



**THE LEGAL FRAMEWORK FOR THE
PROTECTION OF INVESTMENTS IN NIGERIA
IN COMPARISON TO CHINA**

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ABSTRACT

Every country needs economic growth and development. One of ways a country can achieve and sustain economic growth and development is to attract investments (both local and foreign) to its economy. Investments bolster the Gross Domestic Product and Per Capita Income of a country which are indicators for measuring the growth of an economy¹. Every country is therefore wooing investors to invest in their economy and there is a subtle competition among countries to attract investors. Accordingly, this gives investors, especially foreign investors ample choices to decide on where to invest. The fundamental reason of investment is to make returns and returns can only be made where there are enabling environment for investment to thrive. An investor (foreign investor) therefore considers among other things, the whole business environment of a country in his decision of where to invest. One of the effective ways to lure an investor to a country is to enact good investment laws that adequately protect the interest and concerns of investors especially the foreign investors. Nigeria and China, with large markets in Africa and Asia respectively, have an advantage to attract foreign investments to their economies if both countries have good investment legislations that adequately protect investments and also offer irresistible incentives to investments. Against this milieu, this work therefore examines the legal systems of both countries to find out how well their legislations and enforcement mechanisms protect investments especially against non-commercial risks and also provide incentives for investments.

¹ See SPARKNOTES: Measuring the Economy 1, Gross Domestic Product (GDP) available at <http://www.sparknotes.com/economics/macro/measuring1/section1.html> (last visited 30th March 2008)

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To the memory of my late father

Mr. Emmanuel Uwakwe Eze Nwogu

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INTRODUCTION

Investment is the heartbeat of any 'living' economy². One of the indicators of measuring the rate of growth of any economy is the amount of investment especially foreign direct investments it attracts. Investments (foreign direct investments) not only liberalize, develop and open up an economy but it brings in new technologies and facilitates the transfer of technology to the host country especially where the country is a developing nation.³ Investments also brings industrialization, the history of industrialization of the developed western world started with the investments by local and Transnational Companies, in a way investment is synonymous with development and industrialization. Investment (foreign direct investment) is not only needed by the developing countries of the world, developed and economically strong economies also need investments. In 2004, alone the total accumulated foreign direct investment in the United States was \$1.5trillion which is about \$2.7trillion at today's market value.⁴ According to World Investment Report for 2005, United States was the highest recipient of foreign direct investment, followed by United Kingdom and then China.⁵

The importance of investment to the economy of any nation has made most countries to woo investors to invest in their countries by enacting laws and formulating policies that protect investments; reduce the risks especially non-commercial risks faced by investors, and ensure that investors get good returns on their investments. Investment involves taking of risk and the

² Used metaphorically for a growing economy

³ A good example is the all the Telecommunications TNC's that have been licensed to operate in Nigeria have brought in new technologies and technical know how and have transferred same by training of Nigerian Skilled employees in the field

⁴ See the United States Department of State Fact Sheet available at <http://www.state.gov/r/pa/prs/ps/2006/63553.htm> (last visited on the 15th of March 2008)

⁵ See World Investment Report 2005, Transnational Corporations and the Internationalization of R&D: Overview available at http://64.233.183.104/search?q=cache:4g0F-cnXngkJ:goingglobal2006.vtt.fi/pdf/wir05overview_full.pdf+The+World+Investment+Report&hl=en&ct=clnk&cd=4 (last visited on the 15th of March 2008)

risk element can be broadly classified into commercial risk and non commercial risks.⁶ The non commercial risks factors largely contribute in influencing the choice of a country to invest in by an investor. Consequently, countries are now enacting laws that will adequately protect investments against non-commercial risks, and give investors good returns on their investments.

The aim of this research therefore is to examine the legal systems of Nigeria and China to evaluate the protection it afford investors especially foreign investors against non-commercial risks. The study will specifically examine the protection provided to investment in major investment laws in both countries namely: the Law of the People's Republic of China on Chinese-Foreign Joint Ventures 1979, the Law of the People's Republic of China on Sino-Foreign Cooperative Enterprises 1988, the Law of the People's Republic of China on Foreign Capital Enterprises 1986, the Company Law of the People's Republic of China 1993, the Income Tax Law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises 1991, the Foreign Economic Contract Law of 1985, the Provisions on Guiding Direction of Foreign Investment 2002, Catalogue for the Guidance of Foreign Investment Industries 2005 etc and also the Nigeria Investment and Promotion Commission Act 1995, the Investment and Securities Act 1999, the Public Enterprises (Privatization and Commercialization) Act 1999, the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act 1995 etc.

Beyond the legislations, the research will also examine the enforcement mechanisms in both countries in protecting investments by the agencies or administrative authorities that are statutorily empowered to enforce the investment laws and regulations like the Securities and

⁶ Zoltan Vig, Legal Protection of Foreign Investment with Special Emphasis on Serbia and Montenegro and the United States of America Takings, An SJD thesis submitted to CEU (2005)

Exchange Commission, Nigerian Investment and Promotion Commission, Patent Administration of the State Council, Department of Foreign Economic Relations and Trade of the State Council etc. These statutory bodies' contributions can only be measured in terms of the success of the protection and the resultant increase in investments in their economies. In both countries, where unnecessary bureaucracies and corruptions are impediments in achieving government policies and programs, the enforcement of the protections accorded to investments by agencies and administrative authorities may likely suffer the same fate unless government takes a firm stand and reforms the systems.

The adjudicatory systems of investment disputes in both countries play an important role in the actualization of the protection given to investments in the statute books. Most legislations in both countries provide that investment disputes especially, disputes that involve foreign investors are arbitrated either locally or by the international arbitration institutions, but besides this, the legislations also provide that where parties can not agree on the choice of arbitration institution then recourse should be had to the national courts and Tribunals to resolve the disputes, the research will then examine the courts and tribunals to see whether they are impartial, independence and can maintain justice and fairness especially when the state/government is involved.

Nigeria and China share many common traits and similarities and this make the study of evaluation and comparison of their legal systems interesting and as well challenging. Chinese nationals have many foreign direct investments in Nigeria; Chinese nationals have investments in oil, electricity, manufacturing sectors, etc. Chinese firms were Nigeria technical partners in reviving Nigeria railway system about 12 years ago though the project was not completed due to change in government, as the new government did not consider the

project a priority area⁷. The recent publication in Nigerian newspaper put China's investment in Nigeria at \$50m⁸. China and Nigeria both have large market due to their population peculiarities. China today is the world most populous country with a population of about 1.3 billion people⁹ and this translates into a large market for goods and services. Going by the population, China ought to have the largest market in the world and accordingly should be an investor's destination. Of all the factors that attracted tremendous foreign direct investments into China within the short time of the reform and liberalization of its economy, undoubtedly, China's large market and its position in Asian market remain the major reasons.¹⁰ Although Nigeria's population can not be compared with China, but the fact that Nigeria is the most populous African nation and so has a fairly big market within the African axis strikes some similarities with China. Geographically, the Nigerian large market is strategic because its population of over 140 million people¹¹ accounts for 47% of West African population and its economy accounts for 41% of the region's GDP.¹² This has made Nigeria an investor's delight in Africa, especially in West Africa.

China and Nigeria seem to share another similarity in the area of timing of the commencement of economic reforms that triggered investments in both countries. Whilst China's reforms started 'late' in 1978 after the death of Mao Zedong in 1976 whose centrally planned economy from 1949 did not open the Chinese economy for investment,¹³ Nigeria's

⁷ The Government of Late General Achacha in 1996 engaged a Chinese firm to revive our rail system, but the project was abandoned after his death in 1998 and another government of General Abusalami Abubakar took over the government.

⁸ Thisday Newspaper of 14th March 2008 at page 17

⁹ See CIA World Factbook on China available on <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html> (last visited on the 15th of March 2008)

¹⁰ China's Business Summit 2000 Report, "China Emerging Global Role: Impact, Opportunities and Challenges" Beijing China April 16-18 2000

¹¹ Nigeria population was put at over 140 million people at the last census conducted in 2006 by the National Population Commission.

¹² See World Bank Country Brief: Nigeria available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/NIGERIAEXTN/0,,menuPK:368906~pagePK:141132~piPK:141107~theSitePK:368896,00.html> (last visited on the 30th of March 2008)

¹³ Chi Fulin, Pressing Tasks of China's Economic Transition (Foreign Language Press Beijing, 1996) p. 23.

real economic reforms started even much later in 1999 with the coming into power of a civilian democratic government. The military government held onto power in Nigeria for greater number of years since independence in 1960.¹⁴ As an undemocratic government fraught with instability in the polity and inconsistent economic policies, investors especially foreign investors were wary of investing in a country where the instability in the legal system could not guarantee the certainty of returns on their investments. Though there were foreign direct investments in the oil sector of the economy during the military era, the real investment started with the return of democracy in Nigeria and the deregulation of economy in 1999¹⁵.

Another similarity shared by the two countries is great possibilities and opportunities that abound in the two countries. Whilst Nigeria has become irresistible to foreign investor because of her natural resources especially oil and gas,¹⁶ China economy is conducive to investors due to cheap labor, technological advancement, large market, conveniences and other potentials available in the country¹⁷. Thus, with these similarities, evaluation and comparison of the investment laws of both countries will help to proffer suggestions and recommendations on strengthening the investments laws, and the enforcement mechanisms of the laws to achieve a greater result of protecting investments. This will attract more foreign investments to both countries to further develop the economies of both countries.

The first three chapters of this research discuss the concept and types of investments in general terms, the major legislations in Nigeria that protect investment, and the enforcement agencies and mechanisms in place in Nigeria. The enforcement system is divided into two, the

¹⁴Civilians government have only ruled 19 years out of the 48 years of the independence of Nigeria

¹⁵ The economy of Nigeria has witnessed tremendous investment in other sectors like telecommunications sector, power and steel sector, financial sector, manufacturing sectors, gas, solid minerals and other natural resources including the oil sector that was the only investment Nigeria witnessed during the military rule.

¹⁶ Nigeria is the 5th largest producer of crude oil in the world.

¹⁷ Ross Garnut, Yiping Haung, *Growth Without Miracles: Readings on the Chinese Economy in the Era of Reform* (Oxford University Press, 2001) p. 178.

regulatory enforcement (which also exercises quasi-judicial) mechanisms and the judicial enforcement mechanisms. Chapter 4 and 5 give a brief overview of the economic climate of the People's Republic of China, especially pre and post 1978 reform which marked a major turning point in the economic history of China, the role of the reform of 1978 in opening up the Chinese economy from centrally planned economy to a more market oriented economy that eventually attracted so much investment. The Chapters examine the protection provided by the major investment laws in China, the conventions, treaties and membership of international institutions that help to protect and increase investments in China while the last chapter compares the legal systems in China and Nigeria and proffers some suggestions on strengthening the protection of investments in both systems and finally ended up with concluding remarks. Hence, the methodology adopted in this research is evaluation and comparative analysis of Nigerian and Chinese investment legislations.

This topic is wide, the investment laws in China alone are too many to cover and are not easily accessible especially the rules and regulations (neibu), this research therefore focuses on major investment laws in both countries. Investments being a dynamic field, both countries are always revising their laws, to meet with the international best practices and fundamental objectives of international organizations which both countries belong to, for example the WTO, MIGA, WIPO etc, accordingly, the laws analyzed in this research are prone to revisions by both countries. In deed, in Nigeria the Investments and Securities Act of 1999 was undergoing revisions by stakeholders during this research, most probably, the Investments and Securities Act 1999 may soon not be current law on investments in the stock market in Nigeria. But this notwithstanding, this research has analyzed the subsisting laws in both countries as at January 2008.

CHAPTER 1

1. 1 *The meaning and concept of Investment:*

The word investment has different closely-related meaning in different profession. Investment means different things though related in finance, business management, economics, real estate etc. There are several definitions on the word investment but the definition proffered by investor word is chosen as a working definition for this study because it is generally all encompassing and covers the major issues of this study. Investment involves the process of investing and to understand the term clearly, a definition of the verb “to invest” is apposite here. Investorwords¹⁸ define to “invest” to mean:

*“to engage in any activity in which money is put at risk for the purpose of making a profit, and which is characterized by some or most of the following (in approximately descending order of importance): sufficient research has been conducted; the odds are favorable; the behavior is risk-averse; a systematic approach is being taken; emotions such as greed and fear play no role; the activity is ongoing and done as part of a long term plan; the activity is not motivated solely by entertainment or compulsion; ownership of something tangible is involved; a net positive economic effect results.”*¹⁹

In financial world, investment is the purchase of a financial product or other item of value with an expectation of favorable future returns like stocks and bonds of a corporation while in business investment is the purchase by a producer of a physical good, such as durable

¹⁸ Investorwords.com is the biggest, best investing glossary on the web

¹⁹ See investorwords.com available at <http://www.investorwords.com/2598/invest.html> (last visited on the 16th of March 2008)

equipment or inventory in the hope of improving future business like machines, computers, tools etc.²⁰

Black's Law dictionary defines investment to mean:

*“an expenditure to acquire property or assets to produce revenue; a capital outlay”*²¹.

In Nigeria there are several legislations dealing with investment laws in Nigeria. Many of these legislations did not define investment; the only attempt to define an investment was done in the context of foreign direct investment (FDI) by the Nigerian Investment Promotion Commission (NIPC) Act²² which regulates foreign direct investment in Nigeria. The NIPC defines investment as follows:

“means investment made to acquire an interest in an enterprise operating within and outside the economy of Nigeria”.²³

The NIPC Act also defines an enterprise as follows

“means an industry, project, undertaking or business to which this Act applies or an expansion of that industry, undertaking, project or business or any part of that industry, undertaking, project or business and, where there is foreign participation, means such an enterprise duly registered with the commission”.²⁴

A combined reading of the two definitions contained in the NIPC Act and all other definitions of Investorwords and Black's law dictionary above show the existence of at least five factors in any transaction or venture to constitute an “investment”. These factors are as follows:

- (a) A person (investor) engages in an activity or buys or acquires a property.
- (b) The activity or acquisition of the property may be for a short, medium or long term.

²⁰ *Id.* available at <http://www.investorwords.com/2599/investment.html> (last visited on the 16th of March 2008)

²¹ See Black's Law Dictionary, seventh edition page 831

²² Cited as Nigerian Investment Promotion Commission Act Cap N117 Laws of Federation of Nigerian 2004

²³ See Section 31 of NIPC Act

²⁴ See Section 31 of NIPC Act which is the definition section of the Act.

- (c) The activity or acquisition of the property is to make a future profit (returns).
- (d) There is risk involved in the venture.
- (e) A feasibility study has been conducted on the venture and the odds are favorable.

In general, the summation of all the above definitions is that investment means the use of money or property or engagement in an activity in order to make profits or returns.

1.2 General Overview of Nigeria's Investment Climate

The result of the 2006 National Population and Housing Census conducted in Nigeria put the population of Nigeria at over 140 million people. Nigeria is Africa's most populous nation. Nigeria is a country endowed with arable land and abundant natural resources. Rich in oil, gas solid minerals and other natural resources, Nigeria has been ruled by Military Government for the greater years of her independence since 1960. This Military Government was characterized by unstable polity, looting of public funds, wanton embezzlement, fraud, inconsistent economic policies, human rights abuses and subversion of constitutional provisions to remain in power. Nigeria's former military rulers failed to diversify the economy away from its overdependence on the capital-intensive oil sector, which provides 20% of GDP, 95% of foreign exchange earnings, and about 80% of budgetary revenues.²⁵ This resulted in inadequate infrastructure and poor macroeconomic management. The military government²⁶ implemented a few ad-hoc economic reforms that did not yield the desired result. One of such reforms was the introduction of the Structural Adjustment Programme (SAP) in 1986. SAP was introduced due to the decline in the level of foreign exchange earnings and government's income at onset of the recession of the oil market in the early

²⁵See CIA World Factbook Nigeria available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html> (last visited 16th of March 2008)

²⁶ Under the then Head of State and Commander –in-Chief of the Armed Forces General Ibrahim Babaginda

1980's.²⁷ This negatively affected investment in Nigeria especially foreign investment as no investor was willing to invest in an economy that the investment returns was uncertain.

With the return of democracy in Nigeria in 1999, there have been efforts by the democratic government to woo investors back to the country. Former President Olusegun Obasanjo during his tenure (1999-2007) traveled round the globe luring foreign investors to invest in Nigeria. There were also economic policies to encourage investors in Nigeria. The Government started the process of divesting its equities in corporations and enterprises through the privatization process (this will be discussed in details in chapter two) and in order to make the privatization program a participatory one irrespective of status, the government provided a revolving loan scheme²⁸ for low income earners to benefit from the privatization. The Federal Government set up the National Economic Empowerment Development Strategy (NEEDS) in 2004, and enjoined the State government to set up the State Economic Empowerment Development Strategy²⁹. NEEDS is a pro-poor development strategy, designed to grow a private-sector driven market oriented economy to reduce poverty by creating gainful employment.³⁰ The government believes that a reduction of poverty will translate to an improvement of the well being of her citizenry and a corresponding increase in investment.

²⁷ According to Moses Akpobasah "The emphasis on the SAP was on deregulation, market liberalization, demand management through appropriate pricing, floating of the exchange rate and the promotion of agriculture and other rural based export oriented economic activities. It was also expected to promote the growth of resources based industrialization in place of the then prevailing import substitution strategy which had become unsustainable due to foreign scarcity and the consequent inability to import needed raw materials, spare parts skilled labor etc to support industrial production". See generally Moses Akpobasah, Development Strategy for Nigeria, A paper delivered at a 2-day Nigeria meeting organized by the Overseas Development Institute London, 16-17 June 2004

²⁸ Government set up the Privatization Share Purchase Loan Scheme in 2003 and earmarked N10b for its take off, to help low income earners to participate in the privatization programs of the government, but how well the program was managed by the people entrusted with the administration of the program is another thing altogether.

²⁹ The Local Government being the last of three-tier level government was to set up Local Economic Empowerment Development Strategy.

³⁰ Moses Akpobasah, Development Strategy for Nigeria, A paper delivered at a 2-day Nigeria meeting organized by the overseas Development Institute London, 16-17 June 2004.

The government introduced recapitalization of the banking institutions³¹ to check incessant distress in the industry. The reform of the banking sector through recapitalization, stimulated tremendous investments. Almost all the banks that recapitalized went to the stock market to source for funds for the new minimum capital base, and some of the banks offers, especially leading banks offers were over-subscribed mainly by local portfolio investors.

Apart from the economic policy reforms of the government, there are several legislations to protect investments by preventing the expropriation of foreign investment by government, guaranteeing the repatriation of profits by foreign investors and ensuring a fair and just resolution of investment disputes. The legislation also provide incentives to investors in form of tax rebates and exemptions to encourage investment especially investments in some areas of the Nigeria economy or investments undertaken in underdeveloped parts of the country.

Government simplified the process of incorporating business enterprises and also removed a lot of bureaucracies and delays in registering and getting approvals and permits by enterprises, especially foreign enterprises wishing to invest and do business in Nigeria.

The Regulatory Bodies have also been strengthened to carry out their statutory functions of regulating the business and investment environment in Nigeria. Efficient and fast track Investment Tribunal has been created for investment disputes, the removal of investment disputes from the normal rigid and slow normal court system, have made it possible for investment disputes to be settled timely in accordance with business norms. Nigeria has kept to the Multilateral and Bilateral trade and investment agreements, entered into with other countries. Apart from the infrastructural inadequacies³², corruption³³ and the youth unrest in

³¹ The Central Bank of Nigeria increase the capital base of the banks in Nigeria from 2 billion naira to 25 billion naira and gave a deadline of 31st December 2005 for banks to recapitalize or have their licenses withdrawn.

³² President Umar Y'adua's seven point agenda for the country centered mostly on development of decayed infrastructures in Nigeria and he is confronting the problems head long.

the Niger Delta Region³⁴ which are being pragmatically tackled by the government, the investment climate in Nigeria now is conducive and favorable for returns on investment.

1.3 Foreign Investments in Nigeria.

In Nigeria foreign investment is regulated by national legislations, multilateral and bilateral treaties, conventions which Nigeria is a signatory to or has ratified. A convention that has been ratified by the government also needs to be domesticated as a law in Nigeria by the National Assembly before it can be applied and enforced in Nigeria.³⁵ In Nigeria, there is no one specific and comprehensive legislation dealing with foreign investment, unlike in China where a single law like the Law of the People's Republic of China on Foreign Capital Enterprises 1986 is comprehensive and complete on a foreign wholly owned enterprise set up in China.

Notwithstanding this fact, there are major legislations that deal with foreign investments in Nigeria. Foreign direct investment is governed basically by two legislations which are the Nigerian Investments Promotion Commission Act (NIPC) N117 Laws of Federation of Nigeria 2004 and the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act Laws of Federation of Nigeria 2004. Foreign portfolio investment is governed by Investments and Securities Tribunal 1999 and, Foreign Exchange (Monitoring and Miscellaneous Provisions)

³³ The enactment of two Acts; the Independent Corrupt Practices and Other Related Offences Commission Act Establishment Act 2000 and the Economic and Financial Crimes Commission Establishment Act 2004 and the creation of two bodies; the Independent Corrupt Practices and Other Related Offences Commission and Economic and Financial Crimes Commission have seriously confronted the issue of corruption in Nigeria frontally. This has improved Nigeria's rating on the on the world corruption chart by Transparency International.

³⁴ The creation of Niger Delta Development Commission which is addressing the specific development issues of the Niger Delta, and the arrest, detention and trial of the dissident youth leaders like Asari Dukubo and Henry Okah has helped to reduce the incessant kidnap of foreign oil workers in Niger Delta Region and the crises in the region.

³⁵ See section 12 of the Constitution of the Federal Republic of Nigeria 1999.

Act Laws of Federation of Nigeria 2004. Apart from the above legislations, other investments legislations also affect foreign investment, example the tax payable by any foreign investment especially tax rebates and reductions are contained in Industrial Development (Income Tax Relief) Act of 1971 and Companies Income Tax Act Cap 60 Laws of Federation of Nigeria 1990, while the registration of a company by the foreign enterprise to use doing business is governed by the Companies and Allied Matters Act 1990.

Every enterprise operating in Nigeria whether owned by Nigerians or foreigners are expected to be registered under the Companies and Allied Matters Act 1990.³⁶ Registration of the company under the Companies and Allied Matters Act in principle makes the company ‘a Nigerian company’ and so theoretically smudges the distinction between Nigeria and foreign companies. But in practice the NIPC Act tend to characterize foreign investments or enterprise in terms of where the capital and assets needed to set up the investment are coming from. The NIPC Act defined foreign capital as follows:

“means convertible currency, plant, machinery, equipment, spare parts, raw materials and other business assets, other than goodwill, that are brought into Nigeria with no initial disbursement of Nigerian foreign exchange and are intended for the production of goods and services related to an enterprise to which this Act applies”³⁷

Besides the capital and assets of the enterprise another factor that determines whether an investment is foreign or local is the nationality of the subscribers to the memorandum and articles of association of the company used in carrying out the investment³⁸. The subscribers to the memorandum and articles of association are the owners of the company and where the subscribers of the memorandum and articles of the company are foreigners then the company

³⁶ See section 19 (1) of the NIPC Act

³⁷ See section 31 of the NIPC Act

³⁸ See Akintola Jimoh &Co, Nigerian Investment Laws & Business Regulations, Vol. 1 (Learned Publishments Limited, Lagos 2002) p. 421.

and the investment it embarks upon is likely to be treated as a foreign investment. This classification may be deceptive and can easily be manipulated to suit some purposes especially to benefit from tax incentives accorded to foreign investment by local investors. In all, a foreign investment is investments owned and controlled by an alien or a non- Nigerian.

1. 4 Types of foreign Investments in Nigeria.

Generally foreign investments are classified into two major categories; namely foreign direct investment (FDI) and foreign portfolio investment (FPI) and a foreign investor can invest in any of the categories in Nigeria.

1. 5 Foreign Direct Investments (FDI)

Foreign Direct Investment is an integral part of foreign investment in Nigeria. Wikipedia, the free encyclopedia defined foreign direct investment as follows:

*“an investment made to acquire a lasting interest in enterprises operating outside of the economy of the investor. The FDI relationship consists of a parent enterprise and a foreign affiliate which together form a transnational corporation (TNC). In order to qualify as FDI the investment must afford the parent enterprise control over its foreign affiliate. The UN defines control in this case as owing 10% or more of the ordinary shares or voting power of an incorporated firm or its equivalent for an unincorporated firm; lower ownership shares are known as portfolio investment”.*³⁹

What is important for this research is the first sentence of the definition. FDI are investments made by foreign investors especially multinational or transnational corporations who import capital and machineries to establish investments into another country other than their home

³⁹ See Wikipedia The free Encyclopedia on Foreign Direct Investment available at http://en.wikipedia.org/wiki/Foreign_direct_investment (last visited on the 16th of March 2008)

country. FDI develops the economy more than any other type of investment because of the size of investments; it also transfers technology to the local people and facilitates industrialization. Unlike portfolio investments, owners of FDI exercise effective control and management of the enterprises and this is an essential characteristic of foreign direct investment.⁴⁰ FDI could be executed in Nigeria through foreign wholly owned enterprise or through equity joint ventures enterprises.

The volume of FDI in Nigeria has been on the increase, almost all the foreign investments in oil and gas,⁴¹ telecommunications,⁴² manufacturing sector,⁴³ power and steel etc are through the FDI. FDI accounts for more than 88% of foreign investment in Nigeria. According to Library of Congress Country Studies Report,

*“in 2004, the stock of foreign direct investment (FDI) in Nigeria was estimated at \$31.4 billion, which accounted for about 44 percent of GDP. Total FDI Inflow was \$2.1 billion in 2004 and accounted for 20.4 percent of gross fixed capital formation. The stock of U.S. FDI in Nigeria totaled \$2.1 billion in 2003, up from \$1.8 billion the year before. Most FDI is concentrated in the oil and gas sector. Oil companies report that much FDI continues to fund oil and gas exploration and production, liquefied natural gas projects, and related activities. Some FDI is channeled into telecommunications and manufacturing, but the total remains small relative to oil sector investment”.*⁴⁴

⁴⁰See Akintola Jimoh &Co, Nigerian Investment Laws & Business Regulations, Vol. 1 (Learned Publishments Limited, Lagos 2002) p.83

⁴¹ Texaco oil, Chevron oil, Total oil, Mobil oil, Shell Development Company, Agip oil are all by FDI

⁴² All the major service providers are by FDI, they include MTN, Celtel, etc

⁴³ Peugeot Automobile, Volkswagen, Honda etc

⁴⁴ See Report of Library of Congress- Federal Research Division, Country Profile Nigeria- June 2006 available at <http://lcweb2.loc.gov/frd/cs/profiles/Nigeria.pdf> (last visited 18th March 2008)

1.6 Foreign Portfolio Investments (FPI)

Giyas M Gokkent defines foreign portfolio investment as follows:

*“the passive holdings of securities such as foreign stocks, bonds or other financial assets, none of which entails active management or control of the securities’ issuer by the investor; where such control exist, it is known as foreign direct investment”*⁴⁵.

Foreign Portfolio Investments (FPI) are investments in the stocks and other securities of an already existing company by foreign investors either at the stock market (on the floor of the Nigerian Stock Exchange) or by private placements of shares of companies. The primary concern of the investor in portfolio investment is to reap profit and returns on the investment through dividends declared by the companies⁴⁶. This type of investment does not give investor any control or management rights in the company invested in though a portfolio investor, by virtue of his shares in a company is entitled to vote in the directors of the company.

A portfolio investor whether foreign or local is statutorily protected under Section 26 (1) (a) & (b) and (2) of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act 1995 which provides as follows:

26. (1) A person, whether-

- (a) resident in or outside Nigeria; or
- (b) a citizen of Nigeria or not,

may deal in, invest in, acquire or dispose of, create or transfer any interest in securities and other money market instruments whether denominated in foreign currencies in Nigeria or not.

⁴⁵ Giyas M Gokkent, Theory of Foreign Portfolio Investment (Florida International University Press 1997)

⁴⁶ See Reinier Kraakman et al, The Anatomy of Corporate Law, A Comparative and Functional Approach, (Oxford University Press, 1994), see also Akintola Jimoh &Co, Nigerian Investment Laws & Business Regulations, Vol. 1 (Learned Publishments Limited Lagos, 2002) p. 83.

(2) A person may invest in securities traded on the Nigerian capital market or by private placements in Nigeria.

The foreign portfolio investor may buy the shares of any Nigerian enterprises in convertible foreign currency or capital imported into Nigeria through an authorized dealer either by telegraphic transfer, cheques or other negotiable instruments and converted into naira⁴⁷ in the market in accordance with law. ⁴⁸Apart from few sections of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act 1995, which deals with the importation and convertibility of capital for the purchase of equities and other securities of the company, portfolio investment is largely regulated by the Investments and Securities Act 1999 and the Rules and Regulations made there under, code of conduct for capital market operators and the rules and regulations of the Nigerian Stock Exchange. Consequently a foreign portfolio investor must ensure that the rules are complied with.

1.7 Law and Investment: any Correlation?

Investment is risk fraught. Feasibility studies and advice by professional investment advisers only reduce the risk return to an investor. The collapse of ENRON, WORLDCOM⁴⁹ have shown that the perceived *high and mighty enterprises* may be presenting false and misleading reports to the investing public and any professional advice based on such reports may be catastrophic. Although government has quickly enacted an Act⁵⁰ to guide against future

⁴⁷ The name of currency used in Nigeria

⁴⁸ See sections 2 (1) and 15 of Foreign Exchange (Monitoring and Miscellaneous Provisions) Act 1995

⁴⁹In Nigeria many Banks became distressed over night and investors lose their investment, examples are African International Bank, to forestall further distress the Central Bank of Nigeria increased Bank's capitalization to N25b at the end of December 2005. 11 banks did not meet the recapitalization target and their licensees were withdrawn by the CBN, investments in these 11 banks were also lost, many other companies have become bankrupt either due to economic recession, bad management or fraud of the directors. A good example is GOLDEN GUINEA BREWERIES Plc which used to be the pride of South Eastern people of Nigeria, many from this region invested all they saved in this brewery and the company became over-burdened with debts and internal management wrangling, and the company was wound up on account of bankruptcy.

⁵⁰ Sarbanes-Oxley Act of 2002

occurrence, ENRON and WORLDCOM cases are only but few out of several reasons an enterprise may collapse and this increases the commercial risks of an investment.

Investment involves taking of risk and the risk element can be broadly classified into commercial risk and non commercial risks⁵¹. Commercial risk of an investment is beyond the scope of this study but suffice it to say that commercial risk are the normal risk an enterprise face in the course of doing business and this includes breach of contract, market fluctuations, non-payment due to insolvency of default of the debtor, rescission or cancellation of contract etc.⁵² Non-commercial risks include, expropriation of the enterprise, currency inconvertibility risk, risk of currency devaluation, political violence and instability which includes war, terrorism, strikes, revolution etc⁵³.

Already saddled with all these commercial risks, investors need not be overburdened yet again with non-commercial risks by lack of adequate legislations from the government to protect their investments especially for medium and long term investors. Political instabilities in third world countries especially in Africa underscore the need to have legislations to regulate the investment climate. The importance of legislation to an investor cannot be overemphasized, investment is capital intensive and most of the times done with loans from financial institutions with high interest rate, a foreign investor needs adequate protection through legislations to ensure that his investment will not be expropriated, and his returns can easily and freely be repatriated to his home country. These non commercial risks factors have largely contributed in influencing the choice of country to invest in by an investor, consequently, countries are now enacting laws that will adequately protect investments, and

⁵¹ See Zoltan Vig, Legal Protection of Foreign Investment with Special Emphasis on Serbia and Montenegro and the United States of America Takings, An SJD thesis submitted to CEU (2005)

⁵² See Hans Van Houtte, The Law of International Trade

⁵³ See Robert Shanks, Protecting Against Political Risk, Including Currency Convertibility and Repatriation of Profits in Eastern Europe (1992) p. 26

give investors a good return on their investments. This lay the interrelatedness and inseparability of investment and good legislations.

Legislation also protects the society from shrewd and unscrupulous investors by setting the limit defining which investments are harmful to the society. Examples are section 31 of the Nigerian Investment Promotion Act which prohibits investment in the negative list and the Chinese Catalogue for the Guidance of Foreign Investment Industries which contains in specific details the list of each of the foreign invested projects that are restricted and prohibited. Legislations protect both investments and the society. The correlation of legislation to investment is therefore great and important both to the survival and growth of investment and to the good of the society.

CHAPTER 2

2.0 Analysis of the Protection of Investments under the Existing Legislations in Nigeria.

There are several legislations that deal local and foreign investments in Nigeria. The legislations determine the formation or acquisition of the investments, the control, management and dissolution of the investments, the protection to be accorded to investments against especially non-commercial risks and the incentives to these investments. The investment legislations are many but this research will briefly consider the protection of investments in the following major legislations in Nigeria:

- (a) The Constitution of the Federal Republic of Nigeria 1999
- (b) The Investments and Securities Act 1999
- (c) The Nigerian Investment Promotion Commission Act 1995 now CapN117 Laws of the Federation of Nigeria 2004
- (d) Foreign Exchange (Monitoring and Miscellaneous Provision) Act 1995
- (e) The Public Enterprises (Privatization and Commercialization) Act 1999
- (f) The Industrial Development (Income Tax Relief) Act 1971
- (g) Multilateral Investment Guarantee Agency Convention 1997

2. 1 Protection of Investments under the 1999 Constitution of the Federal Republic of Nigeria.

The Constitution of the Federal Republic of Nigeria 1999 is the basic norm in Nigeria. It is the highest law of the land, any other law that is inconsistent with the provisions of the constitution is declared null and void to the extent of its inconsistency.⁵⁴ Investments in a loose sense are properties of the investors or assets of the investor or shareholders that own the enterprise/company. Investments can be tangible or intangible, an intangible investment includes shares and other securities of a company while tangible investments are houses, cars, machineries factories etc of an enterprise. Investments can also be movable or immovable, an investment's real properties like houses are immovable properties or assets, while cars, machineries, computers are generally movable properties or assets of the investment.

The constitution of Nigeria 1999 has guaranteed the protection of both movable and immovable properties/assets of citizens and non-citizens alike. It provided conditions for taking away of these properties by the State and set the limits of ones right to enjoy his properties. Since investments are properties, all the protection of properties guaranteed to the citizens and non-citizens alike under the constitution apply mutatis mutandis to the protection of investments. Consequently the protection of investment in Nigeria has constitutional basis on the protection of property guaranteed under the 1999 Constitution of the Federal Republic

⁵⁴ See section 1 (3) of the 1999 CFRN

of Nigeria. Section 44 of the Constitution of Federal Republic of Nigeria 1999⁵⁵ provides as follows:

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

(a) requires the prompt payment of compensation therefore and

(b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.

(2) Nothing in subsection (1) of this section shall be construed as affecting any general law.

(a) for the imposition or enforcement of any tax, rate or duty;

(b) for the imposition of penalties or forfeiture for breach of any law, whether under civil process or after conviction for an offence;

(c) relating to leases, tenancies, mortgages, charges, bills of sale or any other rights or obligations arising out of contracts.

(d) relating to the vesting and administration of property of persons adjudged or otherwise declared bankrupt or insolvent, of persons of unsound mind or deceased persons, and of corporate or unincorporate bodies in the course of being wound-up;

(e) relating to the execution of judgments or orders of court;

(f) providing for the taking of possession of property that is in a dangerous state or is injurious to the health of human beings, plants or animals;

(g) relating to enemy property;

(h) relating to trusts and trustees;

⁵⁵ The full text of the Nigerian Constitution can be read at <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> (last visited on the 18th of March 2008)

(i) relating to limitation of actions;

(j) relating to property vested in bodies corporate directly established by any law in force in Nigeria;

(k) relating to the temporary taking of possession of property for the purpose of any examination, investigation or enquiry;

(l) providing for the carrying out of work on land for the purpose of soil-conservation;

or

(m) subject to prompt payment of compensation for damage to buildings, economic trees or crops, providing for any authority or person to enter, survey or dig any land, or to lay, install or erect poles, cables, wires, pipes, or other conductors or structures on any land, in order to provide or maintain the supply or distribution of energy, fuel, water, sewage, telecommunication services or other public facilities or public utilities.

(3) Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly”.

The whole section 44 of the 1999 Constitution of the Federal Republic of Nigeria is reproduced deliberately to show the extent of protection and exceptions to the protection of property or investments in Nigeria. Section 44 (1) guarantees the protection of properties/investments but paragraphs (a) – (b) of subsection 1 provides the conditions that must be fulfilled in case of taking or expropriation of investments. The conditions being that it must be acquired with due process of law and adequate compensation paid and the person whose property is being taken must have access to court to determine his interest and entitlements or compensations. Sub-sections (2) (a) - (m) listed the exceptions to this law: i.e.

the instances or events when a persons property or investment can be lawfully taking either by another person or by the government. The above Section 44 of the Constitution being the highest law in Nigeria has a resounding impact on the entire legal order. In the case of *Anderson vs. Federal Ministry of Internal Affairs & A-G of the Federation*⁵⁶ the Court interpreted the right above to include anybody or enterprise that may be within Nigeria's territorial sovereignty. Under the 1999 Constitution of the Federal Republic of Nigeria, a foreign investor is accorded no less a treatment than that accorded the local investor. The foreign investor enjoys the same rights granted by law to Nigerians under similar conditions.⁵⁷

2.2 Protection of Investments under the Investments and Securities Act of 1999

The Investments and Securities Act of 1999⁵⁸ (ISA) deals mainly on portfolio investments in Nigeria acquired by both local and foreign investors. The ISA 1999 repealed the Lagos Stock Exchange Act, the Nigerian Enterprises Promotion (Issue of Non-Voting Equity Shares) Decree 1987, the Securities and Exchange Commission Decree No. 29 of 1988, Part XV11 of the Companies and Allied Matters Act Cap 59 of 1990. The ISA established the Securities and Exchange Commission. Section I of the ISA provides as follows:

- (1) There is hereby established a body to be known as the Securities and Exchange Commission (in this Act referred to as "the Commission ").
- (2) The Commission -
 - (a) shall be a body corporate with perpetual succession and a common seal;

⁵⁶ 1984 FHCR 29

⁵⁷ *Id.* footnote 37 page 422

⁵⁸ The full text of this Act can be read at <http://www.nigeria-law.org/Investments%20and%20Securities%20Decree%20No%2045%20of%201999.htm> (last visited on the 16th of March 2008)

(b) may sue and be sued in its corporate name; and may acquire, hold or dispose of any property, movable or immovable for the purpose of carrying out any of its functions under this Act.

The Securities and Exchange Commission has wide powers and functions as contained in the Act, but the major powers as it relates to the sanitizing of the capital market and protection of investments in the capital market are as follows:

The Commission shall -

- (a) regulate investment and securities business in Nigeria as defined in this Act;
- (b) register and regulate Securities Exchanges, Capital, Trade Points, Futures, Options and Derivatives Exchanges, Commodity Exchanges and any other recognized Investment Exchanges;
- (c) register securities to be offered for subscription or sale to the public;
- (d) render assistance in all aspects including funding as may be deemed necessary to promoters and investors wishing to establish Securities Exchanges and Capital Trade Points;
- (e) prepare adequate guidelines and organize training programs and disseminate information necessary for the establishment of Securities Exchanges and Capital Trade Points;
- (f) register and regulate corporate and individual capital market operators as defined in section 30 of this Decree;
- (g) register and regulate the workings of venture capital funds and collective investments schemes including mutual funds;
- (h) facilitate the establishment of a nationwide system for securities trading in the Nigerian capital market in order to protect investors and maintain fair and orderly markets;

- (i) facilitate the linking of all markets in securities through modern communication and data processing facilities order to foster efficiency, enhance competition, and increase the information available to brokers, dealers and investors;
- (j) act in the public interest having regard to the protection of investors and the maintenance of fair and orderly markets and to this end to establish a nationwide trust scheme to Compensate investors whose losses are not covered under the investors protection funds administered by Securities Exchanges and Capital Trade Points;
- (k) keep and maintain separate registers of foreign direct investments and foreign portfolio investments;
- (l) register and regulate central depository companies and clearing and settlement companies, custodians of securities, credit rating agencies and such other agencies and intermediaries;
- (m) protect the integrity of the securities market against abuses arising from the practice of insider trading;
- (n) act as a regulatory apex organization for the Nigerian Capital market including the promotion and registration of self-regulatory organizations and capital market trade associations to which it may delegate its powers;
- (o) review, approve and regulate mergers, acquisitions and all forms of business combinations;
- (p) promote investors' education and the training of all Categories of intermediaries in the securities industry;
- (q) call for information from and undertake, inspect, conduct inquiries and audits of the Securities Exchanges, Unit Trusts, Mutual Funds, Capital Trade Points, Futures, Options And Derivatives Exchanges as well as other intermediaries and Self-regulatory Organizations in the securities industry;

- (r) conduct research into all or any aspect of the securities industry;
- (s) prevent fraudulent and unfair trade practices relating to the securities industry;
- (t) disqualify unfit individuals from being employed anywhere in the securities industry;
- (u) liaise effectively with the regulators and supervisors of other financial institutions locally and overseas;
- (v) perform such other functions and exercise such other powers not inconsistent with this Act as are necessary or expedient for giving full effect to the provisions of this Act⁵⁹.

The Securities and Exchange Commission is the apex regulatory body that regulates and supervises the capital market to protect the interest of the investors⁶⁰. The Securities and Exchange Commission regulates the activities of Securities Exchanges and Capital Trade Point, investors and other capital market operators. Pursuant to this Act, the Securities and Exchange Commission made rules, regulations and code of conduct for capital market operators to guide the operators of the capital market.

The key powers of the Commission in protecting investors and their investment under the ISA 1999 can be summarized as follows. First under Sections 8 (f), 30 of the ISA 1999, SEC is statutorily empowered to register and regulate capital market operators. Capital market operator is defined in Section 30 of the Act as follows:

“capital market operator includes a securities dealer, a stock broker, sub-broker, jobber, share transfer agent, banker to an issue, trustee of a trust deed, registrar to an issue, merchant banker issuing houses, underwriter, portfolio manager, investment adviser and such other capital market intermediaries as may be licensed by the Commission in accordance with the regulations made under this Act”.

⁵⁹ See Section 8 of the ISA

⁶⁰ See Section 8 (h) of ISA

The essence of registering and regulating these capital market operators is to make sure that only qualified and credible operators are allowed to operate in the capital market because of the sensitive nature of the market. Allowing all-comers who may not understand the dynamics of the capital market to be in the capital market will be harmful and disastrous to the investors. To this end, SEC made regulations which required legal practitioners who want to act as solicitors to an offer to register with SEC. However in the case of Professor A.B. Kasunmu SAN vs. Securities and Exchange Commission ⁶¹ where the Plaintiff challenged SEC directive for legal practitioners to register, the Federal High Court Lagos held that the powers of SEC to register capital market operators did not apply to solicitors. The matter is currently on appeal at the Court of Appeal Lagos. The essence of registration is for SEC to monitor and regulate the activities of capital market operators with a view to ensuring that the standards are maintained and fraudulent capital market operators are detected. This directive aims at protecting investors.

Apart from the registration of operators, the Commission is expected to establish market linkages within the various segments and divisions of the capital market. With the advent of information technology, the Commission is expected to adopt automated approach linking the various segments of the market as well as the operators. The intendment of the act under such system is to allow the Commission to gradually put in place a self regulated and uniform standard of operation and practice within the capital market⁶².

⁶¹Suit No.FHC/L/CS/70/2001 unreported

⁶² See Section 8 (i) of the ISA see also Akintola Jimoh &Co, Nigerian Investment Laws & Business Regulations, Vol. 1 (Learned Publishments Limited Lagos, 2002) p. 40.

By virtue of part X11 of the ISA,⁶³ Securities Exchange and Capital Trade points are required to maintain compensation funds known as Investors Protection Funds. This fund shall be held and applied for the purpose of compensating persons who suffer pecuniary loss from any defalcations committed by a member company or any of its directors or employees in relation to any money or other property which was entrusted or received by a member company or any of its directors or employees.⁶⁴ The fund is to protect investors against abuse of trust by a dealing member or any of its directors or employees by misappropriating the funds given to them by the investor but the fund does not protect and compensate investors against market risks. Many investors who have lost their investments due to the fraudulent practices of dealing members have instituted suits before the Investments and Securities Tribunal seeking compensation under this fund. In the case of Chief Ezemegbe Livinus vs. Nigerian Stock Exchange and Securities and Exchange Commission,⁶⁵ the Tribunal ordered that the Nigerian Stock Exchange (Securities Exchange) should compensate the Investor/Applicant of his loss of over 3 million naira from the Investor Protection Fund. In a more recent case of Mr Ogunlesi Johnbosco vs. Nigeria Stock Exchange and Securities and Exchange Commission⁶⁶, the Investor/Applicant is claiming over 726million naira from the Investor Protection Fund as losses he suffered from the defalcations of dealer broker Jekins Investment Ltd while the matter is still pending, Nigerian Stock Exchange released modalities for the disbursement of the money from Investment Protection Funds and put the limit of the compensation under the Investors Protection Fund provisions to 200,000 naira far below what the investors are claiming. The scope of this research is not to determine the legality or otherwise of the acts of the Nigerian Stock Exchange in this regard, but it suffice to say that here that the Investors Protection Fund is one of the devices provided by the ISA 1999 to protect investments.

⁶³ See generally Sections 148- 170 of ISA

⁶⁴ See specifically section 159 of ISA

⁶⁵ Suit No.IST/OA/06/2006 (unreported)

⁶⁶ Suit No. IST/OA/08/2007 the case is currently pending at the Tribunal

Knowledge is power, in order to protect investors, the ISA requires the Commission to promote investor's education and the training of all categories of intermediaries in the security industries.⁶⁷ Based on this provision, the Commission has established Capital Market Institute which conducts continuing capital market education for all operators and investors at a subsidized fee. One of the criteria for registering a legal practitioner to operate in the capital market by the Commission is the proof of attendance of the Institute's training.

In addition to the Investors Protection funds, the Commission is empowered to act in the public interest having regard to the protection of investors and the maintenance of fair and orderly markets and to this end, to establish a nationwide trust scheme to compensate investors whose losses are not covered under the investors protection funds administered by the Securities Exchange and Capital Trade Point. This additional nationwide trust scheme shows the commitment of the ISA to really protect the interest of the investors.⁶⁸

Under section 8(m) and (u) of the ISA, the Commission is to protect the integrity of the securities market against abuse arising from the practice of insider trading and fraudulent and unfair trade practices relating to the security industry. Pursuant to these sections of ISA and the powers conferred on the Commission by section 259 of ISA, the Commission established Administrative Proceeding Committee (APC) of the Securities and Exchange Commission. The Administrative Proceedings Committee (APC) is a quasi-judicial arm of the SEC. It is an internal administrative machinery set up by the Commission to resolve conflicts, disputes or grievances in the capital market. The APC has handled several allegations of unfair trade

⁶⁷ See section 8 (p) of ISA

⁶⁸ See section 8 (j) of ISA

practices and insider trading in the capital market⁶⁹ (some of these cases will be discussed in details in chapter 3). The decision of the APC is subject to the confirmation by the board of SEC. The decisions of the APC are likely to be any of or the combination of the followings:

- cancellation or suspension of certificate of registration of the concerned operator;
- fines;
- nullification and voiding of irregular transactions;
- cease and desist orders;
- disqualification of professionals from participating in capital market activities;
- censure and warnings;
- referral of criminal matters to the relevant law enforcement agents;
- any other sanctions which the Commission may prescribe from time to time.⁷⁰

In the celebrated case of Owena Bank (Nig.) Plc vs. Nigerian Stock Exchange,⁷¹ the scope of the disciplinary power of Securities and Exchange Commission under the old law of section 24 of the Securities and Exchange Commission Act cap XX11 laws of the Federation 1990 and now section 22 of ISA 1999 was considered. The Supreme Court of Nigeria held that the Commission has power to suspend the registration of any person's security for a period of period of twelve calendar months and no more. The Court further

⁶⁹ It handled the African Petroleum allegations or irregularities by the directors, the infamous scam in the capital market on the shares of Nestle Plc and Unilever Plc known as Bankolans cases, and currently the case of Cadbury Nigeria Plc and its directors. Other cases or complaint handled by the Administrative Proceedings Committee of SEC include the followings: APC/19/2000 SEC vs. NAL Merchant Bank Plc & anor in the case of offering of unregistered prospectus and securities to the public; APC/20/2000 Alhaji Ali Tahir vs. Dominion Trust Limited & 2 ors in the case of fraudulent sale of shares; APC/1/2001 SEC vs. Triumph Merchant Bank Plc & anor in the case of irregularities in rights issue; APC/24/2001 SEC vs. Perfecta Investments Trust Ltd in the case of non compliance with minimum capital requirement; APC/11/2001 Ejere K.C. Ejere vs. Prudential Securities Ltd in the case of failure to lodge shares. All the cases herein are reported in Records of Proceedings of the Administrative Proceedings Committee (APC) 2000-2002 vol. 4 2004.

⁷⁰ See Securities and Exchange Commission Web page on Frequently Asked Questions on Enforcement and APC available at <http://www.sec.gov.ng/faqenforcement.htm#apcdecisions> (last visited on the 18th of March 2008)

⁷¹ (1997) 8 NWLR (part 515)

held that the Commission has to obtain the approval of the minister in order to revoke the registration of a person's securities. It should be pointed out that the time limit of 12 months that SEC can suspend registration under the old Section 24 of SEC Act has been removed under Section 22 of the ISA⁷². In all, the decisions of APC are aimed at sanitizing the capital market, protecting the investors and restoring investors' confidence in the capital market.

The ISA also established the Investments and Securities Tribunal which hears appeal from the decision of the APC of the Securities and Exchange Commission (the Investments and Securities Tribunal will be discussed in details in Chapter 3), but suffice it to say that the whole essence and sections of the ISA is principally to protect investors in the capital market. This Act has largely transformed and sanitized the capital market, restored investors confidence in the capital market although more works needs to be done on the enforcement of the ISA provisions especially the sections that deal with the compensation payable to investors from Investors Protection Fund and nationwide trust scheme.

2. 3 *Protection of Investors under the Nigerian Investment Promotion Commission Act (NIPC) Chapter N117 Laws of the Federation of Nigeria 2004 (Formerly Decree No. 16 of 1995)*

The NIPC Act is the main legislation that protect and regulates foreign direct investment (FDI) in Nigeria. Section 1 of the NIPC Act established the Nigerian Investment Promotion Commission (hereinafter called the Commission) a federal government agency

⁷² Anthony Idigbe, *Legal Issues in Capital Market Operation in Nigeria* (Distinct Universal Limited Lagos, 2006) p. 65. see also the cases of IEC Utomi vs. Nationwide Securities Ltd AHC/12/95, SEC vs. CMB Securities AHC/14/95

charged with registering the foreign direct investments and implementing the NIPC Act. The NIPC Act provides for the composition of the Commission⁷³ and states the functions and powers of the Commission, and the major highlights of the functions are as follows:

- Coordinates and monitor all investment promotion activities.
- Initiates and supports measures which enhance the investment climate in Nigeria
- Promotes investments in and outside Nigeria
- Collects, collates, analyses and disseminates information about investment opportunities and sources of investment capital, and advises on the availability, choice or sustainability of partners in joint venture projects
- Registers foreign enterprises
- Identifies specific projects and invites interested investors to participate in those projects
- Initiates, organizes and participates in promotional activities such as, exhibitions, conferences and seminars and maintains liaison between investors, ministries and government
- Provide and disseminate up-to-date information on investment opportunities and incentives available in Nigeria to investors
- Assist incoming and existing investors by providing support services⁷⁴

The NIPC Act provides that a non- Nigerian can invest and participate in the operation of any enterprise in Nigeria except enterprises in the “negative list”⁷⁵. Negative list is defined in Section 31 of the Act as follows:

⁷³ See section 2 of NIPC Act

⁷⁴ See section 4 of NIPC Act

⁷⁵ See section 18 of NIPC Act

“‘negative list’ means the list of those sectors of investment prohibited to both foreign and Nigerian investors, that is

- (a) production of arms, ammunition, etc.;
- (b) production of and dealing in narcotic drugs and psychotropic substances;
- (c) production of military and paramilitary wears and accoutrement, including those of the Police and the Customs, Immigration and Prison Services; and
- (d) such other items as the Federal Executive Council may, from time to time, determine.”

Under the NIPC Act, a foreigner who intends to establish an enterprise in Nigeria shall not commence business until the enterprise is incorporated under provisions of the Companies and Allied Matters Act 1990; and registered with the Commission. The Commission will within 14 days from the date of receipt of the company’s registration form, register the enterprise if it is satisfied that all relevant documents relating to registration have been submitted to it.⁷⁶

By far, the most radical encouragement and immeasurable assistance rendered to foreign direct investors by this Commission is the recent establishment of One-Stop Investment Centre (OSIC) within the Commission. The Centre was officially declared open by the then President of Federal Republic of Nigeria Chief Olusegun Obasanjo on the 20th of March 2006.

⁷⁶ See sections 19 & 20 of ISA and Akintola Jimoh & Co, Nigerian Investment Laws and Business Regulations (Learned Publications Ltd, 2002) Vol. 1 p. 76.

Before now investors especially foreign direct investors many at times get frustrated trying to incorporate a company and obtain all approvals, quota permits etc from all relevant government agencies like the Corporate Affairs Commission, Nigerian Immigration Services, Nigerian Custom Services, Federal Inland Revenue Services, Standard organization of Nigeria, National Agency for Food and Drug Administration and Control, National Office for Technical Acquisition and Promotion in order to establish their enterprises. This procedure usually takes a period of between months to a year because of the bureaucratic bottlenecks in government ministries and departments.

Efforts by the government to curb the problem in the early 1990's led to the setting up of the Industrial Development Commission Committee (IDDC) to serve as a one stop agency for all pre-investment approvals. The IDDC had the statutory responsibility to grant Business Permits, Approved Status-in-Principle, Expatriate Quota, approvals on fiscal concessions, vet licensing and transfer agreements and generally advise the Federal Government on policy matters designed to promote the industrialization of the country.⁷⁷

The IDDC also became bureaucratic, and could not process the applications and permits of foreign investors within the two months time frame to given to IDDC to process received applications. This was largely because the key government agencies and parastals that composed of IDDC Committee hardly had time to meet due to other pressing official schedule, and this resulted in postponement of IDDC committee meetings, and the failure of IDDC to relieve the foreign investors of the bureaucratic burden and delay in getting approvals and permit. Consequently, the IDDC Act was repealed with the Nigerian Investment Promotion Commission Act.⁷⁸

⁷⁷ See Streamsowers and Kohn, Newsletter: An analysis of one stop shop available at <http://www.sskohn.com/downloads/corporateAndComm/01.pdf> (last visited on the 30th of March, 2008)

⁷⁸ Id.

The establishment of One-Stop Investment Centre (OSIC) within the framework of NIPC Act has eliminated all these problems. The aim of the Centre includes simplifying and curtailing the procedures and guidelines for issuing business approvals, permits and authorizations by eliminating bottlenecks faced by investors in establishing and running businesses in Nigeria. OSIC offers prompt granting of business entry approvals, permits and authorizations to enable investors to set up investment projects; facilitates post-entry approvals, licenses and sector-specific permits with statutory governmental agencies with extant regulatory mandate; general facilitation with all government agencies in respect of investment projects on behalf of investors. OSIC helps the foreign investor to incorporate a company and also assist the foreign investor in getting business permit and registration; tax clearance; work permits; facilitation of customs clearance for investment projects, information and data on Nigeria's economic sectors and industry; generally sorting out of any administrative entry barriers confronting local and foreign investors.⁷⁹

To this end, this Centre takes care of every process of registration of an enterprise, approvals and permits for foreign direct investment in Nigeria. From the incorporation of the company to the very end of registration of the company is done at this Centre. All hitherto agencies and Ministries that were involved in the granting of approvals and permits have their representatives at this Centre and fully integrated within the ambit of NIPC to offer prompt, efficient and transparent services to investors.⁸⁰ A foreign investor who has all the required documentations for setting up an enterprise will only move from one table to another within the Centre to incorporate and register an enterprise including all the permits, approvals etc. The waiting period has been drastically reduced from months to days now.

⁷⁹ See generally OSIC at a Glance: Nigeria Ready for Business, A publication of Nigerian Investment Promotion Commission funded by Nestle Nigeria Plc.

⁸⁰ *Id.* footnote 74

Apart from the establishment of the One-Stop Investment Centre, the NIPC Act has also provided enough safeguards for the protection of investment especially foreign investors. These protections are as follows:

The NIPC Act provides that no enterprise can be nationalized or expropriated by any government of the Federation or of State; and no person who owns, the capital of an enterprise can be compelled by law to surrender his interest in such capital to any other person except the acquisition is in the national or public interest and in which case it shall be acquired with due process and adequate compensation paid without undue delay ⁸¹ This provision is in consonance with Section 44 (1) (a) & (b) of the 1999 Constitution and has removed apprehensions of expropriation or nationalization of foreign enterprise by the government. This provision is by far one of the greatest protections legislation can provide to a foreign investor.

The NIPC Act guarantees the foreign investor an unconditional transferability of funds through an authorized dealer in freely convertible currency. The funds guaranteed here include dividends or profit (net of taxes) accruing to the investment, payments in respect of loan servicing where a foreign loan has been obtained and remittance of proceeds (net of taxes) and other obligations in the event of a sale or liquidation of the enterprise or any interest attributable to the investment.⁸² With this provision the foreign investor is guaranteed returns on investment and repatriation profits back to his home country.

The NIPC Act provides a detailed procedure for the settlement of disputes between an investor and any government of the Federation.⁸³ The NIPC Act provide that where any dispute arises, then the first step is that all efforts shall be made to reach amicable

⁸¹ See Section 25 of the NIPC Act

⁸² See section 24 of NIPC Act

⁸³ See section 26 of NIPC Act and also Akintola Jimoh &Co, Nigerian Investment Laws & Business Regulations pages 77-78

settlement through mutual discussion between the parties involved, but where the dispute can not be resolved amicably through mutual discussions, it may be submitted at the option of the aggrieved party to arbitration as follows:

- (i) in case of Nigerian investor, the dispute shall be submitted in accordance with the rules of procedure for arbitration as specified in the arbitration and conciliation Act;
- (ii) Where the aggrieved party is a foreign investor, the settlement must be within the framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of which the investor is a national are parties; or
- (iii) In accordance with any other national or international machinery for the settlement of investment disputes agreed on by the parties.
- (iv) Where in respect of any dispute, there is disagreement between the investor and the Federal Government of Nigeria as to the method of dispute settlement to be adopted, then recourse will then be had to the International Center for Settlement of Investment Disputes Rules.

The default application of ICSID Rules serves as additional protection of the investor in case of any dispute.

2. 4 Protection under the Foreign Exchange (Monitoring & Miscellaneous Provision) Act of 1995.

Under the NIPC Act, foreign investors are to invest in Nigeria with foreign currency or capital imported into the country through authorized dealer, to realize the aims of the NIPC Act, the government enacted Foreign Exchange (Monitoring and Miscellaneous Provisions) Act (hereinafter called the Foreign Exchange Act). The Foreign Exchange Act established the Autonomous Foreign Exchange Market (AFEM) for the conduct of the Foreign Exchange transactions and empowers the Central Bank of Nigeria (CBN) to issue from time to time guidelines for the regulation of the AFEM.⁸⁴

This Foreign Exchange Act it stated in details how a foreign investor can import capital through the authorized dealers to be appointed by the Central Bank of Nigeria capital for investment or can also invest with the foreign currency.⁸⁵

Transaction in the AFEM can be conducted in any convertible foreign currency. AFEM transactions can also be conducted through the usual money market instruments like:

- a) Foreign bank notes
- b) Foreign coins
- c) Traveler's cheque
- d) Bank drafts
- e) Mail or telegraphic transfers; and
- f) Such other money market instrument as the Central bank may from time to time with the approval of the Minister of Finance determine⁸⁶.

⁸⁴ See section 1 (1) &(2) of the Foreign Exchange Act

⁸⁵ See section 2-11 of the Foreign Exchange Act.

⁸⁶ See section 2 of the Foreign Exchange Act

The Act provides that unless required under any enactment or law, a person executing a transaction in the AFEM shall not be asked, and if asked, shall not be obliged to disclose the source of any foreign currency to be sold in the market and no currency imported under this Act shall be liable to seizure or forfeiture or suffer any form of expropriation by the Federal or State Government except as provided by this Act.⁸⁷

The Act also provides that no person is required to declare at the port of entry into Nigeria any foreign currency which value is less than 5,000 US Dollars or its equivalent. Also foreign currency imported into or exported out of Nigeria in excess of 5000 US Dollars or its equivalent is also expected to be declared on the prescribed form for reasons of statistics only.

⁸⁸ Foreign currencies purchased from the market may be repatriated from Nigeria and shall not be subject to any further approval.⁸⁹

Foreign currency imported into Nigeria and invested in any enterprise through an authorized dealer shall be guaranteed unconditional transferability through an authorized dealer in freely convertible currency relating to

- a) dividends or profits (net of taxes) attributed to the investment;
- b) payments in respect of loan servicing where a foreign loan has been obtained; and
- c) the remittance of proceeds (net of all taxes) and other obligations in the event of sale or liquidation of the enterprise or any interest attributed to the investment.⁹⁰ This section is in pari- material with section 24 of the Nigerian Investment Promotion Commission Act and guarantees that profits of foreign investor shall be repatriated.

⁸⁷ See section 3 of the Foreign Exchange Act see also section 44 of the 1999 Constitution

⁸⁸ See section 12 of the Foreign Exchange Act

⁸⁹ See section 13 of the Foreign Exchange Act

⁹⁰ See section 15 (4) of the Foreign Exchange Act

The Act permits any person including a foreign investor to open, maintain and operate a domiciliary account designated in foreign currency with an authorized dealer. The foreign currency in which a domiciliary account may be opened, maintained and operated shall be an internationally convertible currency.⁹¹ Except as provided under any other law, a person making an application to open a domiciliary account under the act shall not be obliged to disclose the source of foreign currency sought to be deposited in the account.⁹² A person including a foreign investor may open more than one domiciliary account in the same or in different banks. No money imported for the purpose of opening a domiciliary account shall be liable to seizure, forfeiture or suffer any form of expropriation by the Federal or State Government.⁹³

The Foreign Exchange Act is enacted to make it easier for the foreign investor to import capital into the country through an authorized dealer for investment purposes and also guarantees that the capital imported will not expropriated by the government and the profits from such investment can be easily repatriated back to the investor's country.

2.5 Protection of Investments under the Public Enterprises (Privatization and Commercialization) Act 1999.

The Public Enterprises (Privatization and Commercialization) Act 1999 (hereinafter called the Act) repealed the earlier legislations, the Bureau of Public Enterprises Act 1993 and the

⁹¹ See section 17 (1) & (2) of the Foreign Exchange Act

⁹² See section 17 (3) of the Foreign Exchange Act s

⁹³ See sections 17 (5) of the Foreign Exchange Act cf. with section 3 (2) of the Foreign Exchange Act and section 44 (1) & (2) of the Constitution

Privatization and Commercialization Act of 1988.⁹⁴ Privatization and Commercialization is a process embarked upon by the Government of Nigeria to relinquish or transfer the government ownership or shareholdings of enterprises to the private sector. According to IHEME, privatization is

*“any of a variety of measures adopted by the government to expose a public enterprise to competition or to bring in private ownership or control or management into a public enterprise and accordingly to reduce the usual weight of public ownership or control or management. However, in a strict sense, privatization means the transfer of the ownership (and all the incidence of ownership, including management) of a public enterprise to private investors. The latter meaning has the advantage of helping one to draw a line between privatization and other varieties of public enterprise reform. It is also the sense in which the term has been statutorily defined in Nigeria.”*⁹⁵

According to IHEME, one of the major reasons of privatization is to reduce the weight of public ownership or control from the government. But besides the point made by IHEME, privatization also reforms the economy and shifts the economy from centrally planned and public oriented economy to private-sector market oriented economy which is the trend globally. Government’s major business is how to run the state organs and control political power, the government is ill equipped to run enterprises and experience in Nigeria in the past have shown that enterprises are better left to the private sector as government always run enterprise aground by mismanagement and misappropriation of funds meant for enterprises⁹⁶.

⁹⁴ Akintola Jimoh & Co, Nigerian Investment Laws & Business Regulations Vol.1. (Learned Publishments Ltd, 2002) page 448

⁹⁵ See Emeka IHEME, The Incubus: The Story of Public Enterprise in Nigeria (Lagos: The Helmsman Associates, 1997) p. 60

⁹⁶ A good example is the Nigerian air carrier Nigerian Airways which had more than 30 planes in its fleet at one time, but was badly managed and today Nigerian airways can not boast of a good plane in its fleet and had the government sold its some of its shares to Virgin Atlantic, today Nigerian airways has managed to come back under the name Virgin Nigeria with Virgin Atlantic managing the enterprise.

The Act provides that the mode of the divestment of government holdings shall be either public issue of shares which offer may be made in the capital market, private placement of shares or shares offered for sale on a willing- seller and willing-buyer basis⁹⁷. To coordinate and privatize government equities in a transparent way and in accordance with international standards and best practices, the Act established National Council on Privatization and Bureau of Public Enterprises.

Section 9 of the Act provides as follows:

- (1) *“There is hereby established the National Council on Privatization (in this Act referred to as “the Council”).*
- (2) *The Council shall consists of-*
 - (a) *the Vice-President of the Federal Republic of Nigeria, as the Chairman*
 - (b) *the Minister of Finance, as Vice-Chairman*
 - (c) *the Attorney-General of the federation and Minister of Justice*
 - (d) *the Minister of Industry*
 - (e) *the Deputy Chairman, National Planning Commission*
 - (f) *the Secretary to the Government of the Federation*
 - (g) *the Governor of the Central Bank of Nigeria*
 - (h) *the Special Adviser to the President on Economic Affairs*
 - (i) *four other members to be appointed by the President*
 - (j) *the Director-General of the Bureau of Public Enterprises”*

The Act provides the functions and powers of the Council which includes the followings:

⁹⁷ See Section 2 (4), (5), (6) of the Act.

- determine the political, economic and social objectives of privatization and commercialization of public enterprises
- approve policies on privatization and commercialization
- approve guidelines and criteria for valuation of public enterprises for privatization and choice of strategic investors
- approve public enterprise to be privatized or commercialized
- approve the legal and regulatory framework for the enterprises to be privatized
- determine whether the shares of a listed public enterprise should be by public or private issue or otherwise and advise the Government of the Federation accordingly
- approve the prices for shares or assets of the public enterprise to be offered for sale
- review from time to time the socio-economic effect of the program of privatization and commercialization and decide on appropriate remedies
- approve the appointment of privatization advisers and consultants and their remuneration
- appoint as and when necessary committees comprising persons from private and public sectors with requisite technical competence to advise on the privatization or commercialization of specific public enterprise
- supervise the activities of the Bureau and issue directive on the implementation of the privatization and commercialization program

- submit to the President of the Federal Republic of Nigeria in each year a report on the activities of the Council and the Bureau etc.⁹⁸

The Act also established the Bureau of Public Enterprise: a body corporate, with perpetual succession, a common seal which may sue and be sued.⁹⁹ The functions of the Bureau are as follows

- a) implement the Council's policy on privatization
- b) prepare public enterprises approved by the Council for privatization
- c) advise the council on further public enterprise that may be privatized
- d) advise the Council on the capital restructuring needs of the public enterprises to be privatized
- e) carry out all activities required for the successful issue of shares and sale of assets of the public enterprises to be privatized
- f) make recommendation to the Council on the appointment of consultants, advisers, investment bankers, issuing houses, stock brokers, solicitors trustees, accountants, and other professionals required for the purposes of privatization
- g) advise the Council on the allotment pattern for the sale of the shares of the public enterprises set out for privatization
- h) oversee the actual sale of shares of the public enterprises to be privatized, by the issuing houses, in accordance with the guidelines approved, from time to time, by the Council

⁹⁸See section 11 of the Act

⁹⁹ See section 12 of the Act

- i) ensure the success of the privatization exercise taking into account the need for balance and meaningful participation by Nigerians and foreigners in accordance with the relevant laws of Nigeria
- j) perform such other functions with respect to privatization as the council may from time to time, assign to it.¹⁰⁰

The sale of government holdings in the enterprises which is to be implemented by the Bureau of Public Enterprises and supervised by the National Council on Privatization is part of the economic policies of the federal government of Nigeria to further deregulate and liberalize the economy and to grow a private-sector driven market oriented economy. In any of these three methods of divesting government's holdings, the result is to sell government's holdings to both local and foreign investors. A sale of government holdings on a willing-seller and willing-buyer basis presupposes that the investor buys all the shares takes control of the enterprise and manages it profitably well to realize the aims and objectives of the government's privatization policy. The investor is therefore protected by the provisions of this Act in event of any attempt to reverse the sale by the government. The case of *Magi Johnson & 71 ors vs. Attorney General of the Federation & 3 ors*¹⁰¹ is apposite on this issue. The National Council on Privatization privatized Durbar Hotel Plc (then a four star hotel) by selling government equity shares in the Hotel to Kabo Holdings Ltd on a willing-seller and willing buyer basis in March 1993. Government later discovered that Kabo Holdings Ltd was used as a facade by a General in the Nigerian Army to buy the Hotel. This General later got Kabo Holdings Ltd to re-assign the hotel to his company Nasimatume Investment Ltd. This company sacked all the staff of this Hotel, shut down the hotel, and stripped the hotel of all its fittings and assets in the guise of renovating this hotel. Bureau of Public Enterprises seized of

¹⁰⁰ See section 13 of the Act

¹⁰¹ Suit No. FHC/KD/CS/66/2001 unreported decision of the Federal High Court Kaduna delivered on the 21st of December 2004.

this fact, reversed the earlier privatization, repossessed the hotel for another round of privatization as the core investor had breached the fundamental terms of the sale of the hotel to it and this has defeated the aim of the privatization. Despite the overwhelming evidence, the Federal High Court held that Bureau of Public Enterprise has no power to cancel the privatization of Durbar Hotel Plc to Kado Holdings Ltd as this will be injurious to the interest of the investor. This matter is currently on appeal to the Court of Appeal. Though the author disagrees with the judgment of the Federal High Court on this matter, but the Courts reasoning on the matter can not be faulted. Even though the sale of Durbar Hotel Plc to a façade, the stripping of the assets of the hotel, sack of the workers and the close down of the hotel all negate the government principle on privatization and as such the privatization of the hotel to Kado Holdings Ltd should have been canceled and the hotel re-privatized, the greater interest of the protection of the investor who bought the government equities in the hotel should not be sacrificed.

The Act also provides for the Public Enterprises Arbitration Panel made up five persons of proven integrity. The Panel shall be responsible for effecting prompt settlement of any dispute arising between an enterprise and the Council or the Bureau.¹⁰² In particular the panel shall have powers to arbitrate on the following disputes;

- a) any disputes raising questions as to the interpretation of any of the provisions of a Performance Agreement; or
- b) any dispute on the performance or non performance by any enterprise of its undertakings under a performance agreement.¹⁰³

¹⁰² See section 27 (1)& (2) of the Act

¹⁰³ See section 28 (1) (a) & (b) of the Act

This provision of this arbitration panel which was not in the earlier repealed laws has an added advantage to the investor that in case of any dispute, a quicker and efficient way of settling the dispute exist and recourse to the slow and rigid court procedure becomes the last resort. Had this provision been in the earlier law under which Dubar Hotel Plc was sold to Kabo holdings Limited, the case of Magi Johnson & 71 ors vs. Attorney General of the Federation & 3 ors would not had dragged for more than 3 years at the court while the assets of the hotel rot away¹⁰⁴.

2. 6 Protection of Investments under the Industrial Development (Income Tax Relief) Act of 1971

The tax laws of any country that wants to attract investors especially foreign investments into the country must be investment ‘friendly’ and must have tax incentives. Such tax law incentives must provide for tax rebates, reductions and tax holidays to priority aspects of the economic life of such country. This is important because foreign investors are profit driven and a favorable tax incentive will attract investors while a hostile tax regime will repel investors.

From the economic point of view the advantages of favorable tax incentives to the investor are many: it increases the profits available for distribution, it leaves the taxpayer with enough money to re-invest in the enterprise which in turn improves the economy of the country, it

¹⁰⁴ The case was instituted sometimes in 2001 and judgment of the federal high court was only given in December 2004 and the case is currently on appeal, the facilities of the hotel has decayed beyond repairs while the case is still dragging, whoever wins the case at the end (the investor or government) may have to spend double more than what should have been spent to put the hotel in order.

attracts investment to the country and keep the country in a competitive position with other country especially if the country is a developing country.¹⁰⁵

In Nigeria, all the foreign investors wishing to do business must first incorporate their companies with which they will use in executing their enterprises. Once a foreign company is registered in Nigeria, in principle it becomes a Nigerian Company and the tax laws binds the company like other Nigerian owned companies.¹⁰⁶ Companies in Nigeria pay companies tax, except exempted from paying tax under any other law. Section 8 (1) of the Companies Income Tax Act (CITA) Cap 60 Laws of the Federation of Nigeria 1990 provides that a company is chargeable with income tax on the profits accruing in, derived from, brought into, received in Nigeria in respect of the following:

- (a) any trade or business for whatever period of time such trade or business may have been carried on;
- (b) rent or any premium arising from a right granted to any other person for the use or occupation of any property;
- (c) dividends, interest, discounts or annuities;
- (d) any source of annual profits or gains not falling the proceedings category
- (e) any amount deemed to be income or profit under a provision of this Act or, with respect to any benefit arising from a pension or Provident Fund , of Income Tax Management Act;
- (f) fees , dues and allowances (whether paid) for services rendered.¹⁰⁷

¹⁰⁵ see Hiller J.,; Kanffman K. M., Tax Incentives for Industry in less Developed Countries, Harvard Law School, 1963 quoted by Fadojutimi, A. O , “Foreign Investment and Taxation” in Akande O. (ed) Tax law in Nigeria, NIALS, 1991, p356

¹⁰⁶ Akintola Jimoh &Co, Nigerian Investment Laws & Business Regulations page 429

¹⁰⁷ *Id. P. 428*, see also section 8 (1) of the Companies Income Tax Law 1990

But Nigerian government, mindful of the advantages accruable to the Nigerian economy from a favorable tax incentive and desirous of developing some aspects of its economy and some parts of the country that lack any form of development enacted Industrial Development (Income Tax Relief) Act 1971, now Cap 179 Laws of the Federation of Nigeria 1990. This law gives tax reliefs, rebates, holidays etc to investors (both local and foreign) but the recipient must obtain a pioneer certificate from the relevant agencies. For foreign investors the pioneer status certificate is given by Nigerian Investment Promotion Commission. The holder of the pioneer certificate is exempted from tax (tax holidays) for three years which could be extended further for another two years.¹⁰⁸

Few of the tax incentives contained in the Industrial Development (Income Tax Relief) Act are as follows:

*“Pioneer Status: 100% tax free period for initial three years and further possible extension for pioneer industries that their products are declared as ‘pioneer products’ under law or such other deserving enterprise that may be approved by the Council of the Nigerian Investment Promotion Commission. **Local Raw Materials Utilization:** 30% tax concessions for five years to industries that attain minimum local raw materials utilization as follows; Industrial sector –minimum level; Agricultural – 80%; Agro-alied-70%; Engineering-60%; Chemical-60%; Petro-Chemical-70%. **Labor Intensive Mode of Production:** 15% tax concession for five years. The rate is graduated in such a way that an industry employing 1,000 persons or more will enjoy more tax concession while an industry employing 100 will enjoy 6 % and those employing 200 will enjoy 7% etc. **Investment in Economically Disadvantaged Areas:** 100% tax holidays for 7 years, additional 5% depreciation allowance over and above*

¹⁰⁸ See section 10 of the Industrial Development (Income Tax Relief) Act

*the initial capital depreciation. There are many more incentives in the Research and Development projects, Agriculture, Export Incentives for Non-oil Sector, Export Processing Free Zone Scheme etc”.*¹⁰⁹

The import of the above tax concessions is to attract and protect investors, ensure maximum returns on their investments, lure the investors to invest in Nigeria and develop and industrialize the country.

2.7 Protection of Investments under the Multilateral Investment Guarantee Agency Convention

Pamphlet Multilateral Investment Guarantee Agency (MIGA) was formed in 1988 though the Convention Establishing MIGA was assented to in September 1997.¹¹⁰ Membership of MIGA is open to all members of the World Bank and to Switzerland,¹¹¹ Nigeria is a member of MIGA being in category two which means a developing country for the purpose of MIGA's Convention¹¹². MIGA was formed with an initial capital base of \$1billion called 1billion Special Drawing Rights.¹¹³ The objective of the agency is to encourage the flow of investments for productive purposes among countries, and in particular to developing member countries, thus supplementing the activities of the World Bank, the International Finance Corporation and International Development finance Institutions.¹¹⁴

To serve its objective, the Agency shall:

¹⁰⁹ Nigerian Investment Promotion Commission, Investment Incentives in Nigeria, a brochure of NIPC.

¹¹⁰ The full text of the Convention Establishing MIGA is available at <http://www.gwb.com.au/gwb/news/mai/miga.html> (last visited on the 21st of March 2008)

¹¹¹ See Article 4 (a) of MIGA Convention

¹¹² See schedule A to the MIGA's convention

¹¹³ See Article 5 of the MIGA Convention

¹¹⁴ See Article 2 of MIGA Convention

- (a) issue guarantees, including co-insurance and re-insurance against non-commercial risk in respect of investments in a member country which come from other member countries;
- (b) carry out appropriate complementary activities to promote the flow of investment to and among developing member countries and
- (c) exercise such other incidental powers as shall be necessary or desirable in the furtherance of its objectives¹¹⁵.

MIGA is part of the World Bank Group, a global insurer that mitigates the political risks (non commercial risk) to foreign direct investments. MIGA's guarantees, which cover new investments as well as project expansions, helps to ensure that investors receive a reasonable rate of return and are able to operate in a stable and predictable environment. In addition, MIGA's technical assistance services play an integral role by helping developing countries define and implement strategies to promote investment, and by disseminating information on investment opportunities. MIGA mitigates political risks to investments through given guarantees in the following areas:

- Currency inconvertibility and transfer restrictions
- Expropriation
- War and civil disturbance
- Breach of contract by host State
- Dispute mediation services¹¹⁶

Apart from giving guarantees, MIGA protects investment by the following means: first MIGA helps in deterring harmful actions, the host country of the investment is part of MIGA's 174 member countries, MIGA exploit this relationship with host government in providing

¹¹⁵ See Article 2 (a), (b) & (c) of MIGA Convention

¹¹⁶ See Article 11 of MIGA Convention

additional protection by intervening in persuading the host government against taking any action that may be harmful to the investor. Second, this relationship also helps MIGA to intervene where there is any sign of dispute between the host government and the investor before the disputes gets out of hand this they do by mediating in the dispute. Third where the dispute cannot be settled amicably and possibly ends up in an arbitration panel, MIGA ensures that the award or claims are settled promptly by the host government. In a nutshell, MIGA leverages on its relationship with the host government in protecting the investors adequately.¹¹⁷

According to MIGA's African report for June 2006:

„MIGA's is designed to help foreign investors feel more comfortable that their investments will be protected against potential political risks. MIGA's expropriation and breach of contract coverage protects investments against a variety of regulatory risks. It's products also allow deals to be structured in a way that improves risk/return profiles, lowers the cost of capital, and fosters positive relationships with subsovereign governments. This coverage can be used on a standalone basis or in conjunction with the World Bank's partial risk guarantees, which offer an additional set of benefits. Partial risk guarantees include conditions that promote stable regulatory and contractual frameworks, while helping investors obtain capital market financing on better terms¹¹⁸”.

MIGA world country brief for Nigeria gave report of MIGA insurance coverage in Nigeria. Of particular importance to the quality of life in Nigeria and growth of the economy is the

¹¹⁷ World Bank Group Multilateral Investment Guarantee Agency Africa Brief June 2005 p.3
<http://www.miga.org/documents/africa05.pdf> (last visited 28th March 2008)

¹¹⁸ *Id.* p.1

MIGA's coverage of \$50million guarantee to Mobile Telephone Networks International Limited. According to the World Bank Country Brief:

„MIGA issued a \$50 million guarantee to Mobile Telephone Networks International Limited (MTNI) to cover its \$285 million non-shareholder loan to MTN Nigeria Communications Limited (MTNN) in Nigeria against the risk of war and civil disturbance. The project involves the installation, operation and maintenance of a country-wide mobile telephone network, based on GSM technology. Given Nigeria's low teledensity, the project is expected to spur private-sector development”¹¹⁹

Besides the telecommunications guarantee, MIGA has guaranteed FDI worth \$102.9m worth of investment in Nigeria spanning over different sectors like manufacturing, services, provisions of good drinking water for rural dwellers, etc. other examples of MIGA's guarantee to investors include the \$26m MIGA guaranteed to a south African company (SGS Societe General de Surveillance) to cover its equity investment in its subsidiary company in Nigeria SGS Scanning Nigeria Limited for 15 years against breach of contract, currency transfer restriction war and civil diturbance.¹²⁰

With the position of most African countries (except South Africa) in the category 2 of MIGA's ratings¹²¹ MIGA has provided guarantees to other African Countries: specifically MIGA has provided guarantee totalling about \$6.5million in Agribusiness in UGANDA to a company UK based Company, Afriproduce Limited which invested in Ugacof, a coffee processing company in Uganda. In Angola, MIGA provided a guarantee coverage of about \$18.4m in manufacturing to Barlows Tractor International Limited of the UK for its

¹¹⁹ *Id. P.3.*

¹²⁰ See World Bank Group: Multilateral Investment Guarantee agency available at <http://www.miga.org/index.cfm?aid=515> (last visited on the 30th of March 2008)

¹²¹ See Schedule A to the MIGA's Convention of 1997 at *id.107.*

shareholder loan and equity investment in Barlows Angola. The coverage MIGA provided in the two cases covers non commercial risks of transfer restriction, expropriation, and war and civil disturbance. There are other coverages in South Africa, Mozambique etc.¹²²

Not all investments or projects are eligible for MIGA's coverage. Article 12 of MIGA's convention stipulates which investments are eligible for MIGA's coverage. Article 12 of MIGA Convention provides as follows:

- (a) *“equitable interest, including medium or long term loans made or guaranteed by holders of equity in the enterprise concerned, and such forms of direct investments as may be determined by the Board.*
- (b) *The board, by special majority, may extend eligibility to any other medium or long term form of investment, except loans other than those mentioned in section (a) above may be eligible only if they are related to a specific investment covered or to be covered by Agency.*
- (c) *Guarantees shall be restricted to investments, the implementation of which begins subsequent to the registration of the application for the guarantee by other Agency. Such investments includes;*
 - (i) *any transfer of foreign exchange made to modernize, expand, and develop an existing investment; and*
 - (ii) *the use of earnings from existing investments which could otherwise be transferred outside the host country.*
- (d) *In guaranteeing an investment, the Agency shall satisfy itself as to:*

¹²² World Bank Group Multilateral Investment Guarantee Agency Africa Brief June 2005
<http://www.miga.org/documents/africa05.pdf> p. 3. (last visited on the 30th of March 2008)

- (i) *the economic soundness of the investment and its contribution to the development of the host country.*
- (ii) *compliance of the investment with the host country's laws and regulations;*
- (iii) *consistency of the investment with the declared development objectives and priorities of the host country; and*
- (iv) *the investment conditions in the host country, including the availability of fair and equitable treatment and legal protection for the investment”.*¹²³

In conclusion MIGA has greatly protected foreign direct investors in guaranteeing their investments against non-commercial risks attributable to the acts or laws of the host government. MIGA also mediated in disputes between foreign investors and host government in order to find an early amicable settlement of any dispute.

CHAPTER 3

3. 0 Protection of Investments by Judicial Bodies in Nigeria

3. 1 The Investments and Securities Tribunal

Section 224 of the Investments and Securities Act 1999 (ISA) provides for the establishment of Investments and Securities Tribunal (hereinafter called the Tribunal). Section 224 (1) of ISA provides as follows:

“There is hereby established a body to be known as the Investments and Securities Tribunal (hereafter referred to as the Tribunal) to exercise the jurisdiction, powers and authority conferred on it by or under the Act”

¹²³ See Article 12 of MIGA Convention.

The Tribunal shall consist of nine persons called “Capital Market Assessors” to be appointed by the Minister of Finance one of whom shall be the Chairman of the Tribunal.¹²⁴ The chairman, who shall preside every sitting of the Tribunal shall be a legal practitioner of not less than 15 years post call with cognate experience in capital market matters.¹²⁵ All the nine persons appointed as members of the Tribunal shall be knowledgeable about the norms, regulations, laws, practices, procedure and operations of the capital market.¹²⁶

The Tribunal’s powers and jurisdiction is provided in Section 234 (1), (2) (a)-(f) of the ISA 1999. The Sections provides as follows:

234 (1) “The Tribunal shall have power to adjudicate on disputes, and controversies arising under this Act and the rules and regulations made hereunder.

(2) The Tribunal shall in particular adjudicate on matters relating to-

(a) the interpretation of any law, enactment or regulations to which this Act applies;

(b) disputes between the Commission and a Securities Exchange or Capital Trade point

(c) disputes between Capital Market Operators and the Securities Exchanges or Capital Trade Point

(d) disputes between Capital Market operators

(e) disputes between Capital Market Operators and their clients; and

¹²⁴ See section 225 (1) of ISA 1999

¹²⁵ See section 225 (2) & (3) of ISA 1999

¹²⁶ See section 226 of ISA 1999

(f) disputes between quoted companies and the regulators or the Securities Exchanges”

This Tribunal has original jurisdiction and appellate jurisdiction in matters listed under section 234 of the ISA 1999. Any aggrieved party may approach the Tribunal in its original jurisdiction by way of originating application or appeal against the decision of the Administrative Proceedings Committee of the Securities and Exchange Commission to the Tribunal in its appellate jurisdiction. All the disputes listed in section 234 (1), (2) (a)-(f) of the ISA 1999 above concern the investments in the capital market as most of it have to do with the securities of a company.

The Tribunal has its own rules called the Investments and Securities Tribunal (Civil Procedures) Rules 2003 which is different from the normal court rules. Its rules are flexible and aimed at fast-tracking investment disputes and disposing the cases expeditiously and efficiently. The Tribunal has in-house Alternative Disputes Resolution (ADR) where some cases that come before it are referred to explore the possibility of parties settling their investments disputes out of Tribunal. It is only when such cases can not be amicably settled that the Tribunal hears and determines the matter.

The rationale for establishing the Tribunal notwithstanding the multi-layered court system in Nigeria, is the realization that investment dispute (especially in the capital market) by its nature needs a specialized court system and also needs to be determined speedily, and therefore ought to be taken away from the normal rigid and slow court procedures.¹²⁷

¹²⁷ A good example why investments disputes ought to be taken away from the rigid and slow normal court process is the case Messrs Flocco Verwaltung-und (Flocco). In 2002 the Securities and Exchange Commission instituted a case at the Federal High Court in Abuja in suit No. FHC/ABJ/CS/110/2002 SEC vs. Golden Guinea Breweries Plc & 2 ors. In this case Messrs Flocco, a German national acquired some shares in Golden Guinea Breweries which would have given him a controlling majority shares in the company. The Securities and Exchange Commission approved the offer and acquisition but the management of Golden Guinea only gave him part of the shares which could not give him the majority needed to control the company. SEC sued the management of Golden Guinea Breweries before the Federal high Court asking that management gives Flocco

Investors especially foreign investors can only be motivated to invest if there is an efficient dispute resolution mechanism in place that is fast and timely¹²⁸. Conscious of this fact, the law establishing the Tribunal made it a fast track Tribunal and requires it to hear and determine any case before it within ninety days of commencement of the trial.

Since inception in 2003, the Tribunal has heard more than 40 investment disputes, determined 30 of them, given about 40 interlocutory orders.¹²⁹ Few of the notable cases handled by the Tribunal are the cases of Union Bank of Nigeria Plc (Registrars Dept) vs. Securities and Exchange Commission,¹³⁰ FIS Securities Ltd vs. Securities and Exchange Commission,¹³¹ CSCS Ltd Vs. Securities and Exchange Commission¹³² Lighthouse Assets Management Ltd vs. Securities and Exchange Commission¹³³, CSCS Ltd & Anor. vs Bankolans Investment Ltd & 5 ors.¹³⁴ The above five cases arose out of the scam in the capital market, wherein some shares of Nestle Foods Plc and Unilever Plc worth more than 400 million naira then (over \$3million) belonging to two investors were fraudulently sold by a syndicate group through many stock broking firms in Nigeria. The Administrative Proceedings Committee (APC) of the Securities and Exchange Commission found that the Stock Brokers, Registrars and the

all the shares he has paid for which SEC has approved. While the case was pending there was management crisis and it affected the shares of Golden Guinea Breweries and the company finally collapsed. The slow process of the court system made the case to drag for 4 years and the court finally delivered the case judgement in the matter on the 17th of November 2006. When the shares of Golden Guinea breweries became worthless, to Flocco, he instituted a suit at the Investment and securities Tribunal in Suit No. IST/OA//2006 Flocco Verawaltung-und vs. Golden Guinea Breweries Plc & ors asking for a refund of his money for the unalloted shares at Golden Guinea breweries, when the case came up at the Tribunal in 2006, the Tribunal was informed of the decision of the Federal High Court Abuja a few days before ordering that Golden Guinea Breweries Plc gives Flocco his shares he paid for. Here the Tribunal became helpless to Flocco, the Tribunal could not overrule the decision of the court because both the Tribunal and Court are of coordinate jurisdiction, so the Tribunal struck out the matter. But the judgment of the Federal high Court Abuja given 4 years had become useless to Flocco because the Golden Guinea had become bankrupt and collapsed. Had the case been instituted at the Tribunal, Flocco would have gotten judgment in 3 months used his majority shares to control Golden Guinea Plc and most probably turned around the fortunes of the company.

¹²⁸ See the case of Flocco Verawaltung-und vs. Golden Guinea Breweries Plc & ors (supra)

¹²⁹ Interview granted by the Chairman of the Tribunal Dr Nnenna Orji to a news media available at <http://www.guardiannewsngr.com/law/article02/160506> (last visited on the 20th of March 2008)

¹³⁰ (2004) 1 NISLR 113

¹³¹ (2004) 1 NISLR 165

¹³² (2004) 1 NISLR 39

¹³³ (2004) 1 NISLR 81

¹³⁴ (2007) 2 NISLR 95

Clearing house were negligent in trading in the shares and ordered them to buy back shares and retribute the investors the value of their shares. Being dissatisfied with the decision, they all appealed to the Tribunal against the decision of the APC of SEC. The Tribunal upheld the decision of the APC of SEC except in the case of Lighthouse Assets Management Ltd vs. SEC which the Tribunal found out that no fault or negligence can be imputed to the appellant. This landmark case was decided by the Tribunal to protect the interest of the investors and their investments in the capital market and to sanitize and restore investor's confidence in the capital market.

Despite the above cases the Tribunal has also held that any investor who purchased the shares of a stock is entitled to receive the share certificate and the investor is entitled to be compensated for any loses suffered by the non-issue of the shares certificate by the company or Registrars of the shares.¹³⁵

To underscore the importance of this Tribunal for adjudication of investment disputes, the Investment and Securities Act bars other civil courts from having jurisdiction from any matter which the Tribunal is empowered by or under the Act to determine and no injunction against the Tribunal in its performance of its obligation shall be granted by any other court.¹³⁶ Appeals from the decision of the Tribunal lies to the Court of Appeal¹³⁷ and eventually to the Supreme Court¹³⁸ thus making the Tribunal a court of superior record and at par with the Federal High Court or State High Courts in Nigeria.

The Tribunal provides a firm, fair and just adjudication of investment dispute. From the cases it has decided since inception, the Tribunal has shown its commitment to decide disputes fairly without interference from the government or regulatory agencies. In deed the Tribunal

¹³⁵ See Blue –Chip Acquisition Co. Ltd vs. Zenith Bank Plc & 3 ors (2007) 2 NISLR 61

¹³⁶ See section 242 of ISA 1999.

¹³⁷ See section 243 (1) of the ISA1999

¹³⁸ See section 245 of the ISA 1999, the Supreme Court is the last court of appeal in Nigeria

is seen as being too pro-investor protection as it has leaned most times in favor of the investors in its judgment by resolving every doubt in the interest of the investor even in cases justice of the matter would have warranted a different decision.

The success story of the Tribunal (especially its bias towards investor protection) notwithstanding, there are some problems inherent in the appointment and conditions of service of the members of the Tribunal, the appointment of the members of this Tribunal and the conditions of service of the members are not in accordance with the principle of independence and impartiality of the judicial officers more so as the Tribunal is a superior court of record.¹³⁹ The appointment of the members by the Minister of Finance falls short of this principles. The appointment and conditions of service of the members should be in line with other federal judicial officers of the Tribunal's equivalence. The appointment and dismissal should be made by the President on the recommendation of the National Judicial Council¹⁴⁰.

¹³⁹ See sections 225 (1) and 229 of ISA 1999

¹⁴⁰ National Judicial Council is a statutory body charged with the recommendation for the appointment of judicial officers of superior court of record. The body also disciplines and also recommends the dismissal of erring or corrupt judicial officers.

CHAPTER 4

4.0 An Overview of the Economy of the People's Republic of China

The People's Republic of China is the largest country in East Asia and the fourth largest country in the world in land mass.¹⁴¹ China has a population of over 1.3 billion people, the most populous country in the world and China has about one-fifth of the world's total population.¹⁴² After the Communist revolution in 1949, Communist Party of China established the People's Republic of China in 1949 with Mao Zedong as its Chairman, the government nationalized all private properties and abolished all capitalist economic features¹⁴³ and China became a Communist state.

The reign of Mao Zedong was characterized by many programs and projects that adversely affected the China, and caused the economy to take a turn for worse. Mao Zedong introduced the first five year plan (1953-8) which aimed at putting an end to Chinese dependence on agriculture and build industrial plants to become a world power. While China recorded a measure of success in this program, the second project of great leap forward was a disaster. The program de-emphasized agriculture and recruited peasants into infrastructure projects and small scale manufacturing of iron and steel at the expense of agriculture. The great leap

¹⁴¹ See CIA; The World Fact book China available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html> (last visited on the 21st of March 2008)

¹⁴² See Wikipedia the free encyclopedia on China available at http://en.wikipedia.org/wiki/People's_Republic_of_China (last visited on the 21st of March 2008)

¹⁴³ See Chenxia Shi, Protecting Investors in China Through Multiple Regulatory Mechanisms and Effective Enforcement in Conkrad Schirokauer & Miranda Brown, A Brief History of Chinese Civilization (Wadsworth Publ 1991)

forward banned private food production and brought livestock and farm implements under collective ownership. This brought about severe food shortages and famine especially in the rural areas which Mao attributed to drought and floods in some places. The famine caused the death of tens of millions of Chinese peasants from 1959 – 1962 and has been regarded as the worst famine in the world.¹⁴⁴ Mao's Cultural Revolution and hundred flowers campaign¹⁴⁵ saw to the elimination of opposition and his critics within the Communist Party.¹⁴⁶

Most scholars of Chinese economic history¹⁴⁷ agree that though Mao's revolution and economic policy from 1949 -1976 was a bad period in the economy of China. Writing about this period Johnson Gale said,

“In the following brief history of the system that was the subject of the reform process begun in 1979, it will become clear that between 1949 and 1978 there was no so-called normal extended period of time during which any consistent program of policies reached equilibrium. Broken commitments, irrational responses, politically induced and fostered civil disruptions, and attempted palace revolts were scattered about the landscape. Twists and turns, seemingly based upon whims or gross misinformation, were widely evident. What is clear is that Chairman Mao's quixotic behavior prevented a fair test of what might have been accomplished by socialism in China. This is not to say that many Westerners would have been greatly impressed by what might have been achieved, but certainly hundreds of millions Chinese would not have imposed

¹⁴⁴ Johnson Gale, *The Peoples Republic of China 1978-1990* ICS Press California 1990, pages 7-8, see wikipedia on Mao Zedong available at http://en.wikipedia.org/wiki/Mao_Zedong (visited on the 27th of march 2008)

¹⁴⁵ In hundred flower campaign, Mao indicated his readiness to listen to any opinion of how China could be governed and people even within his party started giving him opinion, at first he seemed to welcome it but when the critic started criticizing his government he eliminated them. see wikipedia on Mao Zedong available at http://en.wikipedia.org/wiki/Mao_Zedong (visited on the 27th of march 2008)

¹⁴⁶ *Id.*

¹⁴⁷ Johnson Gale D., Chi Fulin, Guy Liu, Shujie Yao, Jun Ma, Feng Chen, Wang Mengkui etc

*upon them a quarter century of uncertainty, hardship, misery and repeated visitations of famine. The irrationality of what happened in Beijing in June 1989 did not differ significantly from some of Mao's more bizarre behavior"*¹⁴⁸

Before the 1978 reforms China was run purely as a communist state, all the means of production and distribution were in the hands of the state. This made the economy a centralized one and did not allow for private market oriented economy.¹⁴⁹ After the death of Mao Zedong in 1976, Deng Xiaoping, a reformer set the agenda of the reform of the Chinese economy in 1978 and the implementation occurred in 1979.¹⁵⁰ The reform in China has changed the economic landscape of China in several ways. The reform came in stages first in late 1978 at the 3rd plenary session of the 11th central Committee of the Communist Party of China, a decision was made to shift priority of the Part's central task to economic construction, and the mission of restructuring the economic system was put before the nation. In October 1984, at the 3rd plenary session of the 12th Central Committee of Communist Party of China, a document titled Decision of the Central Committee of the Communist Party of China Concerning the Restructuring of the Economy was adopted. The restructuring of the economy was initiated in the rural areas. Again in October 1992 the 14th National Congress of the Communist Party of China confirmed explicitly that the target of economic restructuring in China was to set up a socialist market economic model.¹⁵¹

The reform opened up the Chinese economy, diversified the economy, liberalized and attracted trade and investment and has increased the Chinese GDP. The reform also made the economy to be private sector driven as opposed to the centrally planned economy which

¹⁴⁸ Johnson Gale, *The Peoples Republic of China 1978-1990* (ICS Press California 1990) p.4.

¹⁴⁹ Chi Fulin, *Pressing Tasks of China's Economic Transition*, (Foreign Language Press, Beijing, 1996) p.1.

¹⁵⁰ Johnson Gale, *The People's Republic of China 1978-1990*, (International Center for Economic Growth, California, 1990) p. 10.

¹⁵¹ *Id.* p.6.

existed before pre – 1976. The reform attracted Foreign Direct Investment into China, according to Xian Guoming et al:

*“Since the economic reforms and the open door policy of 1978, China has been extraordinarily successful in attracting FDI. By the end of 1998, China had approved over 324,700 FDI projects, with a contractual value of US\$572.5 billion. The accumulated actual inflows of FDI amounted to US\$267.5 billion. Over the past few years, China has been the second largest FDI recipient in the world, and the largest among the developing countries. Over 170 countries and regions, and 300 of the world’s largest Trans-National Corporations have establishment in China.”*¹⁵²

The Central Intelligence Agency world fact book reports that the reform has lead to tenfold increase in Chinese GDP. The reform has been a two-way traffic, it not only attracted investments, but it stimulated Chinese investors to establish foreign direct investments in other countries. In 2007 the annual inflows of FDI to China was about \$75 billion and while more than 5,000 Chinese enterprises also established FDI in about 172 other countries of the world.¹⁵³

The reform saw to the re-opening of the Chinese Stock Exchanges which was closed by the Communist Party of China in 1949. The Chinese two main stock Exchanges: the Shanghai Stock Exchange was established in December 1990 and the Shenzhen Stock Exchange was

¹⁵²Xian Guoming, Zhang Cheng, Zhang Yangui, Ge Shungi and James X. Zhan, The Interface between Foreign Direct Investment and the Environment: The case of China available at http://www.unctad-10.org/pdfs/preux_fdipaper3.en.pdf (last visited on the 26th of March 2008)

¹⁵³ CIA, The World Fact book China available at <http://www.cia.gov/library/publications/the-world-factbook/geos/ch.html> (last visited March 23rd 2008)

established in July 1991.¹⁵⁴ The re-opening of the stock exchanges and the enactment of investment laws became a catalyst to attracting investors especially portfolio investors both local and foreign. The rate at which investments grew over a short period of time was amazing. In less than 15 years of existence, many companies were already listed at the exchanges and actively trading in company shares and securities with market capitalization in trillions of Yuan. According to Chenxia,

*“By the end of 2005, 834 companies with 878 Securities were listed on the Shanghai Stock Exchange, and market capitalization totaled RMB 2.31 trillion Yuan (\$295 billion). Five hundred and forty- four companies with 586 securities including fifty companies listed in the Small and Medium Enterprises (SME) segment, were listed on the Shenzhen Stock Exchange, and market capitalization of the exchange totaled RMB 933 billion Yuan (\$119 billion)”*¹⁵⁵

Though China opened up its economy to a more market oriented economy in recent times, the economy has experienced a dramatic change from a developing economy to a developed economy. Many factors can be attributed for this growth which includes the Chinese population, cheap labor, technological advancement, investments legislations and incentives to investors, Chinese membership of international economic institutions like WTO, MIGA etc. The research will therefore examine some of these factors in details.

4. 1 INVESTMENTS LEGISLATIONS IN PEOPLE’S REPUBLIC OF CHINA

¹⁵⁴ Chenxia Shi, Protecting Investors in China Through Multiple Regulatory Mechanisms and Effective Enforcement p.467.

¹⁵⁵ *Id.* p. 468.

The reform of the 1978 necessitated the enactment of several legislations to sustain the market oriented economy. The legislations encouraged foreign direct investment, portfolio investments, joint equity investments and cooperative enterprises etc in China by protecting both local and foreign investments and also by providing incentives to the investors. The investment legislations are as follows:

4.2 The Constitution of the People's Republic of China 1982

The Constitution of the People's Republic of China adopted on 4th of December 1982 guarantees foreign enterprises and other foreign organizations and foreign individuals to invest in China in accordance with Chinese Laws. Article 18 of Chinese Constitution 1982 as amended in 1988 provides as follows:

“Article 18. The People's Republic of China permits foreign enterprises, other foreign economic organizations and individual foreigners to invest in China and to enter into various forms of economic co-operation with Chinese enterprises and other economic organizations in accordance with the law of the People's Republic of China. All foreign enterprises and other foreign economic organizations in China, as well as joint ventures with Chinese and foreign investment located in China, shall abide by the law of the People's Republic of China. Their lawful rights and interests are protected by the law of the People's Republic of China.”¹⁵⁶

The Constitution of China reproduced herein is clear on this, it permits foreign entities: individuals, companies and economic organizations to invest in China either in partnership with a Chinese enterprise or as a wholly foreign owned enterprises and also protects their

¹⁵⁶ The text of the Chinese Constitution is available at <http://english.peopledaily.com.cn/constitution/constitution.html> (last visited March 18th 2007)

lawful rights and interest. Like in Nigeria, the Chinese constitution is the supreme law, Article 5 of the constitution states that no other law or authority or persons shall enjoy the privilege of being above the constitution. The implication of this is that Article 18 of the Constitution which has guaranteed the protection of the lawful rights and interest of foreign investors is a supreme law and higher than any other law or authority in China. Apart from the Constitution, China has enacted several other legislations that regulate investments especially, foreign direct investments, like equity joint venture enterprises, sino-foreign cooperatives, wholly foreign owned enterprises etc. These legislations deal with the establishment, operation, management, termination and liquidation of foreign-invested enterprises. Some of these legislations are as follows:

- (a) The Law of the People's Republic of China on Chinese-Foreign Joint Ventures 1979
- (b) The Law of the People's Republic of China on Sino-Foreign Cooperative Enterprises 1988 or the Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures 1988¹⁵⁷
- (c) The Law of the People's Republic of China on Foreign Capital Enterprises 1986 or Law of the People's Republic of China on Wholly Foreign-Owned Enterprises 1986
- (d) The Company Law of the People's Republic of China 1993
- (e) The Income tax law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises 1991
- (f) Foreign Economic Contract Law of 1985
- (g) Provisions on Guiding Direction of Foreign Investment 2002
- (h) Catalogue for the Guidance of Foreign Investment Industries 2005

¹⁵⁷ The law of the People's Republic of China on Sino-Foreign Cooperative Enterprises 1988 and the law of the People's Republic of China on Chinese-Foreign Contractual Joint Venture 1988 are one and same law with the same provisions on same articles. The difference in title of the law may probably be due to the translations of the law and this also applies to the Law of the People's Republic of China on Foreign Capital Enterprises 1986 and the Law of the Law of the People's Republic of China on Wholly Foreign –Owned Enterprises 1986.

- (i) Intellectual Property Rights Protection Laws like the Patent Law, the Trademark Law and Copyrights Law of the People's Republic of China.
- (j) Interim Provisions Concerning the Investment within China of Foreign-Invested Enterprises.¹⁵⁸

The above laws are not exhaustive of the investment laws in China. The main foreign investments laws in China are the laws contained in (a) – (c) while (f) – (h) are detailed rules for the implementation of the three main rules. With the accession of China to WTO some of these laws have been revised and further revisions are still going on to make the laws compatible with the rules of WTO. Few of these legislations and rules will be analyzed.

4.3 Protection of Investments under the Law of the People's Republic of China on Chinese-Foreign Joint Ventures 1979

This Law of the People's Republic of China on Chinese-Foreign Joint Ventures 1979¹⁵⁹ (herein after referred to as the Chinese-Foreign Joint Venture Law) was adopted by the second session of the fifth National People's Congress on July 1, 1979. The law has been revised severally, first in 1990 and further revised according to the Resolution on Revising the Law of the People's Republic of China on Chinese–Foreign Joint Ventures adopted by the Fourth Session of the Ninth National People's Congress on the 15th of March 2001.

¹⁵⁸ See China Through A Lens, a Chinese Government Official web portal available at <http://www.china.org.cn/english/features/investment/36741.htm> (last visited on the 22nd of March 2008)

¹⁵⁹ See China Through A Lens, available at <http://www.china.org.cn/english/features/investment/36752.htm>(last visited on the 22nd of March 2008)

The Chinese-Foreign Joint Venture Law provides that in order to expand international economic cooperation and technical exchange, the government of the China shall permit foreign companies, enterprises, other economic organizations or individuals (hereinafter called foreign partners in a joint venture) to join with Chinese companies, enterprises or other economic organizations (hereinafter called Chinese partner in a joint venture) to establish joint ventures in China in accordance with the principle of equality and mutual benefit subject to the approval by the Chinese government.¹⁶⁰

The Chinese-Foreign Joint Venture Law requires the Chinese government to protect the investment of the foreign partner in the joint venture; the profits, other lawful rights and interest due to the foreign partner by virtue of the joint venture contract or articles of association approved by the Chinese government. The law mandates that the activities of the joint venture comply with laws and regulations of China. The government of China is prohibited from nationalizing or taking over the joint venture unless it is under special circumstance and according to the needs of social public interest, in which case the nationalization must be done according to law and due compensation paid to the foreign partner.¹⁶¹ This provision against expropriation protects the investment of the foreign partner against the rash and unreasonable decisions of governments at times. It also makes for a measure of certainty on the returns of an investment except for other commercial risks.

The joint venture contract and articles of association duly signed by the parties to the venture should be submitted to the competent foreign economic and trade department of the state to give approval within 3 months of submission and where approval is given, the joint venture should register with the competent administration department for industry and commerce to

¹⁶⁰ See Article 1 of the Chinese-Foreign Joint Venture law

¹⁶¹ See Article 2 of the Chinese-Foreign Joint Venture law

obtain a license to do business and start operation.¹⁶²The joint venture shall take the form of a limited liability company and the proportion of the contribution of the foreign partner shall not be less than 25% of the registered capital of the venture. Risks, losses and profits should be shared proportionately to the parties contributions and no assignment of the registered capital of a joint venture shall be made without the consent of the other parties to the venture.¹⁶³ The importance of the limited liability company in the protection of investors in foreign land is obvious; it gives the joint venture a status of legal personality which means that it can sue and be sued, acquire, hold and dispose of property and it makes the joint venture solely responsible for its liabilities and insulates the properties and parties to the joint venture from the liability of the joint venture unless the court decides to pierce the corporate veil where the justice of the case so demands.

The joint venture shall have a board of directors which shall be appointed and replaced by the parties to the joint venture. The position of the chairman and vice chairman shall be decided by the parties to the venture through consultation or elected by the board. The office of the chairman of the board shall be occupied by one side of the venture and the vice chairman by the other side.¹⁶⁴ The board of directors takes key management decision for the venture in accordance with the articles of association and joint venture agreement. This provision has repealed the earlier discriminatory position that stipulated that a foreigner can not be the chairman of the board of directors of a company in China. With this amendment, the foreign partner can become the Chairman of the board depending on the proportion of the foreign partner investments in the joint venture. The position of the Chairman of the board will help protect the interest of the foreign partner because as Chairman, most key decisions of the enterprise will be taken by him with the support and approval of other board members.

¹⁶²See Article 3 of the Chinese-Foreign Joint Venture law

¹⁶³See Article 4 of the Chinese-Foreign Joint Venture law

¹⁶⁴ See Article 6 of the Chinese-Foreign Joint Venture law

The Chinese-Foreign Joint Venture Law provides for the easy transferability of funds of the net profits of the foreign partner, the salaries, wages and other legitimate income earned by the foreign staff and workers of a joint venture in accordance with the foreign exchange regulations and in the currency specified in the joint venture contract.¹⁶⁵ One of the major concerns of a foreign investor is the easy transferability of the profits of his investment in a foreign land. It is crucial in determining where to invest. This provision of the law therefore protects the investor by guaranteeing the easy transferability of the investor's profits and other legitimate incomes back to investor's home country.

In case of heavy losses, force majeure or total failure of a party to fulfill the obligations prescribed by the contract and articles of association, the law provides that the contract may be terminated through consultation and agreement by the parties to the venture subject to the approval of the foreign economic and trade department of the state. In cases of any losses caused by a contract, the party violating the contract shall assume financial responsibility.¹⁶⁶ This provision protects the foreign investor especially if the breach is caused by the Chinese party then the foreign party should be able to recover his investment from the Chinese party.

The Chinese-Foreign Joint Venture Law provides that any disputes between the parties to the joint venture, which the board of directors can not settle amicably may be settled by the mediation or arbitration by the Chinese arbitration institution¹⁶⁷ or through other arbitration institutions agreed upon by parties to the venture. Where the parties to the joint venture have not agreed upon any arbitration agency in the contract or have not agreed on any arbitration

¹⁶⁵ See Articles 11 and 12 of the Chinese-Foreign Joint Venture law

¹⁶⁶ See Article 14 of the Chinese-Foreign Joint Venture law

¹⁶⁷ The major international arbitration institution is the China International Economic and Trade Arbitration Commission, which was established in 1988. It has its head quarters in Beijing and sub commissions in Shenzhen and Shanghai and is authorized to handle all international trade disputes.

agency in writing afterward after the dispute has arisen, the parties may take their dispute to the people's court.¹⁶⁸ This arbitration provision protects the foreign investor because the foreign investor may rely on this Article 15 of the Chinese-Foreign Joint Ventures law to include in the contract the submission of dispute that can not be resolved amicably by the parties to the joint venture to any of the international arbitration institutions like the ICC International Court of Arbitration in France, American Arbitration Association, London Court of International Arbitration etc if the foreign partner does not have confidence with the arbitration agency in China or the Chinese judiciary.

4. 4 *The Law of the People's Republic of China on Sino-Foreign Cooperative Enterprises 1988 or the Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures 1988*

The Law of the People's Republic of China on Sino-Foreign Cooperative Enterprises 1988¹⁶⁹ or the Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures 1988 (hereinafter called the Sino-Foreign law) is one and the same law, the difference in name probably due to different translations. The Sino-Foreign law was adopted by the First Session of the Seventh National People's Congress on the 13th of April 1988 and was further revised on the 31st of October 2000 at the 18th meeting of the Standing Committee of the Ninth National People's Congress in accordance with the decision to revise the Law of the People's Republic of China on Sino-Foreign Cooperative Enterprises. The highlights of the 27-paragraph article that protect foreign investors are hereby examined.

This Sino-Foreign Law is modeled after the Law of the People's Republic of China on Chinese-Foreign Joint Ventures 1979 in structure. This Sino-Foreign Law is to expand

¹⁶⁸ See Article 15 of the Chinese-Foreign Joint Venture law

¹⁶⁹ See China Through A Lens, a Chinese Government Official web portal available at <http://www.china.org.cn/english/features/investment/36755.htm> (last visited on the 22nd of March 2008)

economic cooperation and technology exchanges/transfers with other countries. It is between foreign enterprises, individuals and other economic organizations (hereinafter called the foreign cooperators) and Chinese enterprises and other economic organizations in China (herein after called the Chinese Cooperators) to establish sino-foreign enterprises to effect the technology transfer on the basis of the principles of equality and mutual benefit and in accordance with Chinese laws.¹⁷⁰

The Chinese and foreign cooperators shall set the investment or cooperation conditions, the distribution of the profits or products , the share of risks and losses , the method of management, the ownership of the enterprises when the cooperation ceases in accordance with the regulations of this law. If the Cooperative enterprises meet the regulations of Chinese laws on the requirements of legal persons, the cooperative enterprise may acquire the status of a Chinese legal person.¹⁷¹ The status of legal personality will protect the enterprise by enabling the enterprise to acquire, hold and dispose of property, sue and be sued and do other things that an artificial person is in law entitled to do in China. The State shall protect the lawful rights and interests of cooperative enterprises and sino-foreign cooperators in accordance with the law while the cooperative enterprises shall comply with the laws and regulations of China.¹⁷² The protections accorded here by virtue of this article 3 are as follows: the cooperative enterprise, the Chinese cooperators and the foreign cooperators.

In order to register the cooperative enterprise, the cooperators shall submit the cooperative enterprise agreement, contract, articles of association and other documents signed by the two parties to the sino-foreign cooperative enterprise, to the examination and approving organ

¹⁷⁰ See Article 1 of the Sino-Foreign Law 1988

¹⁷¹ See Article 2 of the Sino-Foreign Law 1988

¹⁷² See Article 3 of the Sino-Foreign Law 1988

who shall within 45 days after receiving the application decide whether to approve it or not.¹⁷³ If application is granted the enterprise shall apply for registration at the relevant commercial and industrial administrative organ and receive a business license within 30 days after the approval is granted.¹⁷⁴ The investment or cooperation conditions provided by the sino-foreign cooperators can be cash, material objects, land-use rights, industrial property rights, non-patent technology or other property rights and shall be certified by Chinese public accountants or other relevant organs, which shall issue testimonials to this effect.¹⁷⁵

The Sino-Foreign Law protects the cooperative enterprise by providing that the cooperative enterprise shall be managed in accordance with the cooperative enterprise contract and articles of association and forbids interference in the management of the enterprise from elsewhere.¹⁷⁶ The cooperative enterprise shall be run by a board of directors or a joint management organ who shall take management decisions in accordance of the cooperative enterprise contract or articles of association. Each side of the sino-foreign cooperators shall produce the chairman and vice chairman of the board of directors or director and deputy director of the joint management organ. The board of directors or joint management organ shall make a decision to appoint or employ the chief manager who shall be responsible for the daily operations and management and also report to the board of directors or the joint management organ. If the sino-foreign cooperators wish to entrust another party besides themselves to manage their cooperative enterprise, a unanimous agreement must be made by the board of directors or the joint management organ and the decision communicated to the foreign economic relations and trade of the state council.¹⁷⁷ No side of the sino-foreign cooperators shall transfer part or all of its rights and obligations in the cooperative enterprise

¹⁷³ See Article 5 of the Sino-Foreign Law 1988

¹⁷⁴ See Article 6 of the Sino-Foreign Law 1988

¹⁷⁵ See Articles 8 & 9 of the Sino-Foreign Law 1988

¹⁷⁶ See Article 11 of the Sino-Foreign Law 1988

¹⁷⁷ See Article 12 of the Sino-Foreign Law 1988

contract without the agreement of the other party and the approval of the foreign economic and trade of the state council.¹⁷⁸

The Sino-Foreign Law provides for the easy transferability abroad of the profits, salaries and other incomes of the foreign cooperators or foreign employees of the cooperative enterprises.¹⁷⁹ Like in the law of the People's Republic of China on Chinese-Foreign Joint Ventures, the transferability of the profits, salaries, and other lawful incomes abroad by the foreign cooperators or employees gives the foreign investors confidence that the return on his investment is protected and can be useful to the foreign investor. The Sino-Foreign law provides for the effective dispute settlement mechanisms. First the parties to the cooperative enterprise shall try to settle their disputes amicably through negotiation, where this is not possible then through the China arbitration agency¹⁸⁰ or the arbitration institution the parties provided for in their cooperative contract. Where parties did not provide for any arbitration agency and cannot agree in writing which arbitration agency should arbitrate the dispute even after the emergence of the dispute then any party to the cooperative enterprise can file a lawsuit with a Chinese court.¹⁸¹ All the arguments advanced for the protection granted by the Law of the People's Republic of China on Chinese-Foreign Joint Ventures 1979 also apply here mutatis mutandis.

4. 5 Protection of Investment under the Law of the People's Republic of China on Foreign Capital Enterprises or Law of the People's Republic of China on Wholly Foreign-Owned Enterprises 1986

¹⁷⁸ See Article 10 of the Sino-Foreign Law 1988

¹⁷⁹ See Article 22 of the Sino-Foreign Law 1988

¹⁸⁰ See footnote 159 on the Chinese arbitration agency

¹⁸¹ See Article 25 of the Sino-Foreign Law 1988

The Law of the People's Republic of China on Foreign Capital Enterprises 1986¹⁸² or called Law of the People's Republic of China on Wholly Foreign-Owned Enterprises 1986 (hereinafter called the Foreign Capital Enterprises Law) was approved by the Fourth Session of the Sixth National People's Congress on April 12, 1986 and revised in accordance with the decisions to revise the Foreign Capital Enterprises Law of China made at the 18th meeting of the Standing Committee of the Ninth National People's Congress on October 31, 2000.

Unlike the earlier two laws, where the enterprise is between the foreign investor and a Chinese partner, here the enterprise is run, controlled and managed solely by the foreign investor, though the foreign investor may have Chinese employees. The Foreign Capital Enterprises Law was promulgated to expand economic cooperation and technical exchanges with foreign countries and to promote the development of China's national economy. Consequently the law allows foreign enterprises, other economic organizations and individuals (hereinafter referred to as foreign investors) to establish foreign capital enterprises in the territory of China and protects the lawful rights and interests of foreign capital enterprises.¹⁸³

The foreign capital enterprises here refers to enterprises which are conducive to the development of the national economy of China, established in China with all their capital exclusively invested by foreign investor in accordance with Chinese laws. It does not include branches of foreign enterprises and other economic organizations which are located in China.¹⁸⁴ It is only the investment in foreign capital enterprises that are in accordance with the laws and regulations of China and the lawful benefits, other lawful rights and interest obtained

¹⁸²See China Through A Lens, a Chinese Government Official web portal available at <http://www.china.org.cn/english/features/investment/36754.htm> (last visited on the 22nd of March 2008)

¹⁸³ See Article 1 of the Foreign Capital Enterprises Law 1986.

¹⁸⁴See Articles 2 and 3of the Foreign Capital Enterprises Law 1986

therein, that are protected by the Chinese Laws.¹⁸⁵ The law prohibits the nationalization or requisition of foreign capital enterprises unless under special circumstances when public interest requires so and it must be done according to law and appropriate compensation shall be paid.¹⁸⁶ This provision allays any fear by the foreign investor that his investment may be expropriated on a flimsy excuse from the government without adequate compensation paid.

Foreign capital enterprises which accord with the regulations of Chinese Laws on the qualifications of legal persons shall acquire the status of Chinese legal persons¹⁸⁷ and the enterprise may carry out its business management activities in accordance with the approved articles of association without any external or governmental interference.¹⁸⁸ A foreign capital enterprise that re-invest its after – tax profits in China may apply for an income tax refund of the part of the income tax already paid on the reinvested amount.¹⁸⁹ This is part of Chinese tax incentive to foreign investments that will be discussed under the Income Tax Law of the People’s Republic of China for Enterprises with Foreign Investment and Foreign Enterprises 1991.

The law also provides for the easy transferability abroad of the lawful profits, salaries and income of the foreign employees of the foreign capital enterprise, other earnings and any fund remaining after the enterprise is liquidated.¹⁹⁰ The arguments on legal personality and repatriation of funds on the two earlier laws also apply *mutatis mutandis* here.

¹⁸⁵ See Article 4 of the Foreign Capital Enterprises Law 1986

¹⁸⁶ See Article 5 of the Foreign Capital Enterprises Law 1986

¹⁸⁷ See Article 8 of the Foreign Capital Enterprises Law 1986

¹⁸⁸ See Article 11 of the Foreign Capital Enterprises Law 1986

¹⁸⁹ See Article 17 of the Foreign Capital Enterprises Law 1986

¹⁹⁰ See Article 19 of the Foreign Capital Enterprises Law 1986

4. 6 Protection of Investment under the Foreign Economic Contract Law 1985

The Foreign Economic Contract Law 1985¹⁹¹ was adopted on the 21st of March 1985 by the 10th Session of the Standing Committee of the 6th National People's Congress. The law is enacted to protect the rights and interest of parties to foreign economic contract and to promote China's foreign economic relations.¹⁹² The law applies to economic contracts entered into between enterprises or other economic organizations of the People's Republic of China and foreign enterprises, other foreign economic organizations or individuals, except international transport contracts.¹⁹³

The analysis of the Law of the People's Republic on Chinese-Foreign Joint Ventures and the Law of the People's Republic of China on Sino-Foreign Cooperative Enterprise shows that these two laws contemplate a partnership enterprise between the foreign partner and Chinese partner. These partnerships require a contract between the partners, the drafting of this contract is governed by the Foreign Economic Contract Law. The law gives the people freedom to choose which law will apply in the settlement of disputes arising from the contract, but where no law is designated by the parties the law with the closest connection to the contract applies.¹⁹⁴ The freedom of the parties to choose which law to apply for settlement of dispute protects the foreign investor as the foreign investor may choose to submit any dispute to any international arbitration institutions if the investor is not confident with the Chinese arbitration institution or Chinese People's court. The law provides that where a

¹⁹¹Text available at <http://english.enorth.com.cn/system/2001/05/29/000002093.shtml> (last visited on the 24th of March 2008)

¹⁹² See Article 1 of the Foreign Economic Contract Law 1985.

¹⁹³ See Article 2 of the Foreign Economic Contract Law 1985

¹⁹⁴ See Article 5 of the Foreign Economic Contract Law 1985

provision of an international treaty relates to a contract in which China has participated or concluded differs with provision of the laws of China; the provision of the treaty will prevail unless China has specifically reserved the right to apply its own law.¹⁹⁵ This provision of the law also protects the foreign investor because provision of a treaty may be more favorable and just to a foreign investor than the provisions of Chinese Laws.

The law provides for the formation of a contract between the parties, the rights and obligations of the parties to the contract, the liabilities of breach of the terms of the contract, termination, modification and cancellation of the contract and the remedies available to the injured party, force majeure, assignment of contract, settlement of disputes. The law enjoins the parties to solve their disputes through consultation and mediation, failure which the parties may submit their disputes to Chinese arbitration body or any other arbitration institution agreed by the parties.¹⁹⁶ If the parties can not agree on an arbitration body before and after a dispute has arisen, then either party may institute a legal action at the Chinese People's Court¹⁹⁷.

4.7 Protection of Investment under the Company Law of the People's Republic of China 1993

The Company Law of the People's Republic of China 1993¹⁹⁸ was adopted at the Fifth Session of the Standing Committee of the Eighth National People's Congress on December 29, 1993. It has been revised in 1999, 2004 and also at the 18th Session of the 10th National People's Congress of the People's Republic of China on October 27, 2005.

¹⁹⁵ See Article 6 of the Foreign Economic Contract Law 1985

¹⁹⁶ See Article 37 of the Foreign Economic Contract Law 1985

¹⁹⁷ See Article 38 of the Foreign Economic Contract Law 1985

¹⁹⁸ The text of the law is available at <http://www.law-bridge.net/english/LAW/20064/0221042566163.html> (last visited on the 24th of March 2008)

The Company Law was formulated for the purposes of regulating the organization and operation of companies, protecting the legitimate rights and interests of companies, shareholders and creditors, maintaining the socialist economic order, and promoting the development of the socialist market economy.¹⁹⁹ The major vehicle for investment either by a local investor or foreign investor is to form a company²⁰⁰ or invest in an already existing Company,²⁰¹ and in which case, the protection provided by the Chinese Company Law to companies automatically extends to such investments. For example the Chinese company provides that the legitimate rights and interests of a company shall be protected by laws and may not be infringed.²⁰²

Chapter X1 of the Chinese Company law 1993 is devoted to Branch of Foreign Companies in China. The law provides that the branches of foreign companies which are established upon approval shall accord with the laws of China when undertaking their business activities within the territory of China, and may not injure the social public interests of China, and the lawful rights and interests thereof shall be protected by Chinese law.²⁰³

The law also provides that the limited liability companies and joint stock limited companies invested by foreign investors shall be governed by the present law. Where otherwise, there are different provisions in any law regarding foreign investment, such provisions shall prevail.²⁰⁴

The Chinese Company laws govern the portfolio investment made by a foreign investor in any Chinese company. Also any issue that is not covered by the specific foreign investment

¹⁹⁹ See Article 1 of the Chinese Company Law 1993

²⁰⁰ Whether it is Chinese – Foreign Joint Venture Enterprises, Sino – Foreign Cooperative Enterprises, or Wholly-Owned Foreign Enterprises or establishment by local investors, it can only be carried out by incorporating Limited Liability Company or a Joint Stock Limited Company.

²⁰¹ By buying shares and other securities of the company at the Shanghai or Shenzhen Stock Exchanges or even private placement of shares conducted by the company itself.

²⁰² See Article 5 of the Chinese Company Law 1993.

²⁰³ See Article 197 of the Chinese Company Law 1993.

²⁰⁴ See Article 218 of the Chinese Company Law 1993

laws (like the Chinese Laws on Chinese – foreign Equity Joint Venture, Sino-foreign Cooperative Enterprises etc) are regulated by the Chinese Company Law. In this regard the Chinese Company Law complements other foreign investment laws of China.

4. 8 The Income Tax Law of the People’s Republic of China for Enterprises with Foreign Investment and Foreign Enterprises 1991

The Income Tax Law of the People’s Republic of China for Enterprises with Foreign Investment and Foreign Enterprises 1991²⁰⁵ (hereinafter referred to as the Income Tax Law) was adopted at the Fourth Session of the National People’s Congress and by Order No. 45 of the President of the People’s Republic of China on April 9, 1991. This Income Tax Law 1991 repealed both the Income Tax of the People’s Republic of China for Chinese-foreign Equity Joint Ventures and the Income Tax Law of the People’s Republic of China for Foreign Enterprises.²⁰⁶

This law provides that Income Tax shall be paid in accordance with provision of this Income Tax Law 1991 by enterprises with foreign investment within the territory of China on their income derived from production, business operations and other sources. Also income tax will be paid in accordance with the provisions of this law by foreign enterprises on their income derived from production, business operations and other sources within the territory of China.²⁰⁷ For the purpose of clarity the law defined “enterprise with foreign investment” to mean Chinese-foreign equity joint ventures, Chinese foreign contractual joint ventures and

²⁰⁵ The law is available at <http://64.233.183.104/search?q=cache:fpzbQzx6yFUJ:china.org.cn/english/investment/1...> (last visited on the 25th of March 2008)

²⁰⁶ See Article 30 of the Income Tax Law 1991

²⁰⁷ See Article 1 of the Income Tax Law 1991

foreign-capital enterprises that are established in China. The law defined “foreign enterprises “ to mean foreign companies, enterprises and other economic organizations which have establishments or places in China and engage in production or business operations, or which, though without establishments or places in China, have income from sources within China.²⁰⁸

In every legal system that wants to attract foreign direct investment, the income tax laws play a great role in attracting or repelling foreign investors. Such income tax law must provide tax rebates, tax reductions, tax holidays, tax concessions to investors in some sectors of the economy in order to lure the investors to invest in the country. The Income Tax law of the People’s Republic of China for Enterprises with Foreign Investment and Foreign Enterprises 1991 has provided such tax rebates, holidays, reductions etc. Example of the tax rebate is provided in Article 7 of the Income Tax law as follows:

“Article 7 The income tax on enterprises with foreign investment established in special economic zones, foreign enterprises which have establishments or places in special economic zones engaged in production or business operations, and enterprises with foreign investment of a production nature in economic, and technological development zones shall be levied at the reduced rate of 15 percent.

The income tax on enterprises with foreign investment of a production nature established in coastal economic open zones, or in the old urban districts of cities where the special economic zones or the economic and technological development zones are located, shall be levied at the reduced rate of 24 percent.

²⁰⁸See Article 2 of the Income Tax Law 1991

The income tax on enterprises with foreign investment in coastal economic open zones, old urban districts of cities where the special economic zones or the economic and technological development zones are located, or other regions defined by the State Council within the scope of energy, communications harbour, wharf or other projects encouraged by the state, may be levied at the reduced rate of 15%. The specific rules shall be regulated by the State Council”

While an example of the tax exemption or holiday is contained in Article 8 of the Income Tax law as follows:

“Article 8 Any enterprise with foreign investment of a production nature scheduled to operate for a period of not less than 10 years shall, from the year in which it begins to make profits, be exempted from income tax in the first and second years and allowed a 50% reduction in the third to fifth years. However, the exemption from or reduction of income tax for enterprises with foreign investment engaged in the exploration of resources such as oil , natural gas, rare metals, noble metals, etc., shall be regulated separately by the State Council. Enterprises with foreign investment have actually operated for a period of less than 10 years shall repay the amount of income tax already exempted or reduced

Any enterprise with foreign investment which is engaged in agriculture, forestry or animal husbandry and any other enterprise with foreign investment which is established in remote underdeveloped areas may, upon approval by the competent department for tax affairs under the State Council of an application filed by the enterprise, be allowed a 15 percent to 30 percent

reduction of the amount of income tax payable for a period of 10 years following the expiration of the period for tax exemption or reduction, provided for in the preceding two paragraphs”

The law even provide for a tax exemption or reduction from income on interest made from loan provided to Chinese state banks by international financial organizations or foreign banks.

Article 19 of the Income tax Law provides as follows:

“An exemption from or reduction of income tax shall apply to the following income:

(1) profits derived by a foreign investor from an enterprise with foreign investment shall be exempted from income tax;

(2) income from interest on loans made to the Chinese Government or Chinese state banks by international financial organizations shall be exempted from income tax;

(3) income from interest on loans made at a preferential interest rate to Chinese state banks by foreign banks shall be exempted from income tax”.

All these exemptions, tax rebates, tax reductions, and tax holidays are incentives and tax incentives are a form of protection and assurance to the investor that the investor will reap good returns on his investments. These tax concessions are also incentives for investment especially in particular sectors of the economy or regions of the country the government considers underdeveloped or has given priority for its development. Enacting a law such as the Income Tax Law 1991 to back up or guarantee the tax incentives gives additional layer of protection to investors by making the law certain in this regard. It is pertinent to note that the

tax incentives may be varied with the development of a particular sector of the economy or a particular region of the country which was hitherto underdeveloped, but this can not cause any confusion because the years or periods of the tax concessions are normally stated in the enabling law.

4. 9 Protection of Investments under Provisions on Guiding Direction of Foreign Investment 2002

The Provisions on Guiding Direction of Foreign Investment Law 2002²⁰⁹ was promulgated by decree No. 346 of the State council of the People's Republic of China on February 11, 2002 and it repealed the Interim Provisions on Guiding the Direction of Foreign Investment 1995.²¹⁰

This provision applies to the following types of enterprises: Chinese-foreign equity joint ventures, sino-foreign cooperative enterprises, and wholly foreign-owned enterprises that operate within the territory of China.²¹¹ Consequently, the provisions classified foreign investments into four major categories: projects to be encouraged, permitted, restricted and forbidden. Foreign investments to be encouraged, restricted or prohibited are listed in the Catalogue for the Guidance of Industries for Foreign Investment. Those projects, other than foreign investments to be encouraged, restricted or prohibited, and not restricted by other Chinese regulations, shall be foreign invested projects to be permitted, these permitted

²⁰⁹See gov. cn Chinese government official web portal available at http://www.gov.cn/english//////////laws/2005-07/25/content_16873.htm (last visited on the 24th of March 2008)

²¹⁰ See Article 17 of the Guiding Direction Law 2002

²¹¹ See Article 2 of the Guiding Direction Law 2002

category are residuary and not listed in the Catalogue for the Guidance of Industries for Foreign Investment²¹².

The provision also listed the broad category or circumstance where the foreign investment could be encouraged, restricted or prohibited. Articles 5, 6, and 7 of the Provisions state as follows:

“Article 5 Foreign invested projects under one of the following circumstances shall be listed as encouraged ones:

(1) projects applying new agricultural technology, for comprehensive agricultural development, and for development of energy, communications or industry of key raw materials;

(2) projects employing new high technology and advanced practical technology which can improve performance of products, increase tech-economic efficiency of enterprises, or manufacture new equipment or new materials while the domestic productivity is deficient;

(3) projects that can meet the demands of market, raise the grade of products, open up new markets or increase the competitive strength of products in international market;

(4) projects adopting new technology or equipment that can conserve energy and raw materials, utilize resources and renewable resources in a comprehensive way or prevent environmental pollution;

²¹² See Article 4 of the Guiding Direction Law 2002, See the US-China Business Council, Foreign Investment in China available at <http://www.uschina.org/statistics/2005foreigninvestment.html> (last visited on the 24th of March 2008)

(5) projects that can make full use of the superiority in human and natural resources in the Mid-west regions and that are in conformity with the industrial policies of the State ; or

(6) other circumstances provided for in laws and administrative regulations”.

“Article 6 Foreign invested projects under one of the following circumstances shall be listed as restricted ones:

(1) projects with backward technology;

(2) projects without any benefit to the conservation of resources and the improvement of eco-environment;

(3) projects involving the exploration and exploitation of any special mineral resource the exploitation of which shall, as provided for by the State, be carried out in a protective way;

(4) projects involving the industry that is being opened up by the State step by step; or

(5) other circumstances provided for in laws and administrative regulations.”

“Article 7 Foreign invested projects under any of the following circumstances shall be listed as prohibited ones:

(1) projects endangering State security or damaging social and public interests;

(2) projects causing pollution or damage to environment, jeopardizing natural resources or impairing health of human body;

(3) projects unfavorable to the protection and development of land resources as a result of occupation of large amount of arable lands;

(4) projects endangering the safety of military installation or the work efficacy thereof;

(5) projects involving the making of products by utilizing the unique craftsmanship or technology of our country; or

(6) other circumstances provided for in laws and administrative regulations”.

The categorization of the foreign invested projects into encouraged, restricted, permitted and prohibited is to inform and also protect foreign investor on which area of investment to engage in, which area of investment attracts preferential treatment by the approving authorities and the Income Tax Law. Foreign investment in encouraged sectors frequently enjoys preferential treatment, often including the right to establish wholly foreign-owned enterprises, while projects listed in restricted categories may be undertaken as an equity joint venture or contractual joint venture with Chinese party holding the majority of shares.²¹³ The Provisions on Guiding Direction of Foreign Investment and the Catalogue for the Guidance of Industries for Foreign Investment (which list in great details the investments in the encouraged, restricted and prohibited categories) are the compass a foreign investor will use in navigating the investment waters of the People’s Republic of China.

4. 1. 0 *Protection of Investment under the Catalogue for the Guidance of Foreign Investment Industries*

The Catalogue for the Guidance of Foreign Investment Industries²¹⁴ and its Attachment have been amended and are promulgated now for the purpose of meeting the need of economy and

²¹³ See Article 8 of the Guiding Direction Law 2002

²¹⁴ Available at <http://cy2.mofcom.gov.cn/aarticle/chinalaw/investment/200506/20050600113595.html> (last visited on the 24th of March 2008)

social development and adjustment of industrial structure, it came into force on January 1st, 2005. This Catalogue repeals the earlier Catalogue for the Guidance of Foreign Investment Industries which was promulgated by the former State Development Planning Commission, the former State Economy and Trade Commission and the former Ministry of Foreign Trade and Economic Cooperation on March 11, 2002. This Catalogue for the Guidance of Foreign Investment Industries is a list containing in specific details the list of each of the foreign invested projects that are encouraged, restricted and prohibited. It should be noted that what is not included in any of these lists is permitted for investment under the Chinese law. It is a residuary list that is not contained in any catalogue or legislation.

4. 1. 1 *Protection of Investments in Intellectual Property Rights in the People's Republic of China*

Intellectual properties are a special class of investment made by the inventors, creators, copyright owners etc. Due to its special nature, a whole lot of intricate legislations are enacted to protect investments in the intellect, time and resources put by the owners of these rights in creating or inventing these intellectual properties. China has been ranked low by WTO Scorecard,²¹⁵ and the ratings of other international agencies and most countries in the assessment of the protection of Intellectual Property Rights (IPR). According to Mertha²¹⁶

“China is by far the world's leading producer of counterfeit goods — from knock-off designer-brand clothing to pirated films and books, to imitation

²¹⁵ See China's Implementation of Its World Trade Organization Commitments; An Assessment by the US-China Business Council, Trade Policy Staff Committee Hearing September 27, 2007 available at http://www.uschina.org/public/documents/2007/09/uscbsc_china_wto_implementation_oral_statement.pdf (last visited on the 26th of March 2008)

²¹⁶ Andrew Mertha, *The Politics of Piracy: Intellectual Property in Contemporary China* (Cornell University Press, September 2005) p.215.

consumer electronics and aircraft parts — a black market that costs legitimate companies in America and elsewhere billions of dollars in lost sales annually”

China has acceded to many conventions and treaties, bilateral agreement on trade relations with the United States and other countries to protect the intellectual property rights and has also enacted and revised several legislations for the protection and enforcement of intellectual property rights. Even before the economic reforms, China had laws for the protection of intellectual property. As far back in April 1963, China enacted a Trademark Act which was later repealed by the Trademark Act of 1982. In July 1979, China signed a bilateral trade agreement with US for each party to offer mutual protection for patents and copyrights, since then China has further signed several memorandum of understanding with the US, examples are in May 1989 there was a US-China MOU on enactment and scope of China Copyright Law, in January 1992 there was a US-China MOU on Intellectual Property Rights, in February 1995, there was a US-China IPR enforcement agreement.²¹⁷

Besides the bilateral agreements, China became a member of the World Intellectual Property Organization,²¹⁸ in 1980 and acceded to many treaties which are listed as follows—

- March 1980- WIPO Convention
- March 1985 – Paris Convention for the Protection of Industrial Property
- October 1989- Madrid Agreement for International Registration of Trademarks
- October 1992- Universal Copyright Convention
- October 1992- Berne Convention for the Protection of Literary and Artistic Works

²¹⁷ See a brief Chronology of China’s Intellectual Property Protection available at <http://www.american.edu/TED/hpages/ipr/cheng.htm> (last visited on the 26th of March 2008)

²¹⁸ See WIPO Administered Treaties available at http://www.wipo.int/treaties/en/ShowResults.jsp?search_what=C&country_id=38C (last visited on 28th March 2008)

- June 1993- Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms(Geneva Convention)
- January 1994- Patent Cooperation Treaty etc²¹⁹

Nationally, China has also enacted several local legislations: Patent Law of People’s Republic of China of 1984 which was revised in 2001; Trademark law of People’s Republic of China of 1982 and was revised in 2002; Copyright Law of People’s Republic of China of 1990, and revised in 2001; and other several other laws, rules and regulations. These whole laws, conventions and treaties are aimed at protecting investments made in the intellectual properties, encouraging inventions, discouraging infringement of ‘works,’ ‘ideas,’ ‘creations’ and ‘inventions’ of others and for the enforcement of the intellectual property rights in China. An analysis of few of the above legislations to examine the protection it affords the investors will be apt here.

4. 1. 2 *Protection of Investments under the Patent Law of People’s Republic of China of 1984 and revised in 2001*

The Patent Law of People’s Republic of China of 1984 and revised in 2001 (hereinafter known as the Patent Law) was adopted by the Fourth Session of the Standing Committee of the Sixth National People’s Congress on March 12, 1984 and has been severally amended and the last amendment adopted at the 17th Session of the Standing Committee of the Ninth National People’s Congress on August 25, 2000 and the amendment came into force on July 1 2001.²²⁰ The law was enacted to protect the patent rights for inventions –creations, to promote

²¹⁹ *Id.*

²²⁰ See the Full Text of this Law and its Short history at Laws and Regulations CCPIT Patent and Trademark Law Office web site available at http://www.ccpit-patent.com.cn/references/Patent_law_China.htm (last visited on the 27th of March 2008)

invention-creation, to further the spreading and application of inventions –creations and finally to promote the development and innovation of science and technology for meeting the needs of Chinese modernization.²²¹

The department in charge of the administration of Patent laws, the application and registration of Patents is the Patent Administration Department under the State Council while in the case of People's governments of provinces, autonomous regions and municipalities directly under the Central Government the body responsible for patent administration is the administrative authority for patent affairs in their respective administrative areas.²²² What is registrable under the Patent Law is an invention-creation; an invention-creation is divided into a service invention-creation and non service invention-creation. The service invention-creation is an invention created while in the employment of an entity and executing the task of the employer using the employer's materials and technical means, here the invention belongs to the entity and can only be registered by the entity itself. The other non service invention-creation is the invention created by the individual on his own without the help of an entity and that individual can register the invention-creation in his own name.²²³

The patent law accords more priority to first to file for patent in cases where two or more persons develop identical invention creation.²²⁴ Both the right to apply for the patent and the patent right itself are assignable but where any of these right is assigned between a Chinese entity or individual and a foreigner, such assignment must be approved by the relevant authority in the State Council and the parties shall conclude a written contract and register it

²²¹ See Article 1 of the Patent Law

²²² See Article 3 of the Patent Law

²²³ See Article 6 of the Patent Law

²²⁴ See article 9 of the Patent Law

with the Patent Administration Department Under the State Council who shall announce the registration. The assignment takes effect from the date of registration.²²⁵

The right of a patent or the real protection a patent gives to a patentee is contained in Article 11 and 12 of the Patent Law which provide as follows:

“Article 11. After the grant of the patent right for an invention or utility model, except where otherwise provided for in this Law, no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, use, offer to sell, sell or import the patented product, or use the patented process, and use, offer to sell, sell or import the product directly obtained by the patented process, for production or business purposes.

After the grant of the patent right for a design, no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, sell or import the product incorporating its or his patented design, for production or business purposes.

Article 12. Any entity or individual exploiting the patent of another shall conclude with the patentee a written license contract for exploitation and pay the patentee a fee for the exploitation of the patent. The licensee has no right to authorize any entity or individual, other than that referred to in the contract for exploitation, to exploit the patent”.

²²⁵See Article 10 of the Patent Law

Article 11 & 12 of the Patent law protect the rights and the investments of the Patentee in the patent by prohibiting other persons from using the patented property in breach of the Patent laws and without authorization from the Patentee.

4. 1. 3 *Protection of Investments under the Trademark Law of People's Republic of China 1982 and revised in 2002*

The Trademark Law of People's Republic of China (hereinafter Known as the Trademark Law) was adopted at the 24th Session of the Standing Committee of the Fifth National People's Congress on August 23, 1982, and has since then undergone some revision and the last being the revision of the law adopted at the 24th Session of the Standing Committee of the Ninth National People's Congress on October 27 2001.²²⁶ Like the Patent Law, Trademark law is promulgated for the purposes of improving the administration of trademarks, protecting the exclusive right to use a trademark, and encouraging producers and traders to guarantee the quality of their goods and services and maintain the reputation of their trademarks, with a view to protect the interests of consumers, producers and traders and promote the development of the Chinese socialist market economy.²²⁷

The office in charge of the administration and registration of the trademark is the Trademark office of the administrative authority for industry and commerce under the State Council and settlement of trademark disputes shall be handled by the Trademark Review and Adjudication Board²²⁸. A trademark that has been accepted and registered by the Trademark Office shall be called a registered trademark and it can then be used on goods, as a service mark, a collective

²²⁶ See the Full Text of this Law and its Short history at Laws and Regulations CCPIT Patent and Trademark Law Office web site available at http://www.ccpit-patent.com.cn/references/Trademark_law_China.htm (last visited on the 27th of March 2008)

²²⁷ See Article 1 of the Trade mark Law

²²⁸ See Article 2 of the Trade mark law

mark or a certification mark. The owner of any of these trademarks shall use the trademark to the exclusion of others and this right to exclusive use shall be protected by law.²²⁹ The application for trademark can be made by a natural person, legal person or other enterprises over goods manufactured, processed, selected or marketed by the person or entity. Where the trademark is on services provided, then the person or entity providing the service shall apply for service mark.²³⁰ Trademark of any type can be made jointly by two or more persons or entities or a combination of both²³¹. An owner of a trademark shall be responsible of the quality of goods or service that has his trademark or service mark.²³²

A trademark should be distinctive, identifiable and distinguishable from other trademark and should not be in conflict with other registered trademark.²³³ Where a proposed trademark constitutes a reproduction, an imitation, a translation of well known existing trademark of another person or entity even though not registered in China and is likely to cause a confusion such a trademark shall not be registered.²³⁴ Where the trademark is being applied for registration by a foreign investor, such person shall apply in accordance with the bilateral agreement concluded between China and the foreigner's country of origin or according to the international treaty to which both countries are parties, or on the basis of the principle of reciprocity.²³⁵

Article 51, 52 and 59 of the Trademark Law protects the exclusive right to use a registered trademark, list the actions that constitute the infringement of trademark law and further

²²⁹ See Article 3 of the Trademark Law

²³⁰ See Article 4 of the Trademark Law

²³¹ See Article 5 of the Trademark Law

²³² See Article 7 of the Trademark Law

²³³ See Article 9 of the Trademark Law

²³⁴ See Article 13 of the Trademark Law

²³⁵ See Article 17 of the Trademark Law

creates offence on the unauthorized use of another's trademark. These Articles provides as follows:

“Article 51. The exclusive right to use a registered trademark is limited to the trademark which has been registered and to the goods in respect of which the registration has been made.

Article 52. A person infringes the exclusive right to use a registered trademark if he:

(1) uses a trademark that is identical with or similar to a registered trademark in relation to identical or similar goods without the consent of the owner of the registered trademark;

(2) Offers for sale goods that are in infringement of the exclusive right to use a registered trademark;

(3) counterfeits, or makes without authorization, representations of a registered trademark of another person, or offers for sale such representations;

(4) changes a registered trademark and put goods bearing the changed trademark on market without consent of the owner of the registered trademark;

or

(5) causes, in other respects, prejudice to the exclusive right of another person to use a registered trademark.

Article 59. Any person who, without the consent of the owner of a registered trademark, uses a trademark that is identical with the registered trademark in relation to identical goods, if it constitutes a crime, shall be prosecuted according to law for his criminal liabilities in addition to compensating the damages that the infringer suffers.

Any person who counterfeits, or makes without authorization, representations of a registered trademark of another person, or offers for sale such representations, if it constitutes a crime, shall be prosecuted according to law for his criminal liabilities. Any person who knowingly sells goods that bear a counterfeited registered trademark, if it constitutes a crime, shall be prosecuted according to law for his criminal liabilities in addition to compensating the damages the infringer suffers”

The punishment ranges from criminal prosecution in serious cases to order asking the infringer to stop the infringing act, confiscating and destroying the infringing goods and implements used in infringing the goods etc.²³⁶ To underscore the seriousness the Chinese government attaches to this Trademark law and its enforcement in the interest of investors, the law provides and enjoins the administrative authorities in charge of administering trademark laws to observe discipline in their duties²³⁷ and further provides as follows:

“Where a member of state personnel responsible for trademark registration, administration and review is derelict of duty, abuses power, or practices fraud for personal considerations, or handles trademark registration, administration, and review matters in violation of the law, or accepts money or property from an interested party, or seeks improper gains, if the case is so serious as to constitute a crime, he shall be prosecuted according to law for his criminal liabilities; where the case does not constitute a crime, he shall be subject to administrative disciplinary measures according to rules and regulations.”²³⁸

²³⁶ See Article 53 of the Trademark Law

²³⁷ See Article 61 of the trademark Law

²³⁸ See Article 62 of the Trademark Law

Like the Patent law, the trademark law seeks to protect the trademark of investors from being counterfeited or used without authorization so as not to negatively affect the business and investment of the original trademark owner.

4. 1. 4 *Protection of Investments under the Copyright Law of People's Republic of China of 1990 and revised in 2001*

The Copyright Law of People's Republic of China of 1990 (hereinafter referred to as the Copyright Law) was adopted at the Fifteenth Session of the Standing Committee of the Seventh National People's Congress on 7 September 1990, and revised at the 24th Session of the Standing Committee of the Ninth National People's Congress on 27 October 2001.²³⁹ The Copyright law was enacted to protect the copyright of authors in their literary, artistic and scientific works and the copyright – related rights and interest. The law also encourages the creation and dissemination of works that will contribute to the construction of spiritual, material and cultural civilization of the Chinese People²⁴⁰.

The Copyright Law protects the works of Chinese citizens, legal entities or other organizations whether published or not, but a foreigner's works can only enjoy protection of this law if the foreigner belongs to a country that has agreement with China, or has a habitual residence with such country, or both the foreign country and China are signatories to international treaties for the protection of literary, artistic or scientific works of authors, or the foreigner, not being a member of this country or is habitually resident in this country, but has

²³⁹ See the full text of the law and the its brief history at Judicial Protection of IPR in China website available at <http://www.chinaipr.com/english/laws/laws10.htm> (last visited on the 27th of March 2008)

²⁴⁰ See Article 1 of the Copyright Law

first published his literary work in this country which is a signatory with China for International treaties for the protection of the literary, artistic or scientific works.²⁴¹

Copyright laws just like Patent and Trademark laws is administered by the copyright administration department under the State Council nationwide whilst other copyright administration department in the People's government of each province, autonomous region municipality directly under the Central Government shall be responsible for the administration of copyright in its administrative regions.²⁴² Copyright belongs to the author who has created the work²⁴³ and where more than one person created the work, the persons becomes co-authors of the work and will enjoy the copyright protection therein in the work.²⁴⁴

Copyright has limitation of rights which means that in certain circumstances a person may use the works of others without permission from the author or a payment of remuneration to the author yet the person will not be liable for infringement. This is possible only if the name of the author and the title of the works are mentioned and acknowledged by proper referencing in the work of this person. Such few instances include the following:

“use of a published work for the purposes of the user's own private study, research or self-entertainment; appropriate quotation from a published work in one's own work for the purposes of introduction to, or comments on, a work, or demonstration of a point; reuse or citation, for any unavoidable reason, of a published work in newspapers, periodicals, at radio stations, television stations or any other media for the purpose of reporting current events;

²⁴¹ See Article 2 of the Copyright Law

²⁴² See Article 7 of the Copyright Law

²⁴³ See Article 11 of the Copyright Law

²⁴⁴ See Article 13 of the Copyright Law

*publication in newspapers or periodicals, or broadcasting by radio stations, television stations or any other media, of a speech delivered at a public gathering, except where the author has declared that the publication or broadcasting is not permitted; translation, or reproduction in a small quantity of copies, of a published work for use by teachers or scientific researchers, in classroom teaching or scientific research, provided that the translation or reproduction shall not be published or distributed; use of a published work, within proper scope, by a State organ for the purpose of fulfilling its official duties; reproduction of a work in its collections by a library, archive, memorial hall, museum, art gallery or any similar institution, for the purposes of the display, or preservation of a copy, of the work; translation of a published work of a Chinese citizen, legal entity or any other organization from the Han language into any minority nationality language for publication and distribution within the country; transliteration of a published work into Braille and publication of the work so transliterated etc”.*²⁴⁵

Besides the above instances generally provided under Article 22 of the Copyright law, any unauthorized use of a literary, artistic or scientific work of an author is protected and the infringer will be liable. Whilst Article 46 creates the offence Article 47 provides the punishment for the infringer. Article 46 and 47 of the Copyright Law provides as follows:

“Article 46 *Anyone who commits any of the following acts of infringement shall bear civil liability for such remedies as ceasing the infringing act, eliminating the effects of*

²⁴⁵ See Article 22 (1) – (12) of the Copyright Law

the act, making an apology or paying compensation for damages, depending on the circumstances:

(1) publishing a work without the permission of the copyright owner;

(2) publishing a work of joint authorship as a work created solely by oneself, without the permission of the other co-authors;

(3) having one's name mentioned in connection with a work created by another, in order to seek personal fame and gain, where one has not taken part in the creation of the work;

(4) distorting or mutilating a work created by another;

(5) plagiarizing a work of another person;

(6) exploiting by exhibition, film production or any analogous method of film production, or by adaptation, translation, annotation, or by other means, without the permission of the copyright owner, unless otherwise provided in this Law;

(7) exploiting a work created by another person without paying remuneration as prescribed by regulations;

(8) rending a work, sound recording or video recording, without the permission of the copyright owner of a cinematographic work, a work created by virtue of an analogous method of film production, computer software, sound recording or video recording or the owner of a copyright-related right unless otherwise provided in this Law.

(9) exploiting the typographic arrangement of a book or periodical without the permission of the publisher.

(10) broadcasting live a performance or communicating the live performance to the public, or recording his performance without the permission of the performer; or

(11) committing any other act of infringement of copyright and of other rights and interests relating to copyright.

Article 47 *Anyone who commits any of the following acts of infringement shall bear civil liability for such remedies as ceasing the infringing act, eliminating the effects of the act, making an apology or paying damages, depending on the circumstances' and may, in addition, be subjected by a copyright administration department to such administrative penalties as ceasing the infringing act, confiscating unlawful income from the act, confiscating and destroying infringing reproductions and imposing a fine; where the circumstances are serious, the copyright administration department may also confiscate the materials, tools, and equipment mainly used for making the infringing reproductions; and if the act constitutes a crime, the infringer shall be prosecuted for his criminal liability:”*

In all, the above three laws have provisions that in theory should effectively protect investors especially foreign investments in intellectual property in China because with all these laws a foreign investor should not entertain fears that infringers will sabotage his goods by imitating it, or placing his trademark on inferior goods for passing off i.e. to sell the goods as the original, or plagiarizing his works especially film production, computer soft ware, sound recording etc. But in practice the opposite is the case in Chinese, notwithstanding these good several legislations above, intellectual property protection in China is unimpressive and many factors have been advanced for this. First traditionally, Chinese people believed in copying

from other people who are better than them and so see nothing wrong in either pirating or plagiarizing people's work²⁴⁶. According wikipedia, of free encyclopedia;

“The enforcement of protection of intellectual property rights is particularly difficult in the PRC. Historically, intellectual property rights are something of a foreign custom to Chinese culture as the Chinese were a people who shared their ideas with each other. Without adequate education with regard to IPRs, there is little awareness that infringement is a crime. For example, though the first intellectual property law was drafted in 1982, the first IPR training centre wasn't established until 1996”²⁴⁷.

This position of wikipedia may have contributed to the infringement of intellectual property rights at the beginning of enactment of the intellectual property laws in 1980's but can not be justified today as a cause in the midst of so many legislations, conventions and treaties. Even if traditionally, Chinese did not believe that infringement was a crime so many years ago, their belief can not hold avail them of liability for infringement in the midst of several legislations. Though this research agrees with wikipedia that awareness of these laws, treaties and conventions may have started late in China, but the truth is that no level of awareness without commitment to punish offenders may deter people from their old inclinations more so when their old beliefs are economically beneficial to them. This researcher has searched fruitlessly to locate the exact newspaper in Nigeria that published the story of raid carried out sometime in 2005 in Nigeria by the Nigerian Copyright Commission, wherein several hundreds of thousands of pirated video, CD, DVD of foreign films and music with hi-tech machines used in pirating them were confiscated from more than 10 Chinese nationals and

²⁴⁶ Alford, Williams P, To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization (Stanford University Press, 1995) p. 187

²⁴⁷ See Intellectual Property in the China- Wikipedia, the free encyclopedia available at http://en.wikipedia.org/wiki/intellectual_property_in_the_People's_Republic_of_China (last visited on the 27th of March 2008)

their Nigerian collaborators. It was major news then mainly because of the quantity of pirated items found with them as against the ‘small scale’ piracy in Nigeria. Obviously, the ten Chinese arrested in Nigeria and their Nigeria collaborators knew about the laws against piracy and the illegality of their act. Another assessment of China’s intellectual property rights states as follows:

“Since joining the World Trade Organization (WTO), China has strengthened its legal framework and amended its IPR and related laws and regulations to comply with the WTO Agreement on Traded-Related Aspect of Intellectual Property Rights (TRIPs). Despite stronger statutory protection, China continues to be a haven for counterfeiters and pirates. According to one copyright industry association, the piracy rate remains one of the highest in the world (over 90 percent) and U.S. companies lose over one billion dollar in legitimate business each year to piracy. On average, 20 percent of all consumer products in the Chinese market are counterfeit. If a product sells, it is likely to be illegally duplicated. U.S. companies are not alone, as pirates and counterfeiters target both foreign and domestic companies.

Though we have observed commitment on the part of many central government officials to tackle the problem, enforcement measures taken to date have not been sufficient to deter massive IPR infringements effectively. There are several factors that undermine enforcement measures, including China’s reliance on administrative instead of criminal measures to combat IPR infringements, corruption and local protectionism at the provincial levels, limited resources and training available to

enforcement officials, and lack of public education regarding the economic and social impact of counterfeiting and piracy”²⁴⁸.

Mertha²⁴⁹ in his book has argued that the protection of intellectual property rights in China is a difficult task because of not only the problem of protectionism but of active collaboration of the leaders of the local government bureaucracies who have a stake in the companies that pirate goods. Where a community relies mainly on piracy for employment and revenue it becomes impossible for the local power brokers to apprehend violators. Also where there is effort to crack down on piracy, lack of resources hinders the efforts while the violators are becoming increasingly sophisticated in the production and sell of the pirated products.²⁵⁰

Infringement of intellectual properties in China can be addressed by either of the two ways: by administrative procedure or legal proceedings by the intellectual property right holder. What ever might be the cause of the high rate of infringement of these intellectual property rights, if Chinese government show a more commitment to enforce these IPR laws, and the local protectionism is eradicated, China will overcome the problem of intellectual property right infringements and it will boost the economy as more and more investors will be willing and enthusiastic to invest in a big market like Chinese economy.

4. 1. 5 *Protection of Investments under the Multilateral Investment Guarantee Agency Convention (MIGA)*

²⁴⁸ See Protecting your Intellectual Property Rights in China: China Current IPR Environment available at <http://www.mac.doc.gov/China/Docs/BusinessGuides/IntellectualPropertyRights.htm> (last visited on the 29th of March 2008)

²⁴⁹ *Id.* at footnote 214

²⁵⁰ *Id.* at page 178

Like Nigeria, China is a member country of MIGA having joined in 1991.²⁵¹ MIGA has been extensively discussed under Nigeria Multilateral protection agreements. MIGA is an arm of the World Bank with the sole purpose of guaranteeing foreign investment in any country that meets some eligibility criteria. MIGA activities in China are in two fold, MIGA's guaranteeing of investment helps attract foreign direct investment into China and at the same time provides guarantees for Chinese local investors who are desirous of investing in other countries of the world. According to the report of MIGA operations in China

“MIGA has been very active in supporting FDI into China. MIGA's current portfolio in China consists of eleven contracts totaling US\$180.2 million in guarantee coverage. The vast majority of projects supported is in the infrastructure sector (92 percent), with the remaining 8 percent in manufacturing. In FY07, MIGA supported two water supply projects (second Darco water project in Zhejiang province and Zhenjiang water project in Jiangsu province) and two solid waste treatment projects (Beijing Chaoyang waste to energy project and Beijing Fengtai waste treatment project) in China, totaling US\$41.78 million in coverage.

Cooperation with Ministry of Finance (MOF) and Ministry of Commerce (MOFCOM): Focus on Outward Investment. MIGA has increased its cooperation with both institutions, with a particular focus on helping Chinese companies looking to invest overseas, specifically in Africa and other parts of Asia.”²⁵²

²⁵¹ See The China Business Review MIGA in China available on <http://www.chinabusinessreview.com/public/0403/miga.html> (last visited on the 28th of March 2008)

²⁵² See MIGA operations in China available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/CHINAEXTN/0,,contentMDK:20585162~pagePK:1497618~piPK:217854~theSitePK:318950,00.html> (last visited on the 28th of March 2008)

MIGA's protection of non-commercial risk to investors can not be overemphasized. The China Business Review gave an account of an instance where the protection and guarantee of investment by MIGA resolved a situation that would have been very disastrous to an investor in China. According to the report, in 1999, provincial government officials in China unilaterally reduced the prices paid to certain foreign electric power producers. MIGA had issued guarantees to one of the affected investors, providing protection against the risks of transfer restriction, expropriation, and war and civil disturbance. When the investor alerted MIGA to its difficulties, the agency stepped in. Negotiations with the investor and government representatives eventually yielded an agreement to resolve the problem and avoid a claim by the investor. This dispute was just one of some two dozen that erupted in China's power sector following the 1999 price change.²⁵³

Just like the protection of investments by national laws, MIGA's protection of investments have helped in attracting foreign direct investment to MIGA member countries by assuring foreign investors that their investment is safe. MIGA's protection is an additional protection that complements the protection given by national laws. The maxim *abundans cautela non nocet* (abundant caution does not harm) is applicable here. The only difference is that much more weight is attached to an assurance given by an international organization consisting of over 174 member countries of MIGA to a foreign investor than an assurance given by a national law. Lastly since MIGA is an insurance group, its protection comes with additional cost to the foreign direct investment. FDI benefiting from the protection of MIGA pays premium for the insurance coverage and this makes the investment costly for the investors and the economy.

²⁵³ See The China Business Review , MIGA in China available at <http://www.chinabusinessreview.com/public/0403/miga.html> (last visited on the 28th of March 2008)

4. 1. 6 *Protection of Investment under China's Accession to World Trade Organization*

The reform and liberalization of China's economy started in 1978 several years before the accession to WTO in 2001. Before the accession to WTO, China has witnessed tremendous economic growth brought about the reforms and the influx of the foreign direct investments into China. The accession to WTO however stimulated regulatory, institutional and normative changes that have transformed the landscape of trade and investment in China. China started re-examining its laws and statutes after the accession in accordance with the framework of WTO by abolishing certain obsolete laws and regulations to conform to WTO fundamental rules.²⁵⁴

China also began to improve and develop its market in order to create suitable conditions for fair competition between domestic and foreign enterprise.²⁵⁵ China revised its Catalogue for the Guidance of Foreign Investment Industries and reduced the list of the restricted and prohibited items for investment to open up the market especially allowing wholly foreign-owned enterprises to operate in most sectors of the economy.

With the accession in 2001, trade and investment increased, other sectors of the economy like service providers, distribution rights, financial service sectors, insurance, research and development, equipment manufacturing, entertainment, electronic industry etc opened up more investment opportunities. According to the report of the US-China Business Council on Investment in China which assessed the foreign direct investments in China, three years after

²⁵⁴ See China Through A lens available at <http://www.china.org.cn/english/features/investment/36741.htm> (last visited on the 29th of March 2008)

²⁵⁵ *id.* available at <http://www.china.org.cn/english/features/investment/36732.htm> (last visited on the 29th of March 2008)

China joined the WTO, the exponential increase of FDI in China has risen to an unprecedented level. The report stated as follows:

“Foreign direct investment (FDI) poured into China at record levels in 2004, totaling more than \$153 billion in new agreements, up by one-third over 2003. Utilized FDI (the amount actually invested during the year) also surged to a record high of almost \$61 billion, rising 13.3 percent over 2003. Though not a record high, the number of contracts in 2004 reached 43,664, up about 6.3 percent

While the PRC government is still actively encouraging foreign investment, the continued inflow of foreign money and competition has led some PRC companies and government agencies to debate whether too much investment is coming in. Nonetheless, FDI will continue to flow strongly into China in 2005, not only into traditional manufacturing ventures but also increasingly into the equipment manufacturing, electronic machinery, high-tech, entertainment, retail, and financial service sectors”²⁵⁶

The accession also brought some challenges on the on the revisions of the laws, regulations and economic policies of the China to accord with the fundamental rules of WTO and to accommodate these new areas. Though not yielding the required result yet, China began to have a second thought on the magnitude of the problem of intellectual property rights violations in the country and the growing concerns of international community towards China because of it, as members of the WTO and Chinese trading partners began to mount pressure for the government to crack down on the violations of trademarks, patent copyrights protections. The State Council set up an intensive 12 month campaign sometime in 2004

²⁵⁶ Available at http://trade.businessroundtable.org/trade_2005/china/wto.html (last visited on the 29th of March 2008)

under the guidance of Vice Premier Wu Yi. The campaign was to coordinate the effort of other government agencies in fighting intellectual property rights abuses in the 15 provinces adjudged to be the locations of the worst abuses²⁵⁷.

There are some mile stones China is suppose to achieve in the liberalization, deregulation and opening of its market under its obligations and commitments to WTO entry agreement. These mile stones have time frame and is aimed at protecting investors and integrating the Chinese economy into the world economy. China is yet to fully comply with this road map in all the areas, like IPR issues etc, but how well the Chinese government has complied or will comply with the road map timely despite the astonishing progress made in the economy is beyond the scope of this research. But suffice it to say that China's accession to WTO has improved the influx of investment especially foreign direct and foreign portfolio investment in China. The accession is also an additional safeguard for the protection of investment in China as the Chinese government will be persuaded to fulfill its obligations and commitments to the fundamental rules and objectives of WTO which is removing trade barriers, reducing tariffs and facilitating free flow trade and services within member states.

CHAPTER 5

5. 0 Comparative Analysis of Chinese and Nigerian Investment Protection

5. 1 Comparison of Chinnese and Nigerian's Investments Regulations and Protection

²⁵⁷ US-China Business Council: China's WTO's Implementation; An Assessment of China's Third Year of WTO Membership. Written Testimony by the US-China Business Council, Prepared on September 7, 2004: Submitted in response to the Office of the USTR's Request for comments and notice of hearing concerning China's compliance with WTO commitments (Federal Register, Volume 69, Number 145, Pages 45369-45370, July 29, 2004) available at http://www.uschina.org/public/documents/2004/09/tpsc_testimony.pdf (last visited on 29th of March 2008)

This research has analyzed some of the investment laws in Nigerian and China and the protection the laws afforded investments in both countries bearing in mind that both countries share some common traits together. From the analysis, it is pertinent now to make a comparison of the major investment laws in both jurisdictions on critical issues that influence investment decisions. This will help this research to proffer suggestions for possible amendments to strengthen the laws.

Some of the major issues confronting any investor in the choice of where to cite an investment are whether the legal system of a country is stable and laws are certain and accessible in the areas of the proposed investment, whether the government will not nationalize or expropriate his investment one day and if it happens, what are his chances of being compensated for his investments, whether the process or procedure for the formation of the company for the investment and obtaining all relevant approvals and permits necessary to commence business is not too cumbersome and too long to embark upon, whether the returns on his investment can be repatriated home without much difficulty, whether the dispute mechanism put in place in such a country are adequate and efficient to deal with any dispute that may arise in the business transactions and whether the tax regime of the country gives good incentives for investment.

The above concerns of investors have been reasonably addressed by the investment laws of Nigeria and China but more work need to be done by the laws of both countries on the issues. On the stability of the legal system and certainty of the investment laws, both legal systems are fairly stable. With the return of democracy in Nigeria, the legal system has become stable, it is not expected that the military will seize power again from the civilian government, while in China the socialist system of government is bound to remain for a very long time to come.

The laws on investment are certain, certainty here means that laws exist in the particular areas, and are valid and subsisting until they are repealed or revised. Examples of such valid and subsisting investment laws in both systems are The Law of the People's Republic of China on Chinese-Foreign Joint Ventures 1979, the Law of the People's Republic of China on Sino-Foreign Cooperative Enterprises 1988, the Law of the People's Republic of China on Foreign Capital Enterprises 1986 etc and Nigerian Investment Promotion Commission Act 1995, the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act 1995, the Investments and Securities Act 1999 etc.

Despite the existence of these investment laws, the problem has been whether these laws and regulations made thereunder are easily accessible to the investors? In Nigeria, the Federal Ministry of Justice sometime ago started the compilation of all existing and subsisting laws in Nigeria in all areas of law, the effort culminated into the compilation and production of Laws of the Federation of Nigeria 1990, containing all the laws in Nigeria, it came out in several volumes and the laws were arranged alphabetically. Since after the compilation in 1990, new laws have been enacted which prompted the review of the compilation to include the new laws and consequently a new set of Laws of Federation of Nigeria 2004 was compiled which have up till date all the laws in Nigeria pre-2004. It is expected that the laws will be further reviewed to include post 2004 laws enacted in Nigeria after a while. So whilst Nigeria's investment laws along with other laws are compiled in a statute book and easily accessible,²⁵⁸ Chinese investment laws are scattered and fragmented in different pieces of legislation and this is difficult for an investor to get access to the laws and regulations that apply to business enterprises. The spreading of legal information in China is so unrefined and haphazard that it is a times hard to find the applicable law and even when the relevant rule can be found,

²⁵⁸See Laws of the Federation of Nigeria available at <http://www.nigeria-law.org/LFNMainPage.htm> (last visited 29th of march 2008)

provisions are too often so wide and imprecise that it is hard to be certain of correct interpretation²⁵⁹. Again the task of enforcing and implementing the wide and imprecise laws are left to government agencies that make their own rules and regulations (neibu) pursuant to these laws, these rules and regulations also apply to individuals and enterprises in establishing and managing their investments. In China many of the internal rules and regulations (neibu) are unpublished and not accessible to investors and the foreign investor may severally visit the agencies in search of the rules.²⁶⁰ The resultant effect of this is that it will negatively affect the investor as the investor may not know which acts are permitted and which are prohibited and this will make the agencies unnecessarily powerful and may likely breed corruption. Consequently it is therefore suggested that the laws, be compiled to make it accessible to everyone, and internal rules and regulations made pursuant to the laws must be published and if possible compiled alongside the laws. This will ease a whole lot of burden encountered by investors especially foreign investors in doing business in China.

On the issue of expropriation or nationalization of the foreign enterprises, the Nigerian Investment Promotion Commission Act 1995²⁶¹ and Law of the People's Republic of China on Chinese-Foreign Joint Ventures 1979²⁶² and The Law of the People's Republic of China on Foreign Capital Enterprises 1986²⁶³ all guaranteed that the government of both countries will not nationalize or expropriate any foreign enterprises unless "under special circumstances when public interest requires"²⁶⁴ or "in the national interest or for a public purpose"²⁶⁵ and it must be done according to law with adequate compensation paid. There are three

²⁵⁹ See Charles MaClain, China Foreign Trade and Foreign Investment Law available at <http://66.102.9.104/search?q=cache:hgT4c41BJyAJ:www.1990institute.org/publications/pub> (last visited 29th of March 2008)

²⁶⁰ id

²⁶¹ See section 25 (1) (a) and (b) of the NIPC Act 1995

²⁶² See Article 2 of the Chinese-Foreign Joint Venture law

²⁶³ See Article 5 of the Foreign Capital Enterprises Law 1986

²⁶⁴ See Article 5 of the Foreign Capital Enterprises Law 1986

²⁶⁵ See Section 25 (2) of NIPC Act

requirements for lawful expropriation of foreign property by host government in international law, the three requirements are that the expropriation should be for public purpose, it also should be non-discriminatory and adequate compensation should be paid.²⁶⁶ Granted that the laws in both countries may have met the three requirement of expropriation in international law, nevertheless, it is better to state in concrete terms what “under special circumstances when public interest requires” and “in the national interest or for a public purpose” means that may warrant the government to expropriate or nationalize the enterprises. This way, certainty will be introduced in this aspect of law that is wide and vague. Again, leaving it imprecise like this may be dangerous as unscrupulous government may hide under these terms to expropriate or nationalize any enterprise for selfish and capricious purposes.

The Nigerian laws have mitigated the cumbersome procedure and undue delay, getting approval and permits can cause a foreign investor by establishing a One-Stop Shop Investment Centre in the National Investment Promotion Commission office which now facilitates in getting all the approval or permits needed to commence business in few days. Even before the establishment of One-Stop Shop Investment Centre, the Nigerian Investment Promotion Commission Act 2004 gave the approving authorities 14 working days from the receipt of all relevant documentations to either accept or reject an enterprise.²⁶⁷ China does not have this One-Stop Shop Investment Centre, but Chinese legislations anticipated such undue long time spent in the process of getting all the approvals needed to commence a business and have made a provision against the undue delays. The Chinese investment laws give a time limit to the examination and approving authorities to approve or reject applications for setting up enterprises in China. The Law of the People’s Republic of China on Foreign Capital Enterprises 1986 gives 90 days to the examination and approving authorities to either accept

²⁶⁶ See Zoltan Vig, *Legal Protection of Foreign Investment with Special Emphasis on Serbia and Montenegro and the United States of America Takings*, An SJD thesis Submitted to CEU 2005

²⁶⁷ See section 20 (2) of the NIPC Act

or reject the enterprise from the date of the receipt of the application²⁶⁸ while The Law of the People's Republic of China on Chinese-Foreign Joint Ventures 1979 provides for 3 months²⁶⁹. The provisions giving 90 days or 3 months are rather too long considering that business decisions need to be taken timely to forestall possible risks and market fluctuations, 2 weeks – 1 month for the authorities to take decision whether to accept or reject an application accords with the exigency of doing business. The provision in Nigeria of the One – Stop Shop Investment Centre is preferable here. Better result will be achieved if the authorities act fast and efficiently in responding to the applications of investors.

The easy repatriation of the profits and other lawful incomes made from an enterprise, back to the investor's home country are guaranteed by Nigerian Investment and Promotion Commission Act 1995²⁷⁰, the Law of the People's Republic of China on Chinese-Foreign Joint Ventures 1979²⁷¹, the Law of the People's Republic of China on Sino-Foreign Cooperative Enterprises 1988, the Law of the People's Republic of China on Foreign Capital Enterprises 1986²⁷² etc.

The dispute resolution mechanism is almost akin to each other. In Nigeria dispute between a foreign investor and Nigerian government can be settled by either an arbitration panel, or in default of any arbitration provision, by the International Centre for the Settlement of Investment Disputes (ICSID)²⁷³ while investment disputes which border on the Investments and Securities Act are taken to a special Tribunal called the Investments and Securities

²⁶⁸ See Article 6 of the Foreign Capital Enterprises Law 1986

²⁶⁹ See Article 3 of the Chinese-Foreign Joint venture Law 1979

²⁷⁰ See section 25 (2) (a) and (b) of NIPC Act 1995

²⁷¹ See Articles 11 and 12 of the Chinese-Foreign Joint Venture law

²⁷² See Article 19 of the Foreign Capital Enterprises Law 1986

²⁷³ See section 26 of NIPC Act 1999

Tribunal created for such disputes.²⁷⁴ China's investment disputes are resolved by arbitration in China by the China International Economic and Trade Arbitration Commission (CIETAC), an international arbitration institute which is authorized to handle all international disputes. In 1994 CIETAC received 829 cases for arbitration.²⁷⁵ Apart from CIETAC, disputes can also be resolved by the arbitration institution agreed by the parties in the contract but where the parties did not agree on any arbitration institution before the dispute arose and can not still agree on any arbitration institution in writing after the dispute has arisen, the parties will litigate their dispute in the Chinese People's Court.²⁷⁶ It is recommended that China should create courts that will handle investment dispute like they have done in establishing intellectual property courts in Beijing, Shanghai and Tianjin within the Intermediate People's Court.²⁷⁷ This will make any investment dispute that gets to the China's People's Court to be determined efficiently and speedily by well trained judges. The normal court procedures or processes of both countries are known to be slow, rigid and at times not very independent and impartial especially where the cases are against the government. This probably accounts for the reason why many foreign investors choose to arbitrate their matters at international arbitration institutions.

Lastly the tax incentive a country gives to an investment goes a long to influence the investor in his investments decisions. Cognizance of this fact, both countries have developed tax regimes that are investor friendly especially if the investment is in sectors of the economy the

²⁷⁴ See Section 234 of ISA 1999

²⁷⁵ See Charles MaClain, China Foreign Trade and Foreign Investment Law available at <http://66.102.9.104/search?q=cache:hgT4c41BJyAJ:www.1990institute.org/publications/pub...> (last visited on the 29th of March 2008)

²⁷⁶ See Article 15 of the Chinese-Foreign Joint Venture law 1979, Article 25 of the Sino-Foreign Law 1988.

²⁷⁷ See Intellectual Property in the China- Wikipedia, the free encyclopedia available at http://en.wikipedia.org/wiki/intellectual_property_in_the_People's_Republic_of_China (last visited on the 29th of March 2008)

government encourages²⁷⁸ or some regions or parts of the country that government accords priority.²⁷⁹ The tax laws of both countries provide tax incentives in form of tax holidays, rebates, concessions and reductions in investments that are accorded priority by the government and investments located in rural underdeveloped parts of the country.²⁸⁰

5.2 CONCLUSION

Investment has been shown to be the key factor that ignites growth in the economy of any nation. Even the industrialized and developed countries of the world still depend on investment especially foreign direct investment for further growth and expansion of the economy. China is a good example of a country whose economy witnessed dramatic development within a short space of time due to the investment, especially foreign direct investment it attracted after the reform of its economy. Beyond other factors that will influence the decision to invest in a country, an investor will weigh the investment laws in existence in a country in order to decide whether there are adequate legislations to protect his investments. Investments, especially long term investment require certainty of the protection provided by law. No investor will ever invest in a country where apart from the normal commercial risk, there is risk of possible expropriation of the business by the government, risk of in event of any dispute there is no efficient mechanism to get justice especially when the disputes involves the government etc. Against this background, this research has considered, major investment legislations in Nigeria and China. The research has found out that both countries have fairly protected investments in their several investment laws and this accounted for influx of foreign direct investments in both countries. However there are still

²⁷⁸ See the Catalogue for the Guidance of Foreign Investment Industries for the list of investment that are encouraged in China and the tax rebates, reductions and tax holidays attached to the encouraged list.

²⁷⁹ In China government accords priority to investments in central and western part of China and the rural areas of Nigeria that is not yet developed

²⁸⁰ See Article 7, 8, and 19 of the Chinese Income Tax 1991 and see section 10 of the Industrial Development (Income Tax Relief) Act of 1971 and Companies Income Tax Act (CITA) Cap 60 Laws of Federation 1990

some areas that the protection is inadequate and also areas that the enforcement of the protection is weak. Consequently recommendations have been proffered on how to strengthen the provisions of the law to adequately protect investments, and how to step up enforcement of the protection already provided in the investment laws by the institutions/agencies statutorily empowered to carry out the enforcement.

In all, the research found out that having a good legal system which comprise of sound legislations, effective institutions and agencies for enforcing the laws, and efficient, impartial and independent adjudicatory system, and favorable tax regimes are the major incentives to attracting investment especially foreign direct investment which in turn accelerates growth and development of the economy of any nation.

BIBLIOGRAPHY

CASES CITED

Anderson vs. Federal Ministry of Internal Affairs & Attorney General of the Federation (1984) FHCRC 29

Professor A. B. Kansumu SAN vs. Securities and Exchange Commission (unreported) Suit No. FHC/L/CS/70/2001

Chief Livinus Ezemegbe vs. Nigerian Stock Exchange & Securities and Exchange Commission (unreported) Suit No. IST/OA/06/2006

Mr. Ogunlesi Johnbosco vs. Nigerian Stock Exchange & Securities and Exchange Commission (unreported) Suit No. IST/OA/08/2007

Securities and Exchange Commission vs. NAL Merchant Bank Plc (2004) APC 2000-2002 Vol. 4, p. 1

Alhaji Ali Tahir vs. Dominion Trust Ltd. (2004) APC 2000-2002 Vol.4, p. 4

Securities and Exchange Commission vs. Triumph Merchant Bank Plc (2004) APC 2000-2002 Vol. 4, p. 9

Securities and Exchange Commission vs. Perfecta Investments trust Ltd. (2004) APC 2000-2002 Vol. 4, p. 90

Ejere K. C. Ejere vs. Prudential Securities Ltd (2004) APC 2000-2002 Vol.4, p. 35

Owena Bank Nigerian Plc. vs. Nigerian Stock Exchange & ors (1997) 8 NWLR (pt515)

IEC Utomi vs. National Securities Ltd (unreported) AHC/12/95

Securities and Exchange Commission vs. CMB Securities (unreported) AHC/14/95

Magi Johnson & 71 ors. vs. Attorney General of the Federation & 3 ors. (unreported) Suit No. FHC/KD/CS/66/2001

Securities and Exchange Commission vs. Golden Guinea Breweries Plc & ors. (unreported) Suit No. FHC/ABJ/CS/110/2002

Flocco Verwaltung-und vs. Golden Guinea Breweries Plc & ors (unreported) IST/OA/ /2006

Union Bank Plc (Registrars Department) vs. Securities and Exchange Commission (2004) 1 NISLR 113

Central Securities Clearing System Ltd. vs. Securities and Exchange Commission (2004) 1 NISLR 165

FIS Securities Ltd vs. Securities and Exchange Commission (2004) 1 NISLR 39

Lighthouse Assets Management Ltd. vs. Securities and Exchange Commission (2007) 2 NISLR 95

Blue-Chip Acquisition Co. Ltd. vs. Zenith Bank Plc & 3 ors. (2007)2 NISLR 61

STATUTES

Constitution of the Federal Republic of Nigeria 1999

Constitution of the People's Republic of Nigeria 1982

The Investments and Securities Act 1999

The Nigerian Investment Promotion Commission Act 1995 now Cap N117 Laws of the Federation of Nigeria 2004

Foreign Exchange (Monitoring and Miscellaneous Provision) Act 1995

The Public Enterprises (Privatization and Commercialization) Act 1999

The Industrial Development (Income Tax Relief) Act 1971

Companies Income Tax Act Cap 60 Laws of the Federation of Nigeria 1990

Companies and Allied Matters Act 1990

The Law of the People's Republic of China on Chinese-Foreign Joint Ventures 1979

The Law of the People's Republic of China on Sino-Foreign Cooperative Enterprises 1988 or the Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures 1988

The Law of the People's Republic of China on Foreign Capital Enterprises 1986 or Law of the People's Republic of China on Wholly Foreign-Owned Enterprises 1986

The Company Law of the People's Republic of China 1993

The Income tax law of the People's Republic of China for Enterprises with Foreign Investment and Foreign Enterprises 1991

Foreign Economic Contract Law of 1985

Provisions on Guiding Direction of Foreign Investment 2002

Catalogue for the Guidance of Foreign Investment Industries 2005

Trademark Law of the People's Republic of China 1982

Patent Law of the People's Republic of China 1984

Copyrights Law of the People's Republic of China 1990

Interim Provisions Concerning the Investment within China of Foreign-Invested Enterprises

CONVENTIONS AND TREATIES

Multilateral Investment Guarantee Agency Convention 1997

World Trade Organization Treaty

Paris Convention for the Protection of Industrial Property 1985

Madrid Agreement for International Registration of Trademarks 1989

Universal Copyright Convention 1992

Berne Convention for the Protection of Literary and Artistic Works 1992

Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms (Geneva Convention) 1993

Patent Cooperation Treaty 1994

WIPO Convention

BOOKS

Carl, Riskin, China's Political Economy, The Quest for Development Since 1949 (Oxford University Press New York, 1991)

Wang, Mengkui, (ed.) China: Accession to the WTO and Economic Reform (Foreign Languages Press Beijing, 2002)

Chi, Fulin, Pressing Tasks of China's Economic Transition (Foreign Languages Press Beijing, 1996)

Yum Kwan, Eden S. H. Yu, (ed) Critical Issues in China's Growth and Development (Ashgate Publishing Limited, 2005)

Gale, Johnson, The People's Republic of China 1978-1990 (ICS PRESS California, 1990)

Ross Garnaut, Yiping Huang, Growth Without Miracles, Readings on the Chinese Economy in the Era of Reform (Oxford University Press, 2001)

Nicholas R. lardy, China's Unfinished Economic Revolution (Brookings Institution Press Washington D.C., 1998)

Ibrahim F.I. Shihata, MIGA and Foreign Investment: Origins, Operations and Basic Documents of the Multilateral Investment Guarantee Agency (Martinus Nijhoff Publishers, 1988)

Nicholas R. Lardy, *Foreign Trade and Economic Reform in China 1978-1990* (Cambridge University Press, 1993)

Feng, Peter, *Intellectual Property in China, 2nd Edition* (Sweet and Maxwell Asia, 2003)

Xue Hong, Zheng Chengsi, *Chinese Intellectual Property Law: In the 21st Century* (Sweet and Maxwell Asia, 2002)

Alford, William P, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (Stanford University Press, 1995)

Anthony Idigbe, *Legal Issues in Capital Market Operations in Nigeria* (Distinct Universal Limited, Lagos Nigeria, 2006)

Freshfields, Bruckhaus, Deringer, *on Financial Services, Investigations and Enforcement* (Butterworths, 2001)

Akintola Jimoh, & Co, *Nigerian Investment Laws & Business Regulations, Vol. 1* (Learned Publishments Limited, 2002)

Emeka IHEME, *The Incubus: The Story of Public Enterprise in Nigeria* (The Helmsman Associates, Lagos, 1997)

Akintola Jimoh, & Co, *Nigerian Investment Laws & Business Regulations, Vol. 2* (Learned Publishments Limited, 2003)

Andrew Mertha, *The Politics of Piracy: Intellectual Property in Contemporary China* (Cornell University Press, September 2005).

Angus Maddison, *Chinese Economic Performance in the Long Run* (Development Centre of the OECD, 1998)

Igwe J. U. K., *Investments, Nigerian Capital Market and Corporate Governance: Laws, Practices and Ethics* (Law Development Research Publications and Consulting Limited, 2005)

Margaret M. Pearson, *Joint Ventures in the Peoples Republic of China: The Control of Foreign Direct Investment under Socialism* (Princeton N.J. University Press, 1992)

Huang Yasheng, *Selling China: Foreign Direct Investment during the Reform Era* (Cambridge University Press, 2003)

H. S Kehal Houndsmill, Basingstoke, Hamshire, *Foreign Investment in Rapidly Growing Countries: The Chinese and Indian Experience* (Palgrave Macmillian, 2005)

James L. Kenworthy, *A Guide to the Laws, Regulations and Policies of the Peoples Republic of China on Foreign Trade and Investment* (Buffalo N. Y. 1989)

Hongying Wang, *Weak State, Strong Networks: The Institutional Dynamics of Foreign Direct Investment in China* (Oxford University Press, Oxford New York, 2001)

Jang-Dang Park et al, *The Special Economic Zones of China and their Impact on its Economic Development* (Praeger, 1997)

JOURNALS

Kargbo, S, "The Control of the Petroleum Industry in Nigeria" *MPJFIL* Vol.3 No. 1 pp 145-177

Abugu, J, "Promoting Investments in Nigeria" *Business & Property Law Journal* 1999 Vol.4 No.9 pp71-76

Prof. Ola, C, "Investor Protection in Nigeria" *Business & Property Law Journal* 1996 Vol.2 No. 8 pp. 85-88.

Chenxia Shi, "Protecting Investors in China through Multiple Regulatory Mechanisms and Effective Enforcement" *Arizona Journal of International and Comparative Law* Vol. 23, NO. 3. (USA) 1-47 2007

Chenxia Shi, "Securities Regulation and Competition in China", the Trade Practices Law Journal, 14:2, 120-128, 2006.

Aigbekaen E. K, "Laws and Ethics in the Primary Segment of the Capital Market" 2007 Vol.1 No.1, Law & Investment Journal pp.157-168

Chaoyang Wang, Dixon Zhang, "Protection of Copyright on the Internet in China: Administrative or Judicial?" The asialaw IP Review July 2005 Vol. 2, Issue 3, pages 1-5

Samson G. Yu, Grace W. Li, "Trademark Enforcement in China" The asialaw IP Review April 2006 Vol. 3, Issue 2, pages 14-16

PAPERS, REPORTS AND PUBLICATIONS

Moses Akpobasah, "Development Strategy for Nigeria," A paper delivered at a 2-day Nigeria meeting organized by the overseas Development Institute London, 16-17 June 2004.

Jerome A. Cohen, Paul, Weiss, Rifkind, Wharton & Garrison, "Twenty Years of Legal Progress in China" China 2000 Emerging Investment, Funding and Advisory Opportunities for a New China, (Asia Law & Practice, 1999) pp.47-54

Liu Yi Zheng, Liu, Yuan & Zhou Law Office and Jonathan Z. Zhou, Fangda Partners, "Realizing and Exiting PRC Investments" China 2000 Emerging Investment, Funding and Advisory Opportunities for a New China, (Asia Law & Practice, 1999) pp. 139-148

Anthony Neoh SC, JP "An Overview of the Chinese Domestic Capital Markets at the Dawn of a New Millennium" China 2000 Emerging Investment, Funding and Advisory Opportunities for a New China, (Asia Law & Practice, 1999) pp. 33-45

China's Business Summit 2000 Report, "China's Emerging Global Role: Impact, Opportunities and Challenges" Beijing China April 16-18 2000

OECD Economic Surveys China, Volume 2005/13 – September 2005 (A Publication of OECD)

Legal Framework for the Treatment of Foreign Investment, Progress Report and Background Studies Vol.1 Survey of the Existing Instruments (IBRD/The World Bank, 1992)

Yanrui Wu, (ed.) Foreign Direct Investment and Economic Growth in China