014.

and effective mechanisms of international standard, a key one being to deprive criminals of the proceeds of crime and instrumentalities.²⁰⁵

The Convention recognises that for achieving the international standard there should be a functional and mutual international cooperation established for that purpose. The earlier steps taken in this regard include the adoption of Resolution 1373(2001) on threats to the continuity of global peace and security as a result of terrorism Council of the United Nations on 28 September 2001 and the international convention for the suppression of the financing of terrorism, which was adopted by the General Assembly of the United Nations on 9 December 1999 particularly its Articles 2 and 4, which oblige the signatories to enact in their laws as criminal offence the financing terrorism in any form and manner. Convinced of the necessity to take immediate steps to ratify and to implement fully the international convention for the suppression of the financing of terrorism, cited above,²⁰⁶ the parties to the treaty agreed to establish financial intelligence units (FIUs) in their respective jurisdictions.

Each party is required to adopt such legislative and other measures as may be necessary to establish a financial intelligence unit as defined in the convention and to ensure that its financial intelligence unit is accessible, to the financial, administrative and law enforcement information from time to time as required to properly undertake its functions, including the analysis of suspicious transaction reports.²⁰⁷ Furthermore, each party is required to adopt such legislative and other measures as may be necessary to institute a comprehensive domestic regulatory and supervisory or monitoring regime to prevent money laundering and shall take due account of applicable international standards, including in particular the recommendations adopted by the Financial Action Task Force on Money Laundering (FATF).²⁰⁸

²⁰⁵ Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 16.V.2005.

²⁰⁶ See Chapter II Article 2 (1) Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 16.V.2005.

²⁰⁷ See also Chapter II Article 12 (2) Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, and 16.V.2005.

²⁰⁸ See Chapter III Article 9 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 16.V.2005.

In the circumstances the signatories to the convention shall put in place, in particular, into their laws and adopt other measures as the case may be essential to corporate and natural persons who operate in the activities which are likely to promote money laundering and consequent upon these activities all financial institutions to identify and check the identity of their customers and, as soon as possible, their beneficial owners.²⁰⁹ State parties are also obliged to be cautious on any contractual relationship and ensure that the persons mentioned above are monitored, and where practicable monitored, the required level of compliance is observed in combating money laundering, where circumstances permit bearing in mind the magnitude of the risk involved.²¹⁰ In that respect, the signatories shall incorporate into their laws and put in place other measures that may assist to detect significant physical cross-border transportation of cash and other negotiable instruments.²¹¹

3.7.1 Postponement of domestic suspicious transactions

Each party shall enact laws and take other measures the circumstance may permit and urgent action be taken by the financial intelligence unit or, as soon as possible, by other concerned authorities or bodies, where it appears there is a suspicion that a transaction is related to money laundering, to withhold or suspend giving a consent to the transaction going ahead in order to assess the transaction and confirm the magnitude of the suspicion.²¹² Each signatory shall not assume on its own volition as to the existence or otherwise of a suspicious but subject to report supported by convincing evidence. The period for which suspicious transactions consent withhold shall be subject to relevant domestic provisions of the particular signatory.²¹³

²⁰⁹ See also Chapter III Article 19 (2) Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, and 16.V.2005.

²¹⁰ See Chapter IV Article 17 (1) and (2) Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 16.V.2005.

²¹¹ See also Chapter V Article 46 (3) Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, and 16.V.2005.

²¹² See Chapter III Article 14 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 16.V.2005.

²¹³ *Ibid.*

3.7.2 International co-operation

The principles of international co-operation shall be upheld among the party states. The mutual co-operation of the parties shall as practicable as possible be maintained for the purposes of gathering intelligence and proceedings designed for the confiscation of instrumentalities and proceeds realised from money laundering.²¹⁴ The signatories shall enact in to their laws and take other measures as may be expedient to enable it to comply, subject to the treaty, with requests for confiscation of specific items of property representing proceeds or instrumentalities, as well as for confiscation of proceeds consisting in a requirement to pay a sum of money in alternative to the value of proceeds. The signatories shall also be prepared to assist investigation and provisional measures with a view to effecting either form of confiscation referred to under the treaty.²¹⁵ Assisting investigation and the measures sought in the treaty shall be carried out as nearly as possible in reflections of the signatory's domestic laws.²¹⁶ In circumstances of which the necessary measures are in form of specific formality unknown to the domestic laws of such a signatory, no matter the unfamiliarity, party concerned shall strictly follow such requests provided is not inconsistent with the fundamental principles of its domestic laws. Furthermore, every signatory shall legislate and take other measures as may be expedient to the that other party's demand to identify, trace, freeze or seize the proceeds and instrumentalities, treated in *pari-materia* as those made in the framework of domestic procedures.²¹⁷

²¹⁴ See also Chapter IV Article 15 (1) and (2) Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, and 16.V.2005.

²¹⁵ See Chapter IV Article 24 (1) Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 16.V.2005.

²¹⁶ See also Chapter IV Article 16 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crimes and on the Financing of Terrorism, Warsaw, and 16. V. 2005.

²¹⁷ See Chapter IV Article 24 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 16.V.2005.

3.8 Comparison of Nigeria, South Africa and Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the proceeds from Crime and on the Financing of Terrorism

Under the convention to which Nigeria and South Africa are parties, each party is required to legislate and take other measures as may be expedient to establish a financial intelligence unit as outlined in the convention and to ensure that its financial intelligence unit generates financial information, directly or indirectly and on a timely basis including the analysis of suspicious transaction reports to the relevant law enforcement agencies.²¹⁸

The Financial Intelligence Centre Act 38 of 2001 has fully addressed the requirement of the convention by making adequate provisions in respect of collating, analyzing, assessing and disseminating financial information to the relevant law enforcement agencies.²¹⁹ For instance, the provisions of FICA in relation to foreign companies and persons connected to foreign companies are comprehensive.²²⁰ FICA provides for the establishment and operation of the Financial Intelligence Centre ("the Centre") and the Money Laundering Advisory Council; creates money laundering control obligations primarily for "accountable institutions" listed in schedule 1 to FICA.²²¹ Accountable institutions include a broad spectrum of persons such as attorneys, estate agents, banks, long-term insurers, foreign exchange dealers, and the like.²²² FICA obliges accountable institutions to identify and verify their clients' identity, keep records of clients and transactions and to report certain transactions to the Centre. The duty to report applies not only to accountable institutions but to all persons who carry on a business or are in charge of or manage a business or who are employed by a business of such accountable institutions. The Act makes non-compliance with FICA, in terms of failure to

²¹⁸ The Financial Intelligence Centre Act 38 of 2001 (FICA), the Prevention of Organized Crime Act 121 of 1998 (POCA) and the Protection of Constitutional Democracy against Terrorism and Related Activities Act 33 of 2004 (POCDATARA) were legislated in South Africa with the object of, *inter alia*, setting up an anti-money laundering regulatory regime.

²¹⁹ Section 2 FICA 2001.

²²⁰ Section 34 FICA 2001.

²²¹ Schedule 1 item 7 of FICA.

²²² FICA Manual 2001 item 2, 2.2.

identify and verify clients as prescribed and "money laundering" criminal offences carrying severe penalties.²²³

The financial intelligence unit as defined in the Council of Europe Convention on Laundering is essentially to collate, analyze, assess and provide financial intelligence to all law enforcement agencies and other relevant agencies and ministries, for example in the case of Nigeria, the Department of State Security (DSS), Economic and Financial Crimes Commission (EFCC), Independent Corrupt Practices Commission (ICPC), Nigerian Drug Law Enforcement Agency (NDLEA), Nigeria Police Force (NPF), Nigeria Customs Service (NCS), Directorate of Military Intelligence (DMI), Nigeria Intelligence Agency (NIA), Federal Inland Revenue Service (FIRS), Federal Ministry of Justice (FMJ) and Federal Ministry of Finance (FMF) in the country, as well as to all financial sector regulators such as the Central Bank of Nigeria (CBN), the Securities and Exchange Commission (SEC), the National Insurance Commission (NAICOM), and to a large extent to the Federal Ministry of Industry, Trade and Investment, (FMIT/Special Control Unit on Money Laundering).²²⁴

Typically the operational structure of these agencies require the utmost confidentiality while relating with the NFIU, however, the NFIU operates as a department of one of the agencies (i.e. EFCC) at the same time the EFCC is interested in the generated intelligence, as such there is no confidence. This is one of the reasons why this modus operandi should change particularly when compared with the operational structure of FICA.²²⁵ As discussed above, the outstanding issues with regard to Nigeria are: lack of operational autonomy of the NFIU; Lack of comprehensive legislation on mutual legal assistance and lack of a comprehensive legislation on recovery of stolen assets and proceeds of crime. Furthermore,

²²³ Section 53 FICA makes it an offence, which on conviction carries a penalty of a fine not exceeding R10,000,000.00 (ten million Rand) or 15 (fifteen) years imprisonment equivalent of Nigeria N151, 781,469.00 (one hundred fifty one million seven hundred eighty one thousand four hundred and sixty nine naira).

²²⁴ Ogbodo, U. K., & Mieseigha, E. G. (2013). The Economic Implications of Money Laundering in Nigeria. *International Journal of Academic Research in Accounting, Finance and Management Sciences*, 3(4) pp170-184, at 178.

²²⁵ *Ibid.*

inadequate funding is hindering the implementation of the core functions of the NFIU as no separate budgetary provision is made for it in the EFCC budget.²²⁶

Consistent observations by the international community on Nigeria despite the establishment of the EFCC, is that Nigeria does not have a single platform for receiving financial intelligence reports.²²⁷ This prompted the EFCC through a board resolution to modify the EFCC Act without reference to the National Assembly by trying to create the NFIU as an independent body. This move still did not address the issues, as a law, ipso facto cannot be changed by a resolution of the Board.²²⁸

The next chapter discusses the protection which these laws offer to foreign investors in Nigeria while identifying challenges. The administrative and judicial remedies applicable to the breach of these laws by both foreign investors and local business people are examined, considering the degree of informal business and investment in Nigeria.

²²⁶ Ngwube, A., & Okoli, C. (2013). The Role of the Economic Financial Crime Commission in the Fight against Corruption in Nigeria. *Journal of Studies in Social Sciences*, 4(1), at 17.

²²⁷ <http://efccnigeria.org/efcc/index.php/news/682-financial-health-of-the-efcc>, Accessed on 5th September 2014.

²²⁸ <http://efccnigeria.org/efcc/index.php/news/686-re-efcc-after-oronsaye-because-of-nfiu>, Accessed on the 5th September 2014.

CHAPTER FOUR

THE EFFICACY OF THE LEGAL FRAMEWORK FOR INVESTMENTS IN NIGERIA

4.1 Introduction

Having described legislation governing investment in Nigeria and cross-border transactions in chapters 2 and 3, this chapter examines the actual protection and investment security provided to foreign investors. Administrative and judicial remedies against the breach of investment legislation are also examined in the light of informal business and investment in Nigeria. Special attention is given to the economic relations between China and Nigeria in the area of foreign direct investment made formally and informally.

The flow of investment is not determine by a single factor or restricted to a number of factors. There are many factors that are likely to induce the flow of foreign direct investment anywhere.²²⁹ It is often claimed that those factors that are favourable to domestic investments are also likely to propel foreign direct investment. In making decisions to invest abroad, foreign investors are influenced by a constellation of economic, political, geographic, social and cultural issues.²³⁰

It is important to note that while the list of factors is fairly long, not all determinants are equally important to every investor in every location at all times. It is also true that some determinants may be more important to a given investor at a given time than to another investor.²³¹ The foreign direct investment that goes into Africa is concentrated in a few countries, with the four traditionally biggest recipients pocketing a significant proportion: Nigeria, Egypt, Angola and South Africa.²³² The inflows that Nigeria has enjoyed in recent times have been attributed mainly to the privatization and commercialization of Nigerian government owned companies. The return of Nigeria to democracy after several decades of

²²⁹ Otepola, A. (2002). Foreign direct investment as a factor of economic growth in Nigeria. *Africa Institute for Economic Development and Planning (IDEP), Dakar, Senegal*. Africa Institute for Economic Development and Planning (IDEP), Dakar, Senegal, (An abstract.) page 1.

²³⁰ *Ibid.*

²³¹ Ayanwale, Adeolu B. (2007) FDI and economic growth: evidence from Nigeria. AERC research paper 165, Nairobi: AERC, page 4.

²³² *Ibid.*

military rule and various social and economic freedoms under a democratic system of government were also key factors responsible for the country's position as one of the major recipients of foreign direct investment (FDI) in Africa.²³³

4.2 Chinese Investment in the Nigerian Economy

There has been active participation of various Chinese firms in the Nigerian economy over the past two decades. For example a railway transport project was contracted to a Chinese company in the mid-1990, involving major Nigerian telecommunications companies. In analyzing the China-Nigeria investment relations with respect to employment, it is important to bear in mind that some part of the policies on foreign investment were promulgated to address the trend of importation of labour by Chinese companies by effecting measures to increase the employment of Nigerians in the foreign investor firms.²³⁴

The major characteristic of Chinese investment in Nigeria is its concentration in a few sectors that are of strategic interest to China, especially in the extractive industries which are carried out largely by state-owned enterprises or joint ventures.²³⁵ In addition, the engagement with China, just like any bilateral relationship, has advantages and disadvantages and optimal outcomes from the engagement will depend on the policies and institutions that are put in place to maximize positive effects and minimize competing effects.

China's commercial investment in Nigerian markets is quite astonishing. In 2006 it was announced that China was to invest US\$267 million to establish the first-phase of the

²³³ Kaplinsky, R., & Morris, M. (2009). Chinese FDI in Sub-Saharan Africa: engaging with large dragons. *European Journal of Development Research*, 21(4), 551-569, at page 556 and Ayadi, F. S. (2009). Foreign direct investment and economic growth in Nigeria. In *Proceedings of the 10th Annual Conference of IAABD*. In Proceedings of the 10th Annual Conference of International Academy of African Business and Development (IAABD) page 54.

²³⁴ Ogunkola, E. O., & Jerome, A. (2006), "Foreign direct investment in Nigeria: magnitude, direction and prospects" in *Foreign Direct Investment*, at page 150 and Oyeranti, O. A., Babatunde, M. A., Ogunkola, E. O., & Bankole, A. S. (2010). The Impact of China-Africa Investment Relations: The Case of Nigeria, *AERC Collaborative Research China-Africa Project Policy Brief*, (8) at 10.

²³⁵ Renard, M. F. (2011). China's Trade and FDI in Africa. *China and Africa: an Emerging Partnership for Development*, at page 12.

Lekki Free Trade Zone (FTZ) in Lagos.²³⁶ Approved by the Chinese government, the Lekki Free Trade Zone is “the first of its kind the Chinese government has ever built abroad”.²³⁷ Power plants, road networks and the construction of various workshops for the manufacturing of sundry goods will be finished by 2009, according to the first phase of the plan.²³⁸

The Sino-Nigerian joint venture links three Chinese companies and the Lagos State government together. China's CCECC—Beyond International Investment and Development Company holds sixty percent (60%) of shares and Nigeria's Lekki Global Investment Company the remaining forty percent (40%). The proposed plan was truly gigantic. The first-phase covers an area of 15 square kilometres, with the Chinese investing \$200 million and the Nigerians \$67 million. Upon its completion, phase I will apparently see an industrial park comprising light industry, textiles, building materials, household electric appliances, communications, and machine processing as well as real estate and gardening. Phases II and III aim to cover 150 square kilometres with a total investment of \$5 billion, focusing on heavy industry manufacturing, chemicals, petroleum processing, pharmaceuticals, cars, logistics, import/export businesses, a deep-water port, tourism, real estate, education, banking and finance, among others.²³⁹

Turning to other aspects of Beijing's links with Nigeria, China has also invested in Nigeria's fixed infrastructure. Chinese companies have signed onto the National Rural Telephony Project, among them ZTE and Alcatel. Shanghai Bell has already finished the first phase of the project, which covered 218 Local Government Areas.²⁴⁰ A third Chinese firm, Huawei was engaged in the second phase and ultimately 576 area councils will have access to

²³⁶ This Day, (Nigerian Newspaper), 9 May 2006 and <http://en.calekki.com/>, Accessed on the 5th September 2014.

²³⁷ The People's Daily Beijing (News paper), 13 May 2006 and <http://www.nigeriapropertycentre.com/lagos/lekki/lekki-free-trade-zone>, Accessed on the 5th September 2014.

²³⁸ *Ibid.*

²³⁹ Oyeranti, G. A., Babatunde, M. A., & Ogunkola, E. O. (2011). An analysis of China-Nigeria investment relations. *Journal of Chinese Economic and Foreign Trade Studies*, 4(3), 183-199, at 186.

²⁴⁰ Nigeria First (Abuja newspaper), 22nd December 2006 and Ndulu, B., Kritzingger-van Niekerk, L., & Reinikka, R. (2005) “Infrastructure, regional integration and growth in Sub-Saharan Africa” in *Africa in the World Economy* 101 at 108.

basic telecommunications, including voice, data transmission and internet services. The whole project is being financed through a concessionary loan secured by the Nigerian Government from China. Further cementing Chinese investment into Nigeria's infrastructure development, China Gezhouba Group Corporation (CGGC), the main constructor of the controversial three Gorges project, has won a contract to build the 2600 Megawatt Mambilla Plateau hydropower station in Nigeria in a \$1.46 billion project. Construction is expected to last for six years only. The Chinese government agreed to build the hydroelectric power station after China and Nigeria signed various deals at the Beijing Summit of the second China – Africa Forum in November 2006, indicating that infrastructure deals and entry into African markets is very much part of China's overall Africa strategy.²⁴¹

Chinese corporations, with Beijing's support, have also invested in Nigeria's transport sector, with a 25-year railway development plan that comprises a wholesale redesign of the existing railway tracks and an ambitious expansion of new lines to areas of Nigeria previously not serviced by rail. The Nigerian government signed a \$2.5 billion loan facility with China in October 2006, much of which will be used to finance the refurbishment of Nigeria's railway system. In all, an estimated 7800 kilometres of standard gauge railway network, to connect all 36 state capitals and major cities in the country, will be built by concession-holders, which then will be responsible for infrastructure upgrades, expansion and maintenance, and train operations. The entire railway modernization and expansion project is estimated to cost over \$30 billion.²⁴² Given the magnitude of the investment, there is definitely a need to ensure compliance with the laws and regulations governing investment in Nigeria by the Chinese and other investors as much as there is a need to protect investors.

²⁴¹ *Beijing Review* (Beijing newspaper) 3 April 2007 and King, K. (2006, November). Aid within the wider China-Africa partnership: A view from the Beijing Summit in *Paper to Workshop on China-Africa Links* pp. 11-12 at 20.

²⁴² This Day, (Nigerian News paper) 14 January 2007 and Gbadamosi, A., & Oniku, C. A. (2009). The strategic implications of China's economic pacts with sub-Saharan African countries: the case of Nigeria. In *International Journal of Arts and Sciences Conference* (pp. 1-4), at page 18.

4.3 Challenges to the Regulation of Foreign Investment in Nigeria

International law recognizes the regulation by the host country of foreign investment in its territory as a justified act of national sovereignty.²⁴³ It is well settled in international law that the host state has the right to control the movement of capital into its territory, to regulate all matters pertaining to the acquisition and transfer of property within its national boundaries, to determine the conditions for the conduct of economic activity by natural or legal persons, and to control the entry and activity of aliens.²⁴⁴ Moreover, Article VI of the Articles of Agreement of the International Monetary Fund (IMF) specifically affirms the right of member states to maintain capital controls.²⁴⁵ However, there are several challenges to the effective regulation of foreign investment in Nigeria, discussed in the sections following.

4.3.1 Informal admission of unapproved investors

Most countries have enacted investment laws, investment codes, or joint venture laws, for the purpose of regulating the entry and operation of foreign investment.²⁴⁶ While such legislation now seems to be a basic element in the legal systems of almost every developing country in the world including Nigeria, it is also to be found in certain industrialized nations, such as China, Canada, Australia, and Japan.²⁴⁷ In an effort to maximize the benefits and minimize the costs of obtaining foreign capital, investment laws define the types of investment projects desired, specify incentives to be granted to desired projects, impose controls on their operations, and establish a process for screening investment proposals so as to determine whether they meet the host country's requirements.²⁴⁸ Proposals which do not

²⁴³ Liu, X., Buck, T., & Shu, C. (2005). Chinese economic development, the next stage: outward FDI? *International Business Review*, 14(1), 97-115, at page 98.

²⁴⁴ Lipsey, R. E. (2004), "Home-and host-country effects of foreign direct investment" in *Challenges to Globalization: Analyzing the Economics* (pp. 333-382). University of Chicago Press at 192.

²⁴⁵ (IMF occasional paper 264, 2008)

²⁴⁶ Kolstad, I., & Wiig, A. (2012) What determines Chinese outward FDI? *Journal of World Business*, 47(1), 26-34, at page 28.

²⁴⁷ Makino, S., Lau, C. M., & Yeh, R. S. (2002). Asset-exploitation versus asset-seeking: Implications for location choice of foreign direct investment from newly industrialized economies. *Journal of International Business Studies*, 403-421, at page 417.

²⁴⁸ Kolstad, I., & Wiig, A., "What determines Chinese outward FDI" in *Journal of World Business*, Volume 47, Issue 1 January 2012, pp 26-34 at 30.

meet such criteria are rejected and thereby denied entry to the host country. Even if they are not formally rejected, the government may achieve the same result by denying the investor needed privileges and facilities for undertaking the project.²⁴⁹

The investment laws thus usually establish an important "barrier" by way of a project approval process. The approval process, which usually involves negotiation between the host government's country and the foreign investor, may result in the imposition of various conditions upon the project's operating conditions which the investor may not desire.²⁵⁰

It sometimes happens that when a proposal is turned down, the local business people still go ahead and transact with those investors through informal arrangements. This is in spite of the government's efforts to regulate the foreign investment process by denying the investor needed privileges and facilities for undertaking the project and by putting in place the investment laws against such investors.²⁵¹

The people that tend to engage those rejected foreign investors informally are mostly those who are privileged to have the confidential information either in an official and/or private capacity and desire to make quick and easy gains. Most of the Economic and Financial Crime Commission's convictions bordering on money laundering, obtaining money by false pretence, dishonest conversion of customers' money, forgery and forged document(s), issuing of dud cheques, forgery of foreign money transfer, criminal misappropriation of funds, impersonation (i.e. impersonating government officials) and criminal breach of trust discussed in the previous chapter are in respect of these informal investments. These informal transactions are extremely vulnerable to money laundering or terrorist financing. By the nature of their business, occupation or anticipated transaction activity, certain customers and entities may face specific risks.²⁵²

²⁴⁹ Oyeranti, G. A., Babatunde, M. A., & Ogunkola, E. O. (2011) "An analysis of China-Nigeria investment relations" in *Journal of Chinese Economic and Foreign Trade Studies*, 4(3) at pp183-199.

²⁵⁰ Busse, M., & Hefeker, C. (2007) Political risk, institutions and foreign direct investment in *European Journal of Political Economy*, 23(2), 397-415 at 400.

²⁵¹ *Ibid.*

²⁵² Richards, J. R. (1998), *Transnational criminal organizations, cybercrime, and money laundering: a handbook for law enforcement officers, auditors and financial investigators*. CRC press (Taylor & Francis Group) at page 15.

4.3.2 Assessment of Customer Risk by Financial Institutions

In pursuance of the financial and investment laws, the Economic and Financial Crimes Commission (EFCC) arrests, investigates, makes findings and sends information on convictions to the Central Bank of Nigeria where they form the basis of its Anti Money Laundering/Combating Financing Terrorism (AML/CFT) rules and policy. The Central Bank of Nigeria in turn gives directives to all financial institutions in respect of AML/CFT risk assessment and management policy. At the stage of the risk assessment process, it is essential that the financial institutions exercise sound judgment and do not define or treat all members of a specific category of customers as posing the same level of risk.²⁵³

In assessing customer risk, financial institutions are required to consider other variables such as services sought and geographic locations. There may be particular considerations for specific customers and entities which include: foreign financial institutions, including banks and foreign money services providers (e.g. currency exchanges and money transmitters);²⁵⁴ non-banking financial institutions (e.g. money services businesses, casinos and card clubs, brokers/dealers in securities, and dealers in precious metals, stones or jewels); senior foreign and domestic political figures, their immediate family members and close associates collectively known as politically exposed persons (PEPs); non-resident aliens (NRAs) and foreign individuals' accounts.²⁵⁵ The accounts of foreign individuals are particularly important as they are often used for these informal investments. Other entities to consider in assessing customer risk are: domestic business entities and foreign corporations, particularly offshore corporations such as domestic shell companies and private investment companies (PIC) as well as international business corporations (IBC) located in higher risk geographic locations.²⁵⁶ Deposit brokers, particularly foreign deposit brokers are also key

²⁵³ Okogbule, N. S. (2007) Official corruption and the dynamics of money laundering in Nigeria in *Journal of Financial Crime* 14(1) 49-63 at 59.

²⁵⁴ Walker, J. (1999) How big is global money laundering? In *Journal of Money Laundering Control*, 3(1), 25-37, at page 28.

²⁵⁵ Obuah, E. (2010) Combating Corruption in Nigeria: The Nigerian Economic and Financial Crimes (EFCC) in *African Studies Quarterly* 12 (1) 127-132 at 129.

²⁵⁶ Obayelu, A. E. (2007) Effects of corruption and economic reforms on economic growth and development: lessons from Nigeria. In African Economic Conference Department of Agricultural Economics, University of Ibadan, Nigeria: Being a paper prepared and submitted For 2007 African Economic Conference.

actors to consider, as are cash-intensive businesses (e.g. convenience stores, restaurants, retail stores, liquor stores, cigarette distributors, privately owned Automated Teller Machines and parking garages).²⁵⁷ Other categories are non-governmental and charities organizations (foreign and domestic) and professional services providers (e.g. attorneys, accountants, doctors or real estate brokers).²⁵⁸

A key challenge faced by financial institutions in assessing customer risk is insecurity which prevents continuity of the risk assessment exercise. In recent times, Nigeria has witnessed an unprecedented level of insecurity. Inter and intra-communal and ethnic clashes as well as ethno-religious violence have led to enormous loss of life and property and a general atmosphere of siege and social tension for the populace. An effective customer risk assessment program must be able to control the risks associated with the institution's products, services, customers, entities and geographic locations and an effective risk assessment is required to be an ongoing process, not a one-time exercise.²⁵⁹

The Management is required to update its risk assessment to identify changes in the financial institution's risk profile when it is necessary, especially when new products and services are introduced, existing products and services change, higher-risk customers open and close accounts or the financial institution expands through mergers and acquisitions. In the absence of such changes and in the spirit of sound practice, financial institutions are required to periodically reassess their money laundering and financing terrorism risks.²⁶⁰ The mass bombing in Kano a commercial city in northern Nigeria on the 25th January 2012 affected the structural framework of all financial institutions in northern Nigeria - the servicing hours were reduced thereby reducing customer service, financial institutions staff

²⁵⁷ Economic and Financial Crimes Commission (2004) EFCC Saves Nigeria N70 Billion. Available on-line at URL <http://www.efccnigeria.org/links>, (2004823 Nigeria first), Accessed on the 20th August, 2014.

²⁵⁸ Chawki, M. (2009) "Nigeria Tackles Advance Free Fraud" in *Journal of Information Law and Technology*.

²⁵⁹ Adeleye, B. C., Annansingh, F., & Nunes, M. B. (2004) Risk management practices in IS outsourcing: an investigation into commercial banks in Nigeria. *International Journal of Information Management* 24(2) 167-180 at 179.

²⁶⁰ Sanusi, L. S. (2010) "The Nigerian Banking Industry: what went wrong and the way forward" delivered at the Annual Convocation Ceremony of Bayero University, Kano held on 3rd January 2010.

dress code changed from corporate to non-western cultural clothing that hide their identity. Their relationship with customers changed under the desperate need for security. In this environment, it is often not feasible to secure the information required under an effective customer risk programme.

4.3.3 Geographical Location

With the current Boko-Haram insurgency and general political insecurity in northern Nigeria, the region is considered to be a high risk financial and security area. In identifying geographic locations that may pose a higher risk, it is essential for the financial institutions' Anti Money Laundering/Combating Financing Terrorism Compliance Program to pay more attention, stringently apply the know your customer policy to natural and corporate persons' accounts or any account(s) connected to such accounts in question and report same to the Central Bank of Nigeria.²⁶¹

Financial institutions are required to understand and evaluate the specific risks associated with doing business in informal environments while opening accounts for customers from or facilitating transactions involving certain geographic locations. However, geographic risk alone does not necessarily determine a customer's or transaction's risk level, either positively or negatively.²⁶² This presents the challenge of identifying and applying other indicators in the assessment of customer risk.²⁶³

4.4 Judicial and Administrative Remedies for Investors and their Hosts

Where a dispute arises between an investor and any government of the Federation in respect of an enterprise, all effort shall be made to reach an amicable settlement through mutual discussion, failing which dispute may be submitted to arbitration at the option of the aggrieved party.²⁶⁴ In the case of a Nigerian investor, arbitration shall be in accordance with the Arbitration and Conciliation Act 1990 and in the case of a foreign investor, within the

²⁶¹ Sharman, J. C., & Chaikin, D. (2009) Corruption and Anti-Money-Laundering Systems: Putting a Luxury Good to Work. *Governance*, 22(1) 27-45 at 30.

²⁶² *Ibid.*

²⁶³ De Goede, M. (2003) Hawala "Discourses and the war on terrorism finance" in *Environment and Planning D: Society and Space* 21 (5) 513-532 at 520.

²⁶⁴ Ahunwan, B. (2002) Corporate Governance in Nigeria. *Journal of Business Ethics*, 37(3), 269-287, at 279.

framework of any bilateral or multilateral agreement on investment protection to which the federal government and the country of which the investor is a national are parties. Besides this, dispute resolution shall be in accordance with any other national or international machinery for the settlement of investment dispute agreed on by the parties.²⁶⁵ Where there is disagreement between the investor and the federal government as to the method of dispute settlement to be adopted, the International Centre for Settlement of Investment Disputes (ICSID) rules will apply. The Nigerian Investment Promotion Commission will act as liaison between the foreign enterprise and the relevant government department.²⁶⁶

Most bilateral investment treaties provide the investor with a choice of commercial arbitration rules under which to bring a claim. The appropriateness of these rules for investment disputes has been questioned over the past few years, particularly with regard to whether hearings should be held in camera.²⁶⁷ However, the drafters of future treaty texts need only make minor changes to ensure openness of future proceedings.

The rules themselves are general in scope, leaving considerable leeway for a tribunal to adopt the practices and procedures that suit the circumstances of the claim to be heard.²⁶⁸ Accordingly, the addition of potential compensation claims for the violation of human rights by an investor/investment would not be difficult to accommodate. Investment treaties also generally provide for the claimant's choice of at least one of the prospective arbitrators, as well as the designation of an appointing authority.²⁶⁹ Whereas investment claimants might choose economic law scholars or lawyers, human rights claimants would probably choose

²⁶⁵ Nwogugu, E. I. (1965) *The legal problems of foreign investment in developing countries* Manchester University Press, at page 244.

²⁶⁶ Section 27 (5) NIPC Act.

²⁶⁷ Eaton, J. (1990) "Debt relief and the international enforcement of loan contracts" in *The Journal of Economic Perspectives*, 43-56 at 50.

²⁶⁸ Asouzu, A. A. (2001) *International commercial arbitration and African states: practice, participation and institutional development* Cambridge University Press at p 47.

²⁶⁹ Van Harten, G., & Loughlin, M. (2006) "Investment treaty arbitration as a species of global administrative law" in *European Journal of International Law* 17 (1) 121-150 at 130.

human rights scholars or adjudicators (i.e. persons who have experience sitting on state-to-state human rights tribunals).²⁷⁰

Moreover, whereas the integrity of domestic regulators and courts could be questioned with respect to the uniform and non-discriminatory application of international human rights norms in any given country, tribunals established under a human rights protection mechanism—such as the one proposed herein—would not likely suffer from similar attacks on their credibility or impartiality.²⁷¹

An international tribunal would hear claims of ill-treatment at the hands of an investor with an international mandate and international law expertise rather than a local tribunal with no international law experience and potentially conflicting mandates. The proposed claim mechanism would provide for the opportunity to receive compensation directly from the offending investor.²⁷² Such a mechanism would potentially represent a considerable improvement over the use of a trade-sanctions mechanism for alleged human rights violations.²⁷³

The proposed mechanism would simply be more economically efficient than the establishment of any trade-sanctions mechanism, because trade-sanctions mechanisms contemplate one state punishing another through application of some form of duty, quota, or ban for failure to enforce human rights norms domestically.²⁷⁴ Claims for compensation that are targeted against an individual firm for specific conduct is far more economically efficient and do not raise the potential for conflicts with multilateral trade regimes.²⁷⁵

²⁷⁰ Alexandrov, S. A. (2006) “The Compulsory Jurisdiction of the International Court of Justice: How Compulsory Is It?” in *Chinese Journal of International Law* 5(1) 29-38 at 35.

²⁷¹ *Ibid.*

²⁷² Broches, A. (1966) “Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction” *Colum. J. Transnat'l L.*, 5, 263.

²⁷³ Francioni, F. (2009). Access to justice, denial of justice and international investment law. *European Journal of International Law*, 20 (3), 729-747, at 735.

²⁷⁴ Akinsanya, A. (1981). Host Governments' Responses to Foreign Economic Control: The Experiences of Selected African Countries. *International and Comparative Law Quarterly*, 30(04), 769-790, at page 778.

²⁷⁵ Kraus, J. (2002). Capital, power and business associations in the African political economy: a tale of two countries, Ghana and Nigeria. *The Journal of Modern African Studies*, 40(03), 395-436, at page 401.

It is to be noted that within the scope of the Arbitration and Conciliation Act²⁷⁶ there is no judicial or administrative remedy for informal investment. In other words, informal investments lack legislative protection. In the concluding chapter the prospect of judicial redress for dispute arising out of these informal transactions is discussed.

²⁷⁶ Arbitration and Conciliation Act Cap A19 Laws of the Federation of Nigeria 2004.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusions:

This study examined the regulatory framework for foreign investment in Nigeria. The choice of subject was informed by the prevalence of informal business engagements between local business people and foreign investors mainly from China. Nigeria's relations with China have grown in the last decade from the limited and intermittent contact that marked the immediate post-independence era to an increasingly complex and expansive engagement. Nigerian businessmen welcomed the opportunity of trading with a lower-cost economy than those of their traditional trading partners and valued the ability to purchase lower-cost merchandise. It was earlier discussed that the regulatory environment for investment in Nigeria opens the door for investments and provide security for such investments.

The Corporate Affairs Commission (CAC) is the first point of entry for investors and custodian of all records of foreign companies and their Nigerian partners. The Corporate Affairs Commission (CAC) that replaced the former Companies Registry simplified the registration procedure particularly for foreign investors and established zonal offices to meet the demand of its customers. Adequate provisions were made under which a foreign company may apply to the federal executive council for exemption from the requirement to register locally if it belongs to the class of companies specified for exemption from local registration.

The process of importing and securing investment capital was discussed in the light of foreign direct investment. Both the Nigeria Investment Promotion Commission and the Securities and Exchange Commission act as regulatory bodies in respect of securities registration. They are empowered to supervise the working capital imported into Nigeria by foreign investors and issue guidelines as to the movement, re-investment and repatriation of such capital.

The tax laws were made to provide a favourable environment for foreign investment by providing a different tax regime for foreign investors. A wide range of incentives and reliefs were designed by the federal government to encourage the inflow of foreign investments. Agricultural production and export have been on the priority lists of the

government of the federation of Nigeria and as such it is one of the areas that enjoy reliefs and incentives.

The entry into Nigeria by a non-Nigerian for investment purpose was regulated and also made easier by immigration regulations. Various permits and approval were designed to suit different situations and circumstances of businesses, residence and movement of expatriates in and out of Nigeria.

The Companies and Allied Matters Act (1990) CAMA provides for different types of companies to suit the choice of a foreign investor or an alien wishing to establish a business according to the provisions of any enactment regulating the rights and capacity of an alien. A private company has a limited number of people, a public company allows for a large number of people and joint venture agreements capture contractual terms between foreigners and local businesses or governments.

The Central Bank of Nigeria and other financial institutions under the supervision of Central Bank keeps and exercises a supervisory role over the capital investment, profits made and recapitalization of such profits. The Governor of the Central Bank of Nigeria is obliged to act as an intermediary in receiving the capital reserved by the foreign investor for investment in banking.

The regulation of cross-border transactions in other jurisdictions particularly South Africa for the purpose of meeting global standards and practice were discussed in the light of current practice in Nigeria. The Financial Intelligence Centre Act 2001 (FICA) operates and covers all financial institutions as it affects foreign investors and local bank customers in South Africa. The aim of FICA is to provide a legal framework for effective money laundering control and prevent criminals from being able to integrate their ill-gotten gains in the name of foreign investment into the South African credible banking systems. The Nigerian Financial Intelligence Unit was established to address the problem of money laundering and injecting ill-gotten wealth disguised as foreign investment into the Nigerian banking and financial system.

The international standard of receiving, keeping and disposing of the proceeds of crime under the Warsaw convention that was established by the Council of Europe on Laundering, Search, Seizure and Confiscation of the proceeds from Crime and Financing of

Terrorism was discussed in the light of foreign investment in Nigeria. The fight against serious financial crime has become an increasingly international problem and calls for the use of modern and effective methods on an international scale, a key one of which consists in depriving criminals of the proceeds of crime and its instrumentalities. The combined effects of the G7 meeting of 1989, the recommendations of the Financial Action Task Force and the Warsaw convention recommend the establishment of financial intelligence units in every country.

Each party is required to adopt such legislative and other measures as may be necessary to establish a financial intelligence unit as defined in the convention and to ensure that its financial intelligence unit has access, directly or indirectly, on a timely basis to the financial, administrative and law enforcement information that it requires to properly undertake its functions, including the analysis of suspicious transaction reports.

Money laundering and financing terrorism in the Nigerian investment environment was analyzed and discussed. The principles of international co-operation to combat money laundering and financing terrorism shall be upheld among the party states. The parties shall mutually co-operate with each other to the widest extent possible for the purposes of investigations and proceedings aimed at the confiscation of instrumentalities and proceeds of money laundering.

Another key point discussed was Chinese participation in the Nigerian economy, the consequences of such participation and how it affects domestic market and local business people. There has been active participation of various Chinese firms in the Nigerian economy for the past two decades. China-Nigeria investment relations with respect to employment was analyzed bearing in mind that certain policies on foreign investment in Nigeria were promulgated to address the trend of importation of labour by Chinese companies. Measures were introduced to increase the employment of Nigerians by foreign investor firms.

The informal admission of unapproved investors was identified as a key challenge to sound investor regulation. The practice of local business people who go ahead, when a proposal is turned down, to transact with those investors through informal arrangements was identified as a risk factor that increases money laundering through informal business. Financial institutions are empowered by statute to assist any foreign investor wishing to do

business in Nigeria to freely transfer capital into the country following laid down procedures and to keep a record of such capital imported by the investor.

The challenges in assessing customer risk by financial institutions as it affects financial services delivery and geographic locations were also discussed. The necessity of securing information to provide a sound customer background and establish the purpose of the customer's financial dealings was emphasised. Such customers include foreign financial institutions such as banks and foreign money services providers.

Dispute settlement mechanisms which include judicial and administrative remedies for investors and their hosts were put in place as discussed for amicable dispute resolution. Where a dispute arises between an investor and any government of the federation in respect of an enterprise, all effort shall be made to reach an amicable settlement through mutual discussion, failing which dispute may be submitted to arbitration at the option of the aggrieved party.

5.2 Recommendations:

Investors' protection and amendment of Companies and Allied Matters Act 1990(CAMA)

The provisions of Companies and Allied Matters Act 1990CAMA no longer reflect current socio-economic policies of government. The Act (CAMA) does not make adequate provisions to differentiate between the fiduciary position of a promoter and that of a shareholder of a company. Modern company law maintains that the doctrinal foundation of promoters' duties is that the promoter stands in fiduciary relation to the corporation he promotes. The relationship between promoter and shareholders is more in the nature of vendor and purchaser which has never been regarded as fiduciary in general or in corporate law.²⁷⁷

Looking back however, some loopholes can be identified in the law. Take for instance, the issue of minimum share capital. Most analysts agreed that N10, 000 minimum share capital for private company and N500, 000 for public company are no longer a deterrent to those who want to float brief case companies and the amount is the least in terms of minimum share capital around the globe.²⁷⁸ Increase in the minimum share capital is essential to curb or

²⁷⁷ Michael J. Whincop, *An Economic and Jurisprudential Genealogy of Corporate Law* (2001) Ashgate Publishing Company, England.

²⁷⁸ Section 27 (2) (a) CAMA.

eliminate briefcase companies used as a vehicle for fraud, strengthening of the Corporate Affairs Commission and giving it more teeth to bite. Many of the fees, fines and penalties in the Act (CAMA) are ridiculously low and therefore should be reviewed upward. For instance, the fee payable by a non-member to inspect a company's register of members is N1.²⁷⁹ Operators of companies often seem to be a step ahead of policy makers, always looking for ways to circumvent even the best of laws. To bid for a project, the same set of people now incorporate up to forty (40) different companies using fictitious names as directors. Every day, the Commission (CAC) is inundated with applications to register mushroom companies, even when the Commission knows there is nothing it can do to prevent the registration of such companies under the current statutory regime.²⁸⁰ Similarly, the requirement of the consent of the Attorney-General of the Federation before the Memorandum and Articles of Association of a company limited by guarantee are registered²⁸¹ should be discarded. Experience has shown that it takes between two to three years before such consent is given. This makes doing business in Nigeria very difficult.

Another vexed issue under the Act (CAMA) that affects foreign investors is who should have custody of unclaimed dividends, the company or government? Today, unclaimed dividends have ballooned into billions of naira, a situation that has forced government to show interest in who keeps the money.²⁸² After a very hot debate among stakeholders, the Corporate Affairs Commission has resolved that unclaimed dividends should be managed within the company. It further recommends that a list of unclaimed dividends be published in two national dailies, and if at the expiration of six months after the publication, the dividends remained unclaimed, they should vest in the Federal Government as bona-vacanta under a law promulgated specifically for that purpose.

CAMA allows a company to invest any unclaimed dividends for its own benefit at the expiration of a three months' notice to the members, and no interest shall accrue on the

²⁷⁹ Companies and Allied Matters Fees Regulations 2003.

²⁸⁰ <http://www.nigerianlawguru.com/articles/company%20law/INVESTORS%20PROTECTION%20AND%20AMENDMENT%20OF%20C.A.M.A.pdf>, Accessed on the 7th September 2014.

²⁸¹ Section 26 (5) CAMA.

²⁸² <http://new.cac.gov.ng/home/latest-news/>, Accessed on the 7th September 2014.

dividends against the company.²⁸³ However, where the unclaimed dividends are as a result of the fault of the company in omitting to send the dividends, members shall earn interest at the current bank rate from three months after the date on which they ought to have been posted.²⁸⁴

More often than not, members do not get their dividends, not necessarily as a result of an omission by companies but because the postal system is unreliable. Sometimes shareholders change addresses without notifying the registrar of the companies where they have shares.

I humbly submit contrary to the resolution of Corporate Affairs Commission of vesting an unclaimed dividend into Federal Government as bona-vacanta, that such unclaimed dividends arising out of postal omission or failure of shareholders to notify the company of their new address should be reinvested in favour of the shareholder by creating additional shares to the existing shareholding of the holder.²⁸⁵

The mandatory provision that requires every public company to establish an audit committee should be extended to private companies as a way of enabling the audit committee to perform its watchdog functions better and ensure that unclaimed dividends are safely invested on behalf of the owners. Such audit committees in private companies will be useful in keeping directors from putting themselves in situations that jeopardize their fiduciary duties to the companies they are serving.²⁸⁶ This is also important because there are a considerable number of foreign investors doing business with private companies and as such their unclaimed dividends should be protected.²⁸⁷

Another important issue that poses a threat to the proper regulation of foreign investment in Nigeria is presented by the formal investor-host relationship. Sometimes this formal relationship gives birth to a species of informal relations discussed in the previous chapters. The approval process, which usually involves negotiation between the host

²⁸³ Section 382 (1) and (2) CAMA.

²⁸⁴ <http://www.nigerianlawguru.com/articles/company%20law/INVESTORS%20PROTECTION%20AND%20A%20MENDMENT%20OF%20C.A.M.A.pdf>, Accessed on the 7th September 2014.

²⁸⁵ Smith and Keenan's *Company Law* (12TH edition), Longman Pearson Education, Harlow England.

²⁸⁶ Section 359 (3) and (6) CAMA.

²⁸⁷ <http://new.cac.gov.ng/home/thailand-investors-visit-cac/>, Accessed on the 7th September, 2014.

government's country and the foreign investor, may result in the imposition of various conditions which sometimes lead to the turning down of the investors' proposal and eventually the termination of the formal relationship. These informal transactions are extremely vulnerable to money laundering and terrorist financing.²⁸⁸

The flow of foreign investors has been on the increase in Nigeria particularly from Asia, dominated by China. Suddenly, Nigerian state governors began leading delegations to China seeking investments, aid, and development partnerships in the belief that increasing ties to China could significantly benefit their communities.²⁸⁹ The volume of trade between Nigeria and China continued to grow at low levels until rapid growth turned China in 1993 from a net exporter of crude oil to the second-largest importer of crude oil in the world. Gulf of Guinea countries like Nigeria, which produce sweet, low-sulfur crude and offered developing markets open to international investment, were particularly attractive to the Chinese.²⁹⁰ As China secured various joint-venture contracts with Nigerian oil companies, often in exchange for low-interest loans and targeted development projects, the volume of trade rapidly increased from 1.3 billion naira in 1990 to 5.3 billion in 1996 to 8.6 billion in the 2000s. Most of this growth was attributable to the oil sector, with a small fraction emanating from the importation of cheaply manufactured Chinese goods and products.²⁹¹

Nonetheless, many imported Chinese goods were often substandard, leading the Standards Organization of Nigeria in October 1996 to threaten China that a formal complaint would be lodged with the World Trade Organization if the situation was not immediately corrected.²⁹² The Chinese responded by explaining that they had not deliberately engaged in the dumping of inferior goods in Nigeria and that it was often Nigerian businessmen of

²⁸⁸ Masciandaro, D. (2004). *Global financial crime: Terrorism, money laundering, and off shore centres*. Ashgate Publishers Limited, at page 24.

²⁸⁹ Mthembu-Salter, G. (2009) "Chinese Investment in African Free Trade Zones: Lessons from Nigeria's Experience", *South Africa Institute of International Affairs, Policy Briefing*, 10, at 3.

²⁹⁰ Gu, J. (2009) "China's private enterprises in Africa and the implications for African development" *European Journal of Development Research*, 21(4) 570-587 at 576.

²⁹¹ *Ibid.*

²⁹² Ikhuoria, E. (2010) "The impact of Chinese imports on Nigerian traders", *Chinese and African Perspectives on China in Africa*, 128, at page 45.

dubious disposition who were ordering products of questionable quality.²⁹³ Problems with corruption and unethical conduct by Nigerian businessmen and public officials would later resurface as a key obstacle in the Sino-Nigerian relationship, when the Chinese blamed these forces for contributing to the ineffectiveness of a Chinese project to revive the Nigerian Railway Corporation.²⁹⁴

Flowing from the above, given its position as the biggest economy in Africa and the overwhelming importance of the war against money laundering and financing terrorism in Nigeria, there is a pressing need to have an independent Nigerian Financial Intelligence Agency as the central body in Nigeria responsible for receiving, requesting, analyzing and disseminating financial and other related information to all law enforcement, security agencies, other relevant authorities, as well as exchange of intelligence with other financial intelligence units globally. This will enhance effective gathering of intelligence in the war against terrorism, terrorism financing, money laundering and other complex crimes which influence the listing of Nigeria on the Financial Action Task Force (FATF) high risk countries.²⁹⁵

The implication of being on the Financial Action Task Force target list is that Nigerian businessmen and women seeking financial instruments and facilities outside Nigeria or from international financial institutions cannot get them. Nigerians also face the same challenges when trying to open accounts in banks outside. No wonder, the much talked about Direct Foreign Investment has not been forth coming. Nigerian students who school abroad cannot be trusted to obtain funding arrangements to continue schooling except they pay cash. Some of the observed operational and institutional deficiencies are: deficient anti-money laundering laws, weak terrorism laws; absence of an independent financial intelligence unit; absence of a mutual legal assistance law; absence of proceeds of crime/asset recovery and management body, as well as the absence of a whistle blowers law.²⁹⁶

²⁹³ Utomi, P. (1998). *Managing Uncertainty: competition and strategy in emerging economies*. Spectrum Books.

²⁹⁴ *Ibid.*

²⁹⁵ http://www1.worldbank.org/finance/assets/images/PB9906_en.pdf, Accessed on the 8th September 2014.

²⁹⁶ Report of Senate Committee on Narcotic Drugs and Financial Crimes on the proposed Nigerian Financial Intelligence Agency. Deliberations before the National Assembly of the Federal Republic of Nigeria headed by Senator Victor Lar, published on the 28th November 2013.

In response to these challenges I submit that Nigerian financial institutions and practice should be brought in line with international law and international financial practice. The Nigeria Financial Intelligence Unit should be restructured to have dual character similar to the international financial institutions. First they are inter-governmental organizations that are created by states for a public purpose and they engage in financial transactions which despite their public purpose, are, by nature, similar to market based financial transactions.²⁹⁷ The NFIU working structure should be changed to reflect the dealings with public and private sectors, as well as national and international agencies.

The current location of the Nigeria Financial Intelligence Unit as a unit of the Economic and Financial Crimes Commission is inconsistent with international standards and has affected the effective functioning of the NFIU. This is because the provisions of that structure merely describes the Economic and Financial Crimes Commission as the financial intelligence unit of Nigeria and failed to provide for the distinct powers of the NFIU.²⁹⁸ Since the NFIU is not set up to be an enforcement agency, this provision negates the core objectives for which the NFIU was established in the first place. It is important to note further that there can only be one Financial Intelligence Unit in every country and Nigeria created one without giving it the full powers to operate.

There is a need to do more to address the issues affecting Nigeria in the international community in order to have a more attractive environment for foreign investors. For some issues, this will require creating new laws, for others it may mean amending existing law and yet for others it may call for operational systems to be put in place for implementing ‘dormant’ legal provisions.

²⁹⁷ Daniel D. Bradlow and David B. Hunter, *International Financial Institutions and International Law* (2001). Kluwer Law International BV, The Netherlands.

²⁹⁸ Section 1 (2) (c) EFCC Act 2004.

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