AN APPRAISAL OF THE ROLE OF LAW IN CURBING THE IMPEDIMENTS TO FOREIGN INVESTMENTS IN NIGERIA

SUSWAM, GABRIEL TORWUA

JANUARY, 2011

TITLE PAGE

AN APPRAISAL OF THE ROLE OF LAW IN CURBING THE IMPEDIMENTS TO FOREIGN INVESTMENTS IN NIGERIA

SUSWAM, GABRIEL TORWUA
LL.B (UNILAG); LL.M (JOS) B.L.,
PG/LAW/UJ/0210/07

A Thesis in the FACULTY OF LAW
Submitted to the School of Postgraduate Studies
University of Jos, in partial fulfilment of the requirements
for the Award of the Degree of DOCTOR OF
PHILOSOPHY (Ph.D) in Law of the
UNIVERSITY OF JOS

JANUARY, 2011

DECLARATION

I, TORWUA GABRIEL SUSWAM, hereby declare that apart from references made to other people's works, which have been duly acknowledged, this work is the result of my own research and has neither in whole nor in part been presented for the award of another degree elsewhere.

…………………………………………

SUSWAM, GABRIEL TORWUA

PG/LAW/UJ/0210/07

CERTIFICATION

This Thesis has been read and approved as meeting the requirements of the Faculty of Law, University of Jos, Jos, for recommendation for the award of the Degree of Doctor of Philosophy (Ph.D) in Law.

……………………………………..
PROFESSOR BEM ANGWE
(Supervisor/Head of Department)

DEDICATION

This Thesis is dedicated to my late mother, Ashiewua Suswam who had always wished and prayed that I attain the peak in my quest for knowledge.

ACKNOWLEDGEMENTS

I wish to express my warmest appreciation to all those who helped and supported me in carrying out this research up to this level.

In particular, I would like to profoundly appreciate my supervisor, Professor Bem Angwe who not only inspired me into starting this programme but also directed my work with a gentle but firm hand and granted me the benefit of his unsurpassed knowledge of international investment law. Despite his tight schedules, he followed and offered useful suggestions to this work with careful attention.

I would also like to express my thanks to my lecturers and staff of the Faculty of Law, University of Jos, particularly, the Dean of the Faculty, Professor Joash O. Amupitan, who greatly influenced, through his useful suggestions, the outcome of this research, Professor J.M. Nasir, Professor F.C. Nwoke, Professor C.J. Dakas, Professor S.S. Shikyil, P.N. Oche, Dr. A.O. Alubo, Dr. Dominic Asada, Dr. Mrs. Emily Alemika together with the other members of the Faculty Postgraduate Committee, made many useful suggestions which improved the quality of this work.

I am indeed indebted to my brothers, Cephas Suswam, Dr. Terkula Suswam and my sister, Mwuese Suswam for their unswerving support

and encouragement. I use this opportunity to pay this debt by expressing my deep appreciation to them.

My special thanks goes to the Deputy Governor of Benue State, His Excellency, Mr. Steven Lawani, who made my research easier in every way by taking up some of my responsibilities while this research work was going on.

I won't neglect to appreciate and express my thanks to my colleagues, aids, friends and teaming well wishers, who helped with the research by passing unto me pieces of information, making suggestions or simply voicing their support, but who are too numerous to cite here individually.

My deepest thanks of course goes to my best friends, that is, my immediate family, my wife Architect Dooshima Suswam and my sons – Shima and Terna Suswam, without whose support and prayers this research would never have seen the light of day. Above all, I give GOD, the Almighty, the Glory.

TORWUA GABRIEL SUSWAM

TABLE OF CONTENTS

TITLE PAGE	i
DECLARATION	ii
CERTIFICATION	iii
DEDICATION	iv
ACKNOWLEDGEMENTS	v
TABLE OF CONTENTS	vii
LIST OF STATUTES	xi
TABLE OF CASES	xii
LIST OF ABBREVIATIONS	xiv
ABSTRACT	xvi

CHAPTER ONE:
INTRODUCTION

1.1 BACKGROUND TO THE STUDY	1
1.2 STATEMENT OF THE PROBLEM	9
1.3 AIMS AND OBJECTIVES OF STUDY	12
1.4 RESEARCH METHODOLOGY	13
1.5 LITERATURE REVIEW	13

CHAPTER TWO:
CONCEPTUAL FRAMEWORK AND HISTORICAL DEVELOPMENT OF FOREIGN INVESTIMETS IN NIGERIA

2.1 THE CLARIFICATION OF THE CONCEPT OF FOREIGN INVESTMENT	28
2.2 TYPES OF FOREIGN INVESTMENTS	38
2.2.1 Direct Foreign Investment	39
2.2.2 Portfolio or Indirect Investment	43

2.3 NATURE AND GENERAL CHARACTERISTICS OF FOREIGN INVESTORS 44

2.4 GOVERNMENTAL CONTROL OF THE OPERATIONS OF TRANSNATIONAL/ MULTINATIONAL CORPORATIONS 48

2.5 THE DEVELOPMENT OF THE REGULATORY FRAMEWORK FOR FOREIGN INVESTMENTS IN NIGERIA 50

2.5.1 The Pre/Post-Independence Period 50

2.5.2 The Indigenisation Era 53

2.5.3 The Era of Structural Adjustment 58

2.5.3.1 Tax Relief 58

2.5.3.2 Tariff Relief 58

2.5.3.3 Export Promotion Incentives 59

2.5.3.4 Foreign Currency Incentives 59

2.5.3.5 The Industrial Development and Coordination Committee 61

2.6 THE NIGERIAN INVESTMENT PROMOTION COMMISSION 62

CHAPTER THREE:
IMPEDIMENTS TO FORIGN INVESTMENTS IN NIGERIA

3.1 POLITICAL INSTABILITY 64

3.2 EXPROPRIATION 74

3.2.1 Direct Expropriation 78

3.2.2 Indirect or Regulatory Expropriation 87

3.3 LACK OF BASIC INFRASTRUCTURE 94

3.4 NATIONAL INSECURITY AND UNFAVOURABLE BUSINESS CLIMATE 97

3.5 CORRUPTION AND LACK OF TRANSPARENCY IN GOVERNANCE 101

CHAPTER FOUR: INTERNATIONAL LEGAL FRAMEWORK FOR THE PROMOTION AND PROTECTION OF FOREIGN INVESTMENTS

4.1 NATURE OF CROSS-BORDER INVESTMENT REGULATIONS 104

4.2 INTERNATIONAL INVESTMENT CONTRACTS 115

4.3 CLASSIFICATION OF FOREIGN INVESTMENT CONTRACTS 118

4.3.1 Concession Agreement 119

4.3.2 Production Sharing Agreement 120

4.3.3 The Joint Venture Agreement 122

4.3.4 Turnkey Contracts 124

4.3.5 Build, Operate and Transfer Agreement 125

4.4 BILATERAL INVESTMENT TREATIES 127

4.4.1 Theoretical Underpinnings of Bilateral Investment Treaties 129

4.4.2 Major Components of BITs 132

4.4.3 Protection of Investments Against Expropriation 133

4.4.4 Requirements for Fair and Equitable Treatment and Full Protection and Security 141

4.4.5 Umbrella Clauses 148

4.5 MULTILATERAL INVESTMENT TREATIES 151

4.6 POLITICAL AND LEGAL RISK INSURANCE 155

4.6.1 Multilateral Investment Guarantee Agency (MIGA) 156

4.6.2 Overseas Private Investment Corporations (OPIC) 157

4.6.3 National Investment Registrations 158

CHAPTER FIVE:
NIGERIAN LEGISLATION AS A FRAMEWORK FOR FACILITATING FOREIGN INVESTMENTS IN NIGERIA

5.1 THE STATUTORY FRAMEWORK FOR FACILITATING FOREIGN INVESTMENT 160

5.1.1 The Nigerian Investment Promotion Commission (NIPC) Act 1995 163

5.1.2 The Foreign Exchange Monitoring and Miscellaneous Provisions Act, 1995 169

5.1.3 The Nigerian Export Processing Zones Act, 1992 172

5.1.4 The Minerals and Mining Act, 1999 175

5.2 TAX RELIEF AND TAXATION INCENTIVES 177

5.3 SETTLEMENT OF INVESTMENT DISPUTES 180

CHAPTER SIX:
CONCLUSION

6.1 SUMMARY 184

6.2 FINDINGS 188

6.3 RECOMMENDATIONS 191

6.4 CONTRIBUTION TO KNOWLEDGE 196

6.5 SUGGESTIONS FOR FURTHER RESEARCH 197

WORKS CITED 199

APPENDIX I 207

APPENDIX II 224

APPENDIX III 273

LIST OF STATUTES

ACP – EEC (Lome) Convention, 1984

ACP- EEC (Lome) Convention, 1989

Albanian Foreign Investment Act 1993

Board of Investment, Philippines “Primer on Build-Operate-Transfer (BOT) and Building Transfer Schemes, Act, 1990

China – Germany BIT, 2003

Copyright Act, 1970

Germany –Pakistan BIT, 1959

Immigration Act, 1963

Industrial Development (Income Tax Relief) Act, 1958

Industrial Development (Income Tax Relief) Act, 1971

MIGA Convention, 1988

Nigerian Banking Act, 1969

Nigerian Companies Act, 1968

Nigerian Enterprises Promotion Decree, 1989

Patents and Designs Act, 1970

Petroleum Authority of Thailand Act, 1978

Restatement of Foreign Relations Law of the United States, 1987

Trademarks Act, 1965

U.S – Argentina BIT, 1994

TABLES OF CASES

Case	Page
American International Group V. The Islamic Rep. of Iran (1983) 4 Iran – U.S C.T.R. 96	78
Asian Agricultural Product Ltd. V. Sri Lanka AAPL: Case No. ARB/98/4. Award of Dec. 8, 2000.	133
Biloune V. Ghana Investment Centre (1990) 95 I.L.R. 184	85
British Petroleum Exploration Co. (Libya) LTD. V. Government of the Islamic Republic of Libya.	75
CME V. Czech Republic UNCITRAL partial Award of September, 3, 2001	75,125
Delocoa Bay and East African Railroad Co. (U.S & Great Britain) V. Portugal (1943) 3 Damages Int. L 1694	77
Euroko V. Poland UNCITRAL, Partial Award of August 19, 2005.	135
Factory at Charzow's case (1925), P.C.I.J (Ser. A) N0. 13. L. Trib Rep. 219	75
Huidian V. Philippine National Bank, (1990) 9th Cir. 912 F.2d 1085	73
Libyan America Oil Co. V. Libyan Arab Republic (1973) 53 I.L.R 297	124
Mavrommatis Jerusalem Concession Case (1925) P.C.I..J. (Ser. A) N0. 5	75
Mchard, Roberts, Wallace and Todd V. Islamic Republic of Iran (1986) 13 Iran – U.S CL. Trib. Rep. 286	124
Middle East Cement V. Arab Republic of Egypt ICSID Case N0. ARB 99/6 delivered on April 12, 2002.	86
Norwegian Shipowners Claim (1933) I.R. Int'l Arb. Awards 307	78

Oscar Chimn Case (1934) P.C.I.J. (Ser. A/B) N0. 63	124
Saluka v. Czech Republic, UNCITRAL, partial Award of March, 17, 2006	131
S. D. MYERS V GOVT OF CANADA, 40 ILM 1408 (2001)	123
Starret Housing Corporation V. Govt. of Islamic Republic of Iran (1983) 4 Iran - USCL Trib. Rep. 122	83
Tecmed V. United Mexican States (2004) I.L.M. 133	84, 126
Texaco Overseas Petroleum Co./California Asiatic Oil Co. V. Government of the Libyan Arab Republic (1978) 17 I. L. M. P. 1	75
Tippetts, Abett Mccarthy, Stratton V. Tamsaffa Consulting Engineers of Iran, the Govt. of the Islamic Republic of Iran & Ors. (1984) 6 Iran – US	83, 128
Union Csarbide Corp Gas Plant Disaster at Bhopal, India (1987) 809 f. 2d 195 (2nd Cir) 484 U.S 871	103
WENA V. EGYPT (2002) 41 I.L.M. 896	133
West V. Multibanco Comermex, S. A. (1987) 9th Cir. 807 F.2d 820	77

LIST OF ABBREVIATIONS

AAPL	-	Asian Agricultural Products Ltd
ACP	-	African, Caribbean Pacific Group of State
ASEAN	-	Association of South East Asian Nations
BIT	-	Bilateral Investment Treaty
EDF	-	European Development Fund
EHC	-	Egyptian Hotels Company
ECOWAS	-	Economic Community of West African States
FEMMP	-	Foreign Exchange Monitoring and Miscellaneous Provisions
FDI	-	Foreign Direct Investment
FTA	-	Free Trade Agreement
ICLQ	-	International Corporation Law Quarterly
ICSID	-	International Centre for the Settlement of Investment Disputes
IDCC	-	Industrial Development and Co-ordination Committee
LDC	-	Less Developed Countries
LFN	-	Laws of the Federation of Nigeria
MIGA	-	Multilateral Investment Guarantee Agency
NAFTA	-	North American Free Trade Agreement

NALT	-	Nigerian Association of Law Teachers
NEPZ	-	Nigerian Export Processing Zone
N.I.A.L.S	-	Nigerian Institute of Advanced Legal Studies
NIPC	-	Nigerian Investment Promotion Commission
OCT	-	Overseas Countries and Territories
OPIC	-	Overseas Private Investment Corporation
SAP	-	Structural Adjustment Programme
TNC	-	Transnational Corporations
UNCTAD	-	United Nations Conference on Trade and Development
UNTC	-	United Nations Trade Commission

ABSTRACT

The country's prolonged inability to attract foreign investments has been an issue of major concern to successive administrations in Nigeria. The desire and urgent demand for a substantial inflow of foreign investment into Nigeria as triggers for national economic development nurtured the undertaking of this research. The research was aimed at identifying the factors that have impeded the influx of foreign investments into Nigeria in spite of the efforts made to attract foreign investors to move their capital into Nigeria and to thereby analyse the role of law in removing the impediments. In carrying out the research, a doctrinal research approach was adopted whereby both the primary and the secondary sources were carefully examined and analysed. The research found that factors such as lack of basic infrastructures like electricity, transport system, power, water and communication system, social and political instability, unfavourable investment legislation, lack of government commitment to international obligations, expropriation, corruption and lack of political will were responsible for the low inflow of foreign investments into Nigeria. The research also found that an appropriate legal framework, both at the national and international levels, if appropriately applied, can promote and protect foreign investments in Nigeria. The research in conclusion recommends for the establishment of the appropriate legal instruments to curb the impediments militating against the promotion of foreign investments in Nigeria. The major contribution of this work to knowledge is its revelation that law can be used as an effective instrument for promoting the influx of foreign investments into Nigeria.

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND TO THE STUDY

Nigeria, at more than 50 years after independence, is still looking for the right key to open the gate for the influx of foreign investment. Amazingly, substantial portion of President Olusegun Obasanjo's days in office[1] were committed to the search for foreign investment partners for the nation. Incidentally, the quest for foreign investment is not restricted to Nigeria alone. Quite a good number of developing countries and even developed countries depend on foreign investments for the development of their economies.

Obviously, the economies of most developing countries, particularly the African states, are highly characterized by low income earnings, high level of unemployment, high inflation rates, high level of dependency on imported food and other products, very slow rate of growth and development, high mortality rate and poor standards of living.

Given the foregoing situation, foreign investment becomes the only instrument to be used in achieving sustainable level of economic growth and development amongst the developing nations.

[1] *From 1999 to 2007*

At independence, Nigeria, though one of the richest countries in terms of natural resources, ranked among the most underdeveloped countries of the world, largely being due to the selfish interests and policies of the colonizing powers who made sure that, the country's natural resources were never exploited. About this period, majority of Nigerians were peasant farmers, with the manufacturing sector almost completely ignored. It is pertinent to note here that the few industries that existed then were utilized mainly for the extraction of minerals for export to service the raw material needs of the imperial industries.

Consequently, the only form of existing international trade and investment was restricted to the exportation of raw materials and agricultural produce and the importation of consumer items. Analyzing the situation, Oluwole Akanle concluded that "The new sovereign government was faced with a new struggle, i.e. that of economic emancipation through accelerated promotion of trade and investment"[2].

The economic crisis and instability that has bedevilled the Nigerian nation since independence have led its several administrations into seeking cooperation with other nations. Instructively, the on going search for international economic cooperation is not peculiar to Nigeria. Today,

---

[2] Akande, O., "Regulation of Trade and Investment in Nigeria" in Ajomo, M.A. *et al.* (eds.). Regulation of Trade and Investment in Era of Structural Adjustment: The African Experience, NIALS, 1995.

almost every nation including the biggest and most developed, lacks the all embracing natural resources, economic power, time, technical know how to take solo actions. Suggestively, one major method of ensuring economic cooperation is through direct foreign investment. Unfortunately, foreign investment is one direction where it is apparent that developing countries are still facing the worst challenges.

Foreign investment which was expected to be a spring board for Nigeria's economic development has continued to be elusive. Many factors are held to be responsible for this low inflow of foreign investment into Nigeria. It may appear that lack of an effective and adequate legal regime is responsible for this situation on one hand, while on the other hand, it does seem that nationalization and expropriation of foreign interests is a factor discouraging foreign investors from investing in Nigeria. Lack of adequate infrastructures and political/social instability has also to a great extent being held to be responsible for Nigeria's inability to attract foreign investment.

Nigeria at post independence realised immediately that political independence or sovereignty was not on the same side of the coin with economic independence. In the same vein, the country also realised that in view of the economic setups between the developed and the developing

states, arrangements concluded to facilitate the influx of foreign investments tended to favour the developed nations. However, since the developing countries lack the requisite tools of industrialization, such as, capitals, technical know-how, technology etc, they have no other choice than to continue with such arrangements.

Capital investment operators on the other hand, waking up from their past experiences, demand that certain safeguards be introduced under international law to protect their investments from arbitral expropriation by the host countries.

In Nigeria, as in any other developing country, the importation of capital and technology for industrial and economic development is vested in the hands of multinational corporations. It must be noted here that these transnational corporations[3] are not charitable organisations but rather oligopolistic investors and producers of products derivable from capital intensive technologies. In the views of Asante, they possess a strategy of cordial financial operation, which enables them pave their operations through different countries with minimal risk. And in the process, they maximize taxes, costs, and make maximal profits. Thus

[3] Commonly called TNC^{S}

they spread like “wild fire” with the power of the “spider web”[4]. It is indeed this network and ability to strive across continents that makes the stability of the investment regime important from the point of the transnational investor.

Consequent upon the foregoing, Nigeria soon after her attainment of independence, introduced a complex form of incentives to facilitate and attract foreign investment. By this time, in the words of Akehurst, Nigeria as a new nation, needed to,

> define the framework and details for accepting foreign assistance in capital and technological know-how such as to make them compatible with the new status and at the same time establish the concept of permanent sovereignty over natural resources… Replete on the issues for consideration in this bid were; terms of agreed incentives, regime to govern the investment, use of imported technology and possible means of dispute resolutions[5].

In an effort to establish a framework of clear, efficiently implemented and stable policies in relation to foreign investments, Nigeria from the outset recognized as binding, the various schemes under

---

[4] *Asante, stability of Contractual Relations in the Transnational Investment Process 28 ICLQ 409 (1999)*

[5] *Akehurst, M., A Modern Introduction to International Law 3rd ed. (London)*

the international legal regime for the protection of foreign investment[6]. Such schemes which have been established to promote and protect investments and to cover investment risks, include, bilateral, multilateral regional or even national[7] arrangements.

The international legal framework in this regard consists of all the customs, treaties, conventions, instruments / other basic documents adopted at the international scene and to which the host state is a high contracting party so as to ensure the protection of the investment.

Introducing a national approach in the scheme, the Nigerian Export Credit Guarantee and Insurance Act[8] protects foreign investors in Nigeria against non-commercial risks for exports of goods processed or made in Nigeria. By virtue of the provisions of this legislation, foreign investors exporting at least 35% of their total production in any proceeding year were qualified to benefit or to enjoy an insurance cover against non-commercial risks over their exports in the international market.

In allaying the fears of expropriation held by foreign investors, Nigeria also promulgated the Nigeria Investment Promotion Commission Act[9] which prohibited any form of nationalization of foreign interest.

---

[6] *With the object of retaining the existing investment and that of attracting the influx of new ones.*
[7] *National but coloured with international scope, content and concept.*
[8] *Cap. 305 Laws of the Federation of Nigeria (1990) though initially enacted as Decree No. 15 of 1988.*
[9] *Ibid*

Section 25(1) (a) and (b) of the Act[10] provided that no Enterprises shall be nationalized or expropriated by any government of the Federation and no person who owns, whether wholly or in part the capital of any enterprise shall be compelled by law to surrender his interest in the capital to any other person.

The cumulative effect of Nigerian Legislations, the bilateral and multilateral arrangements entered into by Nigeria and the international instruments / documents recognized by Nigeria as binding towards the promotion and protection of foreign investment in Nigeria, is the demonstration of Nigeria's efforts and preparedness to attract and protect foreign investments.

In spite of the foregoing, there still continues to be a very slow and low inflow of foreign investments into Nigeria. Given the significant role foreign investment plays in the development of national economy of states, this state of affairs[11] in Nigeria raises a good number of questions which this work is aimed at or set to find answers.

Several factors influence the decision of investors to undertake cross border business activities. Some of these factors include.

(i) Resource sourcing

---

[10] *Ibid*

[11] *Low inflow of foreign investment to Nigeria.*

(ii) Market availability

(iii) Profit orientation

(iv) Favourable environment

(v) Governmental policies.

In addition to the foregoing, attracting foreign investors to invest in a developing country may be dependent on a combination of many factors such as social, political and economic. Interestingly, most of these factors are within the control of the government of the country hosting the investment.

In Nigeria today, a good number of factors have been identified as constraints to the inflow of foreign investments, namely, expropriation, political instability, corruption, existence of unfavourable laws, inconsistent government business policies, lack of infrastructural development, financial crimes such as Advanced Fee Fraud, social insecurity and violence such as hostage taking and kidnapping in many parts of Nigeria.

These impediments not only discourage intending investors but also frighten existing investors thereby making them to close shop and flee the country. It has been reported by *ThisDay* Newspaper that as a result of the prevalence of hostage taking activities in the Niger Delta area, Imo

State Government lost about 8,500 million dollars Chinese investment as the investors were forced to leave the area[12].

1.2 STATEMENT OF THE PROBLEM

The evolution and development of foreign investment activities all over the world is an indication that no nation can be self reliant from a realistic point of view. In this regard, albeit the side of developing countries[13], yet the governments of these nations, including Nigeria have endeavoured to formulate these regulations and policies aimed at promoting and protecting foreign investments. In the wake of competition for foreign capital by other countries, Nigeria particularly under the administration of President Olusegun Obasanjo[14] put in place many economic policies aimed at attracting foreign investment into the country, yet foreign investment activities have continued to decline steadily.

In an attempt at unravelling the problem that confronts the steady inflow of foreign investment into Nigeria, it must be emphasized here that investment generally entails a balance of the rate of returns on investments and as a result, foreign investment tends to be higher in

---

[12] *Thisday News Paper* Report of Monday, 23rd July, 2007.
[13] Who do not really possess the skills and technological know-how and worst still the requisite capital for investment.
[14] 1999 to 2007

countries that guarantee higher rate of returns in comparative terms with other countries. But closely related to this is the risk factor. There is no doubt, and justifiably too, that foreign investors require adequate guarantees and protection of their interests not only from the point of view of economic policies of states but also protection against such unwanted elements such as expropriation and nationalization. Supporting this position, Reuber expressed the view in the following words:

> Fiscal incentives are not per se very effective in drawing foreign investors unless they are the only difference between alternative locations[15].

There is no doubt that there is a high return on foreign investments in Nigeria, the profit margins produced by service providers in the Nigerian Telecommunications industry, such as MTN, GLO, Zain, etc. can attest to this. This means that low returns on investment is definitely not responsible for the retardation in the inflow of foreign investments into Nigeria.

The foregoing naturally implies that attention and more significance must be attached to the legal framework and regulatory issues which will remove the impediments to foreign investment such as

---

[15] See generally, Reuber, G., *Private Foreign Investment in Development* (Oxford: Clarendon Press, 1973).

favourable legislation, the provision of the basic infrastructures, political and social stability etc. that today serve as constraints to the inflow of foreign investments into the Country.

The problem and the question which requires an immediate answer is whether the Nigerian Legal framework for the protection of foreign investment is effective or adequate to provide the requisite security and basic infrastructures required by the nature of anticipated foreign investments or to remove the impediments such as corruption, unfriendly legislations, social insecurity, political instability etc. that challenge the influx of foreign investments into the country. This is the fundamental question which this study has addressed.

Arising from the foregoing, this study also found answers to the following research questions:

1. Can the present legal regime really attract and protect foreign investments in Nigeria?
2. Can the existing legal framework effectively protect the interests of foreign investors against the undesirable elements of expropriation and nationalization?

3. Does appropriate legal machineries exist in Nigeria to ensure the provision of the basic infrastructure, such as light, good roads, water etc required by the foreign investors?
4. Can the legal framework effectively protect foreign investments against the prevalent social insecurity, social unrest and violent activities such as the operations of militant groups in Jos, Plateau State, the Niger Delta area and the Boko Haram?
5. Can the existing legal framework effectively reduce the high cost of production in Nigeria comparatively with the cost in other parts of the world?

These are the problems that this research has addressed.

1.3 AIMS AND OBJECTIVES OF THE STUDY

The principal aim of this study is to evaluate and appraise the role of law in curbing the impediments to foreign investments in Nigeria. In addition to the foregoing, the study has achieved the following objectives:

(i) to examine the role of law as an instrument for removing the constraints to foreign investments in Nigeria.

(ii) to identify the factors that impede the free flow of foreign investments into Nigeria.

(iii) to appraise the adequacy or otherwise of the existing Nigerian legal regime for the promotion and protection of foreign investments.

(iv) to evaluate the level of application of international instruments for the protection of foreign investments in Nigeria.

(v) to consider and suggest efficient legal and policy options to be adopted in promoting the influx of foreign investment in Nigeria.

1.4 METHODOLOGY

In this study, the researcher adopted the doctrinal approach. In effect, both primary and secondary sources were utilized. Under the primary sources, national legislation and international instruments such as conventions, bilateral and multilateral treaties were critically analysed. Opinions of publicists contained in text books, journal articles and general publications in the area of study were considered and carefully scrutinized.

1.5 LITERATURE REVIEW

There is quite a good amount of literature in existence on the promotion and protection of foreign investment; however none has come out to address specifically the issue of applying the Law as an instrument for removing the constraints militating against the free inflow of foreign investments in Nigeria.

A study of this nature, no doubts calls for a critical mass of evaluation and review of the literature on the subject of foreign investment.

This study considered the various instruments that exist at both the national and international levels that protect foreign investments in general and in Nigeria specifically. The legal framework for foreign investment provided a valuable source of information for this study. An assessment of the legal framework has exposed its adequacy or otherwise in the promotion and protection of foreign investment in Nigeria.

Akinsanya in his work, "The Expropriation of Multinational Property in the Third World"[16] admits that expropriation, which can be used synonymously with confiscation, requisition, nationalization to refer to the various forms of state interference with private property, is a strong factor that impedes the inflow of foreign investment[17]. His analyses of this form of impediment will serve as an invaluable source of information for this study. Peter Adrianse has earlier in his book "Confiscation in Private International Law"[18] devoted the whole book in analysing the effect of confiscation on foreign investment.

---

[16] Akinsanya, A. A., *The Expropriation of Multinational Property in the Third World* (U.S.A Praeger, 1980)

[17] See p. 7 Ibid

[18] Adrianse, P., *Confiscation in Private International Law* (The Haque; Martinus Nighoff)

According to him,

> Confiscation is the taking of private property by the state without compensation… any government action by which private property is seized without compensation no matter in what form or under what name[19].

Example abounds of instances of confiscation of multinational corporations' interests particularly in the developing countries. In Nigeria for instance after the civil war, it was erroneously believed that one of the most effective ways of ensuring economic independence for the country was the taking over of control of majority shares in the economy which was already in the hands of foreign investors. This led to the expropriation of the proprietary rights and economic interests of foreign investors. The indigenization policy was backed up by the promulgation of the Nigeria Enterprises Decree of 1972. This legislation became the first formal effort by the Nigerian Government to transfer the equity or proprietary interests of foreign investors to Nigerians. This action on the part of the Nigerian Government impacted negatively on the country's effort to attract foreign investment. And as Professor Osunbor rightly opined;

---

[19] Ibid, P. 18

> The objective through indigenization of increasing the level of Nigerian ownership and control of business was misconstrued in some quarters to mean the expropriation and exclusion of all of foreign participation. This perception affected negatively the flow of new investments and even led to a certain degree of capital flight[20].

It is instructive to note here that the provisions of this law[21] operated in consonance with the provisions of the Exchange Control Act[22] which prohibited the remittance or transfer of foreign exchange outside the country. There is no doubt that this significantly retarded the inflow of foreign investment.

Samuel Friedman's book, "Expropriation in International Law" dwells substantially on the negative effects of expropriation on foreign investment. In the book – Friedman clarifies the concept of expropriation as:

> The procedure by which a state in time of peace and for reasons of public utility expropriates a public property right,

---

[20] Osunbor, O. A., "Opportunities for Direct Foreign Investment in Nigeria in the Industrial and Manufacturing Sectors in the proceedings of a workshop on Strategies for Creating a Favourable Legal and Economic Environment for Foreign Investment in Nigeria, March, 1990, Abuja

[21] Reviewed in 1977 by Nigerian Enterprises Promotion Decree No. 3 of 1977.

[22] Promulgated as Decree No. 3 of 1962

> with compensation, so as to place it at the disposal of its public services or of the public generally[23].

The exposition contained in this book constitutes a significant form of contribution in the area of the study.

Fawcet in his work "Some Effects of Nationalization of Private Properties," made some valuable analysis which this work cannot ignore. According to him, "the taking of property without compensation is not expropriation. It is confiscation[24]". He tried to establish the difference between expropriation and confiscation, but most significantly, he concluded that expropriation in whatever form or name it takes serves as a major constraint in attracting trans-border investments.

Investment according to Levy[25], is the,

> Use of financial capital in an effort to create more money. That is, an investor foregoes consumption today in an attempt to achieve an even higher level of consumption in the future. Investment also refers to the vehicle used to make more money.

---

[23] Friedman, S., *Expropriation in International Law* (Cambridge: University Press 1959), P.2

[24] Fawcet, J. E., *Some Effects of Nationalization of Foreign Properties,* (British yearbook of International Law, 1980) p 369.

[25] Levy, H., *Introduction to Investment* (South Western College Publishing Company)

Levy therefore in the work, tried to balance the concept of investment with the expectation of the investors.

This work will also find useful the information contained in Bhalla's book entitled "Investment Management: Security Analysis Portfolio Management[26]. In this book, Bhalla classifies the concept of investment into economic investment[27] from a general sense, and financial investment, in his analysis, he refers to the wealth of a state which can be quantified by the productivity level of its economy. He added further that, investment must be differentiated from the pseudo-investment concept of the consumer and the real investment of the businessman[28]. This study will evaluate his analysis and improve upon them.

Aluko's view on Nigeria's efforts at attracting foregoing investment expressed in his work entitled "The Case for Rapid Industrialization in Nigeria[29] will be considered in this work.

Wallace in his book "Foreign Investment in the 1990s: A New Climate in the Third World"[30] outlines the impact of direct foreign investment in the third world countries. He also took a look at the

---

[26] Bhalla, V. K., *Investment Management: Security Analysis Portfolio Management,* 10th ed. (Ram Nagar, New – Delli, 2004)
[27] p. 3 Ibid
[28] Investment from an economist point of view
[29] Aluko, S. A., *The Case for Rapid Industrialization in Nigeria in the Quarterly Journal of Nigeria,* University of Ife, April, 1970.
[30] Wallace, D. C., *Foreign Investment in the 1990s: A New Climate in the Third World* (Amsterdam: Martinus Nijhoff Publishers, 1990)

constraints to such investments amongst the developing nations. To him, direct foreign investment entails:

> The establishment or acquisition of substantial ownership in a commercial enterprise in a foreign country, or an increase in the amount of an already existing investment abroad to achieve substantial ownership[31].

This work found this book an invaluable source of information. Attention shall also be paid to Professor Ajomo's justification of foreign investors' requirement for security for their investments and their drive to maximize profits, contained in his work, "The Dimensions and Legal Framework of International Investment Agreements in Nigeria: The Joint Venture Model"[32]. In this work, Ajomo opined that:

> In many developed countries, especially those of the west, the exportation of capital and technology for economic development is vested in Trans-national Corporations (TNCS), as a major instrument of international investment, and in some cases in private hands. By the nature of their set up, TNCs are not charitable organisations. They specialise in

[31] P. 150 Ibid

[32] Ajomo, M. A., *The Dimensions and Legal Framework of International Investment Agreement in Nigeria: The Joint Venture Model:* In Ajomo, M. A (eds) *New Dimensions in Nigeria Law* (Lagos: N.I.A.L.S 1989)

> oligopolistic industries producing sophisticated products made by capital intensive techniques and have a centralization of financial strategy which enables them to operate across different countries to minimize risk and tax payments and maximize profit[33].

Sornarajah's work, "The International Law of Foreign Investment"[34] is also worth reviewing here, particularly its analyses of the "Hull doctrine". The "Hull's doctrine" has today been incorporated into Nigeria's legal Regime Governing Foreign Investments under section 25 (1) (2) of the Nigerian Investment Promotion Act which provides:

> (a) No enterprise shall be nationalised or expropriated by any government of the federation, and
>
> (b) No person who owns, whether wholly or partly, the capital of any enterprise shall be compelled by law to surrender his interest in the capital to any other person.

This section prohibits expropriation or nationalisation of foreign proprietary interest. But in situations where nationalisation may be exceptionally permitted, Section 25 (2) provides for the payment of prompt and adequate compensation.

---

[33] P. 1 ibid.

[34] Sornarajah, M., *The International Law of Foreign Investment* (Cambridge: Grotius Publications, 1994)

Section 25 (2) of the Act provides as follows:

> There shall be no acquisition of an enterprise to which this Act applies by the Federal Government unless the acquisition is in the national interest or for a public purpose and under a law which makes provision for:
>
> (a) Payment of fair and adequate compensation, and
>
> (b) A right of access to the courts for determination of the investor's interest or right and the amount of compensation to which he is entitled.

This provision represents one of the areas where the law is used as an instrument for curbing the challenge of expropriation to foreign investment in Nigeria.

Bernard in his work, "Contracts between States and Foreign Nations: A reassessment"[35] stresses the role of joint venture arrangement as a legal tool for removing the challenges of expropriation and nationalization, to him;

> All these various types of contracts, a normal business technique like issuing a bank guarantee, opening a documentary letter of credit, requiring advance payments, non-commercial risks insurance coverage through institutions like OPIC in the United

[35] Bernard S., "Contracts between States and Foreign Nationals: A Reassessment" in Smith, Galston, and Levit sky (eds). *International Contracts* (New York: Eagle Wood Publisher, 1988).

> State of America, COFACE in France, could provide the foreign contracting party with sufficient confidence to go ahead with the transaction without insisting or imposing a "stabilization clause" and/or excluding the contracting state domestic legal system by means of a choice of law provision operating at least a " delocalisation" if not total internationalization"[36]

The Views of Bernard were re-echoed by Peter Hansen when in the same year he expressed similar views in the following words:

> "Transnational corporations influence the world economy not only through investing equity capital abroad. The essence of transnationalization is the internalization of international market transaction within an individual decision working unit, the transnational corporation"[1]

This research will consider the views expressed by Bernard and improve upon them.

Ingrid Delupis in his book," Finance and Protection of Investments in Developing Countries"[2], list some of the factors that motivates transnational corporations to invest in developing countries' economies to

---

[36] p.201 Ibid.

[1] In a paper titled "Transnational Corporation and the World Economy" at a seminar organized by the UNTC on Transnational Corporation in Moscow on 10th March, 1988.

[2] Delupis, I., *Finance and Protection of Investments in Developing Countries* (Essex: Gower Press Ltd. 1973)

include, political and business ties between the home country and the state of proposed investment and the desire to facilitate the development of some countries. He is also quick to add however, that these factors are however in themselves influenced by:

(a) The profitability of the venture,

(b) The safety of proposed venture,

(c) The availability of funds.

He further opines that though it is of outmost importance that an investor must first pass a judgement about the intrinsic profitability of the venture, it is equally important for the investor to consider the safety of the investment which in most cases relates to the fear of possible expropriation or nationalization. The only short coming of this work is that it failed to explore the legal mechanism which can be utilized in preventing such occurrences.

Zouhiair Kroufol in his book entitled "Protection of Foreign Investment"[3] admits the need for states to, by mutual consent, establish standards and mechanisms for dealing with properties of aliens. The only problem with Kroufol's work in relation to this study is its failure to relate

[3] Kroufol, Z., *Protection of Foreign Investment,* (Netherland: A. W. Sijthoff International Publishing Co., N. V. 1972).

law to such mechanism that need to be adopted by states. This study however found this work a highly resourceful material.

This study is in agreement with Nwogugu's suggestions made in his book, 'the Legal Problems of Foreign Investments in Developing Countries'[4] that investment guarantee agreements are fundamental tools in safeguarding the interests of the foreign investors in developing countries, this research will rely and improve upon this work.

Laudably, Delupis agrees with this suggestion of Nwogugu and refers to some of those agreements as treaties on "friendship' commerce, and navigation"[5] which according to the state department of the United States of America are particularly suitable to safeguard the interests of investors' overseas.[6]

One of the areas identified by Nwogugu which need the guarantee of the hosting state is the repatriation of profit or returns on investments. Concurring with Nwogugu in this direction, Modibo in his work, "Comparative Perspective on the National Legal-Institutional Framework for Foreign Investment in Africa"[7] opined that prompt transfer of income from investment contributes immensely in creating a favourable

---

[4] Nwogugu E. I., *The legal problems of foreign investment in Developing countries* (Manchester university press, 1965).
[5] Delupis Op. cit., P. 34
[6] U. S. A. Department of State publication No. 6565 of 1958.
[7] Modibo, T. "*Comparative Perspectives on the National Legal Institution Framework for foreign investment in Africa*" in Zambia Law Journal Vol. 12 (1980)

environment for foreign investment[8]. Interestingly, the provision of safeguards for the repatriation of funds has now been taken care of in Nigeria through section 24 of the Nigerian Investment Promotion Commission Act which guarantees a foreign investor unconditional transferability of funds[9] through an authorized dealer, in freely convertible currency. Wale Adetunji outlines[10] the benefits of attracting foreign capital into Nigerian economy. According to him, the international capital market has much greater debt, liquidity, investor base and financing instruments than the domestic market which should serve as an important benefit for capital sourcing, diversifying a company's shareholder base, attracting sophisticated investors and enhancing liquidity of its securities. Adetunji however fails to bring to the fore the constraints that retard the inflow of expected foreign investments to Nigeria. It is not enough for Nigeria to open her gates to foreign investors as a means of attracting foreign investment, to be able to effectively compete, comparatively, in the global economy; Nigeria must also ensure transparency in corporate governance and financial dealings. This entails a major shake up of the criminal justice system as it portends to economic

---

[8] Pp. 1 – 37 Ibid.

[9] Transferable funds here include (a) dividends or profits attributable to the investment, (b) payment in respect of loan servicing where a foreign loan has been obtained; (c) the remittance of proceeds (net of all taxes) and other obligations in the events of a sale or liquidation of the enterprises or any interest attributed to the investment.

[10] See Adetunji, W. *Accessing The Global Market; Benefit, Challenges And Prospects for Nigerian Entities;* in Securities Market Journal, Vol. 10

and investment issues. Emphasizing the need for corporate transparency, Oji *et. al.* made the following observations:

> The criminal law and the criminal justice in Nigeria like in most other jurisdictions need to be updated in the light of modern economic activities. Outdated concepts need to be changed. The criminal law of Nigeria must be defined in such a way to transcend the territory of Nigeria as economic crimes have assumed international character. Economic and financial crimes in capital market operations need to be closely monitored and kept in check. With increasing globalization, Nigeria must be aware of the possibility of grievous harm being done to its economy by international criminals. One of the important issues, which influence domestic and foreign investment, i.e, the extent to which a market is transparent. No investor (particularly, foreign investor) would be willing to invest in a market where fees and charges are made outside those stipulated by law... Corruption must therefore be eschewed.[11]

[11] Oji, E. O. et al "Globalization and New Perspective in Corporate Governance" , a paper presented at NALT Conference May, 2004

It must be pointed out here that the foregoing literature is anchored on both the international and national framework for the regulation of foreign investments. This was basically the primary source of information for this study. It must also be emphasized here that the foregoing literature has failed to address in specific terms the problems sought to be resolved by the study. The researcher therefore improved upon the literature reviewed. In consonance with the researcher's hope, the outcome of this study has constituted a valuable contribution to the literature on the subject matter of foreign investment in Nigeria.

CHAPTER TWO

CONCEPTUAL FRAMEWORK AND HISTORICAL DEVELOPMENT OF FOREIGN INVESTMENTS IN NIGERIA

2.1 THE CONCEPT OF FOREIGN INVESTMENT

Foreign investment has today become a major issue in the strategies adopted by both developed and developing countries for ensuring the growth of their economies. Increasingly, foreign investment is being used as a vehicle for the growing economic globalisation. Traditionally, the largest flow of foreign investment occurs between the industrialised countries especially North America, North Western Europe and Japan. Incidentally, flows to non-industrialised countries have steadily been on the increase since the last quota of the 20th century. Notable examples can be found in the impact of foreign investments in the economies of Singapore and China. Analysing the situation in Singapore, Teck-Wong and Stoever[12] came to the following conclusions:

> Singapore is a superb example of a (formerly) less developed country (LDC) that has succeeded in attracting desirable foreign investments and harnessing them to its development programme. The attraction and development have taken

[12] Teck-Wong Soon is Senior Lecturer in the Department of Economics and Statistics at the National University of Singapore. William A. Stoever is Keating-Crawford Professor of International Business at the Stillman School of Business, Seton Hall University, South Orange, New Jersey.

> place despite the country's lack of natural resources or large domestic market; rather they have been focused on manufacturing and service industries of the type that could be attracted to any country. The country's success has been largely a matter of sensible and effective policies; for example, it was one of the first countries to switch from import-substitution policies to export oriented ones. Hence, despite its unique size and history, other developing countries are looking to Singapore for lessons in how to attract desirable investments and how to make them similarly conducive to their own development needs.[13]

With respect to China, since the late 1970s, when economic reform began in China, the role of the foreign sector has burgeoned in ways that no one anticipated. Indeed, as at today, China attracts more foreign investment than any other country and is one of the world's largest trading nations and a major participant in International Financial Markets. In attesting to this position, Lardy puts it more succinctly: "The immensely increased presence of foreign capital and foreign trade in China has

---

[13] Teck-Wong and Stoever, A.W. "*Foreign? Investment and Economic Development in Singapore. A Policy-Oriented Approach*" in the Journal of Developing Areas, Vol. 30, No. 3, April 1996; pp.317-340.

certainly put China prominently on the world business map".[14] Lardy's analysis stress the dynamics of foreign investment by concluding that the economic dynamism generated by foreign capital and trade in China has largely by-passed her state-owned industries, which remain inefficient and over-protected.

In Nigeria, despite the series of efforts made by the Federal government to attract foreign investment, the country has continued to experience a steady slowdown in the inflow of foreign investment. This is attributable to several factors.

The sketchy or synthetic think-piece on what constitutes foreign investment has provided the fundamental premises for understanding the factors that impede the inflow of foreign investment to Nigeria. This starting point is considered valuable – not so much because it is going to provide a sudden revelation into the concept or to provide an incremental addition to the scientific literature around foreign investment but rather, it is an attempt made at critically reconsidering dominant conceptual paradigms of foreign investment. Next, the chapter attempted to sketch the development of the regime of foreign investment in Nigeria.

---

[14] Lardy N.R., "*Economic Engine Foreign Trade and Investment in China*" in the Brookings Review, Vol. 14, No. 1 (Winter, 1996), pp.10-15 also found at http://www.jastor.org/stable/20080613, visited on 07/04/2009-12.29.

A good starting point in the conceptual clarification of foreign investment must be a discourse of the meaning of investment itself. Not even an impressionist attempt can graphically sketch the exact face of investment. It is a concept that is found in the lexicons of almost every discipline of the humanities. This means that the concept of investment is formulated by opinionists or publicists with different persuasions and orientations.

The Webster's dictionary defines investment as:

> The commitment of funds with the view to minimizing risk and safeguarding capital while earning a return, and or, the commitment of something other than money to a long term interest or project.[15]

This definition proffered by Webster is acceptable in that it conceives investment as a commitment which goes beyond the mere spending of money. In another development, the New Standard Encyclopaedia perceives investment as "the spending of money, or capital in the expectation of getting future income and profits".[16] From this analysis, one can deduce that investment involves the spending of money with the ultimate aim of getting more money at a future date. With due

---

[15] Merriam-Webster, *Webster's Third New International Dictionary*, Vol. II (Chicago: Encyclopaedia Britannica Inc., 1981), p.1190.
[16] *The New Standard Encyclopaedia*, Vol. 7, p.162.

respect, this definition is not completely acceptable. Investment connotes so many factors and goes beyond financial commitments. Investment may in some circumstances be in form of machineries and not necessarily in form of money.

In more explicit terms, the New Encyclopaedia Britannica describes investment as: "A process of exchanging income during one period of time for an asset that is expected to produce earnings in future periods".[17]

Analysing the true meaning of investment, Ademola agrees with the position of the Dictionary of Modern Economics that investment is the flow of expenditure devoted to projects producing goods which are not intended for immediate consumption.[18]

Despite the divergence in the approaches adopted by commentators, there seems to be some points of convergence in the views expressed by them. For instance, scholars like Levy, concede that investment is the use of financial capital in an effort to create more money. That is, an investor forgoes consumption today in order to benefit in the future.[19]

The clarification of the concept of investment by Levy is principally the same with the following views expressed by Bhalla:

---

[17] *The New Encylopaedia Britannica*, Vol. 6 (Chicago: Encyclopaedia Britannica Inc., 1986), p.363
[18] See Ademola, A. *Economics: A Simplified Approach*. 2nd ed. Vol. 2 (1999) p.37
[19] Levy, H. *Introduction to Investment* (South-Western College Publishers, 1996) p.6

> Investment is the sacrifice of certain present value for the uncertain future reward. It entails arriving at numerous decisions such as type, mix, amount, timing, grade, etc. of investment and disinvestments.[20]

It can be discerned from the foregoing definitions that investment refers to a commitment of funds or any other form of capital capable of providing returns that will compensate the investor for the time involved, the rate of inflation during the period, and the risk involved. Expressed in other words, investment is an instrument for achieving a variety of social and economic goals.

Having looked at the meaning of investment, we can now proceed to define foreign investment. Foreign investment has featured widely in the studies carried out in recent times. Studies that seek to examine the concept of foreign investment have generated puzzling results. Both in popular and in expert publications, opinionists have asserted that there is a vacuum in conceptualising foreign investment. But such sweeping assertions are not accurate. It is however, true that there still exists a debate between scholars as to the exact meaning of foreign investment. At

---

[20] Bhalla, V.K., *Investment Management: Security Analysis, Portfolio Management*. 10th ed. (Ram Nagar, New Delhi – 110055) p.3

present, there is no singular or universally accepted definition of foreign investment. For instance, Okon defines foreign investment as:

> The acquisition of physical assets and/or securities of companies by either the nationals or the government of one country in another. It is a cross-border acquisition of financial or physical assets. It is the use of funds in the conduct of an enterprise that distinguishes 'foreign investment' from foreign trade.[21]

Odiase-Alegimenlen on his part described foreign investment as "a means whereby capital, technology and other managerial expertise are sourced outside the country by a state".[22] In the opinion of these two scholars, foreign investment involves the commitment of resources across the border within the jurisdiction of another state. The further implication of this is that the capital committed for production purposes or utilised to acquire proprietary interest is imported from some other state – meaning that the host state is either unable to finance the production or that the host state has consented that such capital be imported. It is also important to note from these two definitions that foreign investment can occur even

[21] Okon, E.E., "*Foreign Investment and National Security in Developing Countries under the Globalised Environment: The Nigerian Perspective*" in Guobadia, A. and Akper, P. (eds.). Foreign Investment in a Globalised World (Lagos: NIALS, 2006) p.121

[22] Odiase-Alegimenlen, O.A., "*An appraisal of the Legal and Institutional Regime for Foreign Investment Promotion and Protection in Nigeria*" in Guobadia, A. and Akper, P., *Ibid*.

where the host state is in position to finance the production but most importantly lacks the needed technology to carry out the production.

Where capital is a strong factor in the production process, it can also be called investment. In this regard, it might take the form of either finance or machineries.[23]

Other Nigerian scholars like Odozie also agree with the foregoing definitions. To him foreign investment is an activity,

> Involving the transfer of a package of resources including capital, technology, management and marketing expertise. Such resources usually have the effect of extending the production capabilities of the recipient country.[24]

To Popoola, foreign investment is the:

> Transfer of funds from one country (called the capital exporting country) to another (called the host country) to be used in the conduct of an enterprise in that country in return for a direct or indirect participation in the earnings of the enterprise.[25]

---

[23] See further, Section 41 of the Foreign Exchange (Monitoring and Miscellaneous Provision) Act, No. 17 of 1995.

[24] Odozie, V. "*An Overview of Foreign Investment in Nigeria: 1960-1995*, CBN Research Department Occasional Paper No. 11.

[25] Popoola, A., "*Foreign Investment in the 21st Century: Nigerian Perspective* in Yinka Omorogbe (ed): *International Law and Development: Strategies at the Threshold of the Twenty First Century*". Nigerian Society of International Law 27th Annual Conference, August 14-16, 1993, p.72. *The Encyclopaedia of Public International Law*, Vol. 8 at p.246.

This definition is a restatement of the views expressed by Sornarajah as far back as 1991 when he described foreign investment as, "The transfer of tangible or intangible assets from one country for the purpose of use in the country to generate wealth under the total or partial control of the owner of the assets."[26]

Both Popoola and Sornarajah's analysis represents a fair assertion of the concept of foreign investment particularly when they suggest that it is the shifting of capital or other forms of assets by an investor from his home country to another country for the purposes of carrying on economic activities in that other country. Relatedly, foreign investment has also been explained elsewhere as,

> An investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of an investor, the investor's purpose being to have an effective choice in the management of the enterprise.[27]

To Graham and Krugman, foreign investment can be simply defined as "Ownership of assets by foreign residents for purpose of controlling the use of these assets".[28]

---

[26] Sornarajah Mamud, *International Law on Foreign Investment* (Cambridge University Press, 1991), p.4

[27] IMF, Balance of Payment Manual (1980) Par. 408

[28] Graham, E. and Krugman, P., *Foreign Direct Investment in the United States* (1991) p.7

It must be observed here that this definition is not applicable in all situations because it is not every foreign investor that may be interested in active participation in the management and control of the foreign enterprise. At best, this definition is more suitable in Foreign Direct Investment cases. The exercise of effective control in the management and conduct of the affairs of the enterprise is an essential integral feature of foreign direct investment.[29]

Statutorily, the Nigerian Investment Promotion Commission Act, 1995[30] defines Foreign Investment to mean "investment made to acquire an interest in operating within and outside the economy of Nigeria". The NIPC Act being a Nigerian instrument for the promotion and protection of foreign investments in Nigeria, no doubt and unsurprisingly too, narrows down the concept of foreign investment to operations containing foreign elements conducted around the Nigerian economy.

Apparently, from the foregoing definitions and analysis, one can safely conclude that foreign investment is the aggregate of the capital or other form of material commitment exported to one country from another with the sole aim and expectation of deriving benefits (profits) there-from at a future date. It is pertinent to mention here that such an investment

---

[29] Peters, D., "*Foreign Investment in the Broadcasting Industry in Nigeria: Prospects and Challenges*" in Modern Practice Journal of Finance and Investment Law, Vol. 3, No. 2, April, 1999, p.313.
[30] Originally promulgated as Nigerian Investment Promotion Decree No. 16 of 1995

must by all necessary implications, be capable of contributing to the capital or economic growth of the recipient or host country. In the words of Obitayo,[31]

> Economic literature has underscored the positive relationship between investment and economic growth, and the critical role which investment plays as an engine of growth. Investment increases the productivity capacity of an economy, generates income and improves the standard of living of the people. High rates of investment which enhances the competitiveness of an economy in the global market.[32]

It is with regard to the economic benefits which host countries derive from foreign investments that makes it obligatory for such countries to formulate legislations and policies to promote and protect foreign investments.

2.2 TYPES OF FOREIGN INVESTMENT

Basically, there are two broad ways through which an investor may commit resources in a foreign jurisdiction or host country. One of the ways is foreign direct investment while the other is portfolio investment.

[31] Obitayo, K.M. is the Deputy Director, Economic Policy Unit, Central Bank of Nigeria
[32] Obitayo, K.M., "*Image Building and Investment Generation – Prospects for Nigeria*" in Guobadia and Akper (eds.) Op. cit. p.51

Attempts have also been made to introduce "foreign debts"[33] as a third category but this is yet to receive popular acceptability.[34] In summing up the dual elements of foreign investment, Adegbite stated that foreign investment involves:

> The injection of such foreign sourced resources directly into the real sector of the economy. The resources are converted not just into financial (paper) assets such as shares and bonds but factories, goods and services.[35]

The components introduced by this assertion are physical or material investment and paper or intangible investment.

2.2.1 Foreign Direct Investment

This form of foreign investment is a measure of foreign ownership of productive assets, such as factories, mines and land.

Sullivan and Sheffrin define foreign direct investment as a situation where "one company from one country making physical investment into building a factory in another country. It is the establishment of an enterprise".[36]

---

[33] Loans to foreign governments

[34] See Pritchard, R., *The Transformation of Foreign Investment Law – More than a Pendulum Swing* (1997) 71CCLR. 233-234.

[35] Adegbite, S., "Direct Foreign Investment – Its Promotion and Prospects" 11th Omolayole Annual Lecture delivered in Lagos on 22nd November, 1995.

[36] Sullivan, A. & Sheffrin, M.S., *Economics: Principles in Action* (New Jersey, Upper Sadde River, 2003) p.551

This definition though not encompassing but it is simple and illuminating as it provides a classical description of foreign direct investment. This form of investment is aimed at achieving an effective control and management over a company in a foreign land. According to Peters, the quantum of financial commitment in foreign direct investment is usually huge and sometimes beyond what an individual or group of individual entrepreneurs may be willing or able to raise.[37]

Speaking in the same vein, Wallace defined foreign direct investment as:

> The establishment or acquisition of substantial ownership in a commercial enterprise in a foreign country, or an increase in the amount of an already existing investment abroad to achieve substantial ownership.[27]

The definition of foreign direct investment has been extended to include "investments made to acquire lasting interest in an enterprise operating outside of the economy of the investor".[28] Drawing the same conclusions, Odozie asserts that "the purpose of direct foreign investment

---

[37] Peters, D. Loc-Cit.
[27] Wallace, D.C., *Foreign Investment in the 1990s: A new climate in the third world* (Amsterdam: Martinus Nijhoff Publishers, 1990) p.150
[28] United Nations Conference on Trade and Development – check www.united.org.

is to acquire a lasting interest and effective control in the management of an enterprise".[29]

Okon on the other hand concluded that:

> A direct foreign investment may take the form of new ventures or the acquisition of an existing enterprise. A direct foreign investor's ambition is to own and control the foreign investment enterprise. Such an investor prefers to be active in the day-to-day management of the firm.[30]

Judging from the above premise, it is clear that under foreign direct investment, the foreign investor is practically involved in the management and control of the physical enterprises.

In Nigeria, like most other developing countries, foreign direct investments have primarily been focused towards the exploitation of natural resources, particularly oil and gas resources. Given the exploitative records of the investors, it is quite difficult to identify other investing areas in public utilities. For example like the transport industry. Foreign direct investments in natural resources are governed by concessional arrangements which are regrettably made to the detriment of developing countries.

---

[29] Odozie, V. loc-cit
[30] Okon, E.E., loc.cit.

Foreign direct investment particularly in natural resources has significant impact on the economies of host states far above the situations of foreign debt. As Odiase Alegimenlen commented with insight:

> For many developing nations, direct foreign investment is the preferred option because it provides visible development benefits for the state in terms of capital input, know-how, technology and organisational and trading skills.[31]

Given these analysis, it becomes very pertinent to balance the interest of foreign investors and those of developing countries when foreign direct investment is involved. The obligation of states in this regard is to put in place the legal regime and to institute such policies which will adequately balance the need for foreign investment with the developmental needs of the state.

One major problem that is associated with this form of investment is the realities associated with the modus operandi of Transnational Corporations. These Transnational Corporations are the principal actors in foreign direct investment and are usually exploitative in nature and at all times they seek to minimise costs while seeking to maximise profits. This undoubtedly affects the developmental expectations of the host states.

[31] Alegimenlen, O., Loc. Cit.

2.2.2 Portfolio or Indirect Investment

This is a form of investment which involves the movement of funds from a foreign country to a host country for the purpose of obtaining proprietary interests in the shares of an already existing enterprise. Portfolio investments are only concerned with earning dividends, interest, capital gains without any active participation in the management of the enterprise.[32]

Commenting on the difference between foreign direct investment and portfolio investment, Okon concludes that a portfolio foreign investment is a:

> Financial commitment in which the investor's stand is either in the provision of debt such as bonds or equity such as stocks or shares. Consequently, he does not get involved in the day-to-day management of the firm but rather remains passive.[33]

Consequent to the foregoing, it can be deduced that portfolio investment relates to the acquisition of shares by the foreign investor in an existing business with no desire to participate physically in the political affairs of the company or the business.

---

[32] See Peter, D., loc. cit

[33] See Okon, E.E. op. cit. p.121

It is worth observing that in most cases where the host state desires to retain a good measure of control over her economy, the portfolio investment is the preferable option. Obviously, the rights of the portfolio investor are limited to the number of shares held and the dividends he is entitled to whenever declared. One major difference between foreign direct investment and portfolio investment is in the management and control of the enterprise. While the former entails the participation of the investor into the business, the investor in portfolio investment does not participate physically in the business.

2.3 NATURE AND GENERAL CHARACTERISTICS OF FOREIGN INVESTORS

Transnational or multinational corporations are perhaps the most important investors in the world economy today. They also account for a significant proportion of the total global economic output. To Hansen,

> Transnational corporations influence the world economy not only through investing equity capital abroad. The essence of trans-nationalisation is the internationalisation of international market transactions within an individual decision-making unit; the transnational corporation.[34]

[34] Hansen, P., "*Transnational Corporations and the World Economy*". A paper presented at a Seminar organized by UNCTC on Transnational Corporations held in Moscow on 10th March, 1988.

Transnational Corporations are therefore the transnational vehicles/actors of effecting foreign investment and are consequently endowed with the legal capacity to act in international law.

For sometime now much is dependent on Transnational Corporations for much of the technological requirements, capital resources, and managerial talent that are needed to solve the contemporary world's economic problems. It is in view of this that Jack Behrman was prompted to observe that:

> The most striking new institution on the international scene in the past decade is the multinational enterprise. The rate of growth of international production (largely controlled by multinational enterprises) is conservatively estimated at twice that of the free world. If one projects this trend over the next decade or so, the influence of multinational enterprises can be seen to rise significantly relative to GNP.[35]

The premise of this discussion stems from the fact that the global economic display amongst nations is as much a cause as a benefit that recognises the existence of machinery, covertly or overtly, which can

---

[35] Behrmen, J.N.: "*The Multinational Enterprise: Its Initiatives and governmental reactions*" in *Journal of International Law and Economics.* Vol. 6, No. 2, Jan. 1972, p.215.

enhance economic corporation and/or transaction. That machinery is the Transnational Corporations.

Different publicists and lexicons have defined the term Transnational Corporation from different perspectives and philosophies. And while some definitions emphasise structural criteria such as the number of countries in which a firm is operating or, ownership by persons from many nations or nationality of top management, other definitions stress performance characteristics such as the absolute amount or relative share of earnings, assets or employees derived from or committed to foreign operations.[36] For instance, Professor Vernon opines that an enterprise could be referred to as a multinational if it possesses at least six overseas manufacturing subsidiaries.[37]

In the same vein, Dunning adopted the view that a transnational enterprise is that which owns or controls production facilities (such as factories, mines, oil refineries, distribution outlets, offices and so on) in more than one country.[38] These two definitions though instructive, but their insistence on the criteria for number of subsidiaries or countries is

---

[36] Read further, Simmond, R. "*International business and Multinational Enterprises*" (Illinois, R.D. Irwin USA, 1977) p.6.

[37] Vernon, *Sovereignty at Bay: The Multinational Spread of U.S. Enterprise* (Harmondsworth: Penguin, 1973)[2]

[38] Dunning, J. *Studies in International Investment* (London: George Allen and UN, 1970) p.12

rather too arbitral, because they failed to show the determinants for arriving at those figures.

Adopting a similar approach with Professor Vernon, the United Nations Organisation describes a multinational enterprise as a firm that has more than five manufacturing subsidiaries outside the home country. Determining the qualification of an enterprise as being multinational by setting a standard number of subsidiaries makes the opinions of Adediran and Offiong more preferable as they are silent on the number of subsidiaries or number of countries an enterprise must operate in order to qualify as a Transnational or Multinational Corporation.

On his own part, Adediran defines Transnational Corporation as “a firm with foreign subsidiaries which extend the production and marketing of the firm beyond the boundaries of any one country”,[39] while Offiong sees Transnational Corporations as those companies having production facilities in many lands, having access to capital world wide, and having a “global outlook” among their management team.[40]

Though there is no acceptable or precise definition of a Transnational Corporations, a working definition is however desirable here for the purpose of this presentation.

---

[39] Adeniran, T., *Introduction to International Relations* (Ibadan: MacMillan Nig. Publishing Ltd., 1988), p.170

[40] Offiong, D.A., *Imperialism and Dependency* (Enugu: Fourth Dimensions, 1980) p.124

For this purpose a Transnational Corporation is nothing but a planetary enterprise. That is to say, an enterprise, which represents the totality of organising and operating business establishments in an international context. This means that it must embrace not only the popular notions of managerial orientation, ownership distribution, political composition of markets, and the flow of funds and management talents across boundaries – but also such functions, processes, and relationships as forms of organisation, physical location, operational facilities, and the entire functional spectrum from the allocation of corporate resources to distribution of output, and from engineering segmented by political boundaries, varying levels of economic development and cultural plurality.

2.4 Governmental Control of the Operations of Transnational/ Multinational Corporations

The first point for consideration on this subject is the identification and determination of policy objectives. And to achieve this, it may be necessary to answer pressing questions such as whether regulation is necessary, the extent and scope of regulation, the weighing of various factors and interests that may affect or be affected by the governmental control measures.

It is pertinent to commence the analysis with a statement that the transnational corporations have a firm control of the Nigerian economy and it is only from this premise that one can appreciate the Nigerian governmental control over the activities of the multinational corporations.

It is truism to say that Nigeria's present economy is largely dependent on Western Europe and the United States of America and the path followed by the transnational corporations is to expropriate profits for their parent companies.

In most key sectors of the Nigerian economy, foreign investment operators remain the dominant participants. For instance, the Nigerian oil industry is highly dominated by Transnational Corporations. This however affects the level of governmental control exercised and enforced against the Transnational Corporations. In this regard, for example, there is always the fear that investors are likely to run away from the oil sector with the promulgation of measures that require them to invest more funds in the provision and installation of anti-pollution equipments.

Government in a bid to induce control in the Transnational Corporations particularly in the oil sector, acquire 60% equity shareholding of the corporations, but this however does not give government the effective grip over such corporations. These transnational

Corporations continued to operate in Nigeria only with a view to satisfying only their own interest. As a result, they do not supply technology as a commodity that can be purchased in the open market. Rather, they supply it as their own investment, packaged up in materials and in their nationals whom they supply along with materials.

2.5 The Development of the Regulatory Framework for Foreign Investments in Nigeria

The advent of foreign investment in Nigeria started a century ago, that is, as far back as the period of Nigeria's first contact with the European traders in the coastal areas and with the Arabs through the trans-Saharan trade routes in the north.[41] At this time trade and related services were dominated by foreign investors who came with capital advanced technology and know how. In another development, the indigenous enterprises limited themselves to retail trading, small scale farming and handicrafts. A discussion on the development of the regulatory framework for foreign investment will be considered here in three phases.

2.5.1 The Pre/Post-Independence Period

At the conquest of Lagos and subsequent cessation of Lagos as a British colony in 1950s, it became obvious that the British motive was to improve the fortunes of the imperial exchequers. Consequent to the

---

[41] See Akin George in *Business Times*, Lagos, Monday, May 23rd, 1998

foregoing, the colonial government promulgated legislative orders tuned towards the improvement of the investment climate to promote the economic interests/efforts of the foreigners. The only form of international economic relations that then existed was limited to such activities for the satisfaction of the raw material requirements of the colonial enterprises. The foreign investment regime that emerged at this time was designed to promote and protect the interests of foreigners without the corresponding desire to develop the economy of the host community.

Analysing the state of affairs at the time, Diaku came to the following conclusions:

> Therefore, before 1950, investment and industrial activities in the country was modest, but received a boost between 1954 and 1959 when the regional government stepped up process of practical industrialisation of their regions, leaving the federal government to play the role of an enabler through putting in place industrial policies, infrastructural facilities and strategies for the whole of the country.[42]

Diaku further categorised the evolution of the regime in Nigeria into two phases. To him, the first phase spanned between 1952 and 1968

---

[42] Diaku, I., *Industrial Finance in Nigeria* (Lagos: Longman, 1989), p.17

which he said was characterised by a gradual industrial establishment[43]. The second, according to him started from the early 1970s and was characterised by the discriminate grant of incentives and a deliberate attempt to reform the economic sector to reflect the political situation.[44]

Historically, the first significant regulatory framework provided by the colonial government was the Industrial Development (Income Tax Relief) Act, 1958.[45] This piece of legislation granted tax relief to companies that were incorporated under Nigerian Law and were held entitled to enjoy pioneer status. Significantly, this statute granted a 5-year holiday to such companies from the time of commencement of business.

Within the period under review, other notable legislations aimed at promoting foreign investment were, the Exchange Control Act of 1962[46], the Immigration Act, 1963[47] and the Trade marks Act, 1965[48]. Interestingly, the Exchange Control Act, 1962 provided for the repatriation of capital and projects of Foreign Investors. The Trademarks Act, 1965 which was a re-enactment of the English Trademarks Act of 1938, recognised and gave protection to all trademarks that were registered in Great Britain at the time.

---

[43] Ibid, p.18

[44] See Aluko, S.A. "*The Case For Rapid Industrialization in Nigeria*" in *Quarterly Journal of Administration*, April 1978, p.277

[45] *Industrial Development (Income Tax Relief) Act, Cap. 87 of Laws of the Federation, 1958*

[46] *The Exchange Control Act, No. 16 of 1962*

[47] *Immigration Act No. 6 of 1963*

[48] *The Trademarks Act, No. 29 of 1965*

Understandably, during this period, the existing regulatory framework was ministerial in nature, and, largely, one of restraint and guidance contrary to any systematic regulatory approach directed towards the encouragement of foreign investment.[49]

2.5.2 The Indigenisation Era

The Nigerian government, soon after Nigeria attained her independence in 1960, commenced a vigorous and comprehensive programme of providing incentives to attract foreign investment with the motive of accelerating the industrialisation process in the country. Regrettably, there were series of calls upon the government to nationalise all the foreign interests in the Nigerian economy. The Governor-general then resisted all such calls and in clear terms made a policy statement to the effect that the government was not going to nationalise existing industries. This policy stand changed with the military take over of government and the subsequent break out of civil war in the country. In consequence, the Nigerian Enterprises Promotion Act was promulgated in 1972.[50] This Act reserved some businesses exclusively for Nigerians or Nigerian Companies while foreigners were allowed to participate in some other enterprises only if they met certain minimum requirements.

[49] See Akande, O., "*Regulation of Trade and Investments in Nigeria*" in Ajomo (ed). Regulation of Trade and Investment in an Era of Structural Adjustment the African experience (Lagos NIALS, 1994), p.2

[50] *No. 4 of 1972*

Unfortunately, the practical implementation of the indigenisation policy introduced by the legislation was marred by a few problems due largely to the inability of indigenous entrepreneurs to muster sufficient capital to establish some of these scheduled businesses. This failure made the public sector to take over the ownership and management of these enterprises. In the view of the foregoing, the federal government had to set up an industrial Enterprises Panel to examine the 1972 Act and assess the extent of its implementation. Following the report submitted by this panel, the 1972 Act was reviewed and this gave birth to the Nigerian Enterprises Promotion Act of 1977.[51]

The 1977 Act contained 3 basic schedules in relation to: enterprises exclusively reserved for Nigerians, enterprises which foreigners could own up 60% of equity participation and enterprises which foreigners were not permitted to own more than 40% equity participation.

It must be noted here that within this period, oil which was the country's major foreign income earner, suffered a universal glut which pushed the government to embark upon uncontrolled importation of goods and services and as a result, the country's foreign trade suffered a devastating blow in the hands of foreign exchange racketeers.

---

[51] *No. 3 of 1977*

Observably, the indigenisation policy did not achieve the desired goals. In the first instance, the policy came into being following nationalistic calls for the government to break the foreign domination of the economic domination.[52]

The policy was also aimed at transferring the ownership control and management of the enterprises to Nigerians and to prevent the economic effects, which any sudden withdrawal of foreign investors may have on the nation. All these were not achieved through the practical implementation of the policy. With the failure of the policy, government decided to adopt a more liberal policy that was aimed at attracting more foreign investment.

2.5.3 The Era of Structural Adjustment

The indigenisation era can be said to have brought about modest gains in the area of infrastructural development, but the period on the other hand witnessed a substantial outflow of resources far in excess of the inflow of foreign investment. The government therefore, realised the urgent need to introduce policies that will turn around the economy of the

---

[52] Which was perceived as another form of colonization.

nation. The Structural Adjustment Programme (SAP) was introduced as a policy thrust to implement the economic turn around.

Recounting the economic situation before the introduction of SAP, Akin George stated thus:

> Changes in economic policies have taken place so frequently in the past that prospective investors have found it wise to hold back in order to protect their investment. A ready example would suffice. The Obasanjo's regime before leaving office in 1979, undertook import restrictions in response to which many investors undertook investment in industrial plants to fill the gaps. However, no sooner had the Shagari administration came into being than the same policies were reserved thereby putting into jeopardy the investment gains made in response to the earlier measures.[53]

There is no doubt that these policy inconsistencies coupled with the stiffer policies of the Buhari/Idiagbon administration, dangerous signals were sent out to foreign investors across the globe. Consequently, by October 1985 the regime of President Ibrahim Babangida, which replaced that of Buhari/Idiagbon, declared a state of economic emergency under

---

[53] Akin-George, J., *Industrial and Economic Development in Nigeria: Selected Issues* (Lagos: Malt House Press Ltd., 2002), p.43

which as the President, he was given the full powers to make regulations and take such measures to ensure the turn around of the economy. It was in the exercise of these powers that this regime introduced SAP into the Nigerian Economy in 1986.

The Structural Adjustment Programme was based on policy measures, introduced to establish the requisite machineries for mobilising the inflow of foreign capital into the Nigerian economy. The principal objective of this programme was the implementation of incentives for the encouragement of foreign investment and the accumulation of capital. Pursuant to the structural adjustment programme, the government instituted legal and administrative measures aimed at the reformation of the economy. These include the Foreign Currency (Domiciliary Accounts) Decree of 1986,[54] the Export Incentives and Miscellaneous Provisions Decree of 1986,[55] the Second Tier Foreign Exchange Decree, 1986,[56] the Export Credit Guarantee and Insurance Corporation Decree of 1988. in addition to the foregoing measures, the regime also introduced other measures such as the debt conversion programme and the formulation of a new industrial policy.

---

[54] *No. 18 of 1985*
[55] *Decree No. 18 of 1986*
[56] *Decree No. 23 of 1986*

Toward attracting the inflow of foreign investments, the government introduced series of incentives which were packaged in an industrial policy that was launched in January 1989.[57] This package classified the incentives into 4 groups, namely:

(i) Tax Reliefs
(ii) Tariff Relief
(iii) Export Promotion Incentives
(iv) Foreign Currency Incentives

2.5.3 Tax Relief

Tax relief incentives, in addition to the existing industrial development (Income Tax Relief) Act, 1971, were granted to enterprises that were:

(a) engaged in export activities, particularly those that qualified as manufacturing exporters.[58]

(b) engaged in research and development. This tax incentive was to encourage research and developmental activities towards the growth of local industries and production.

2.5.3.2 Tariff Relief

In order to encourage foreign direct investment, the government enacted the Customs, Excise, Tariff, etc. (consolidated) Decree, 1988.

---

[57] See the Industrial Policy of Nigeria published by the Federal Ministry of Industry (Abuja, 1989).
[58] See the Export Incentives and Miscellaneous Provisions Decree 18 of 1986

This Law contained a comprehensive review of the tariff structure with the aim of ensuring the protection of the local industries.

2.5.3.3 Export Promotion Incentives

These incentives were granted so as to facilitate the growth of exports. They included the Export (Incentives and Miscellaneous Provisions) Decree, 1986 and the Export Credit Guarantee and Insurance Corporation Decree, 1988. These legislations actually served as an inducement and guarantee to exporters and promoted the industrialisation and exportation of Nigerian-made products which was indeed substantially undertaken by the foreign investors.

2.5.3.4 Foreign Currency Incentives

This form of incentives was introduced as a way of providing access to foreign exchange into the country. Hitherto this development, the extant legislations like the Exchange Control (Anti-Sabotage) Decree[59] discouraged the sourcing of foreign exchange into the country through the banking system. This administration therefore, enacted the Foreign Currency (Domiciliary Accounts) Decree, 1985 which permitted foreign investors to operate domiciliary accounts in banks authorised to go.

---

[59] *Enacted between 1977-1985*

In furtherance of the nation's economic recovery programme under SAP, the Second-Tier Foreign Exchange Market Decree was enacted and programmed to realign the external value of the Nigerian naira. The legislation was also designed to achieve the following objectives:

(i) to optimise the foreign exchange earnings;

(ii) encourage the inflow of foreign capital;

(iii) to ensure a more efficient utilisation of Nigeria's foreign exchange resources;

(iv) to eliminate or at least reduce to the barest minimum, black marketeering; and

(v) to discourage the accumulation of trade arrears.

The foregoing incentives coupled with governmental policy statements did set the stage to attract foreign investment within the structural adjustment era.

Apart from the foregoing incentives, the SAP era can rightly be referred to as the period of trade deregulation and liberalisation. This era also introduced the Nigerian Enterprises Promotion Decree, 1989, measures to eliminate bureaucratic delays in the processing of business permit. Applications were put in place through the establishment of one-

step foreign investment promotion agency – the Industrial Development Coordination Committee.

2.5.3.5 The Industrial Development and Coordination Committee

This Committee which was established by Decree No. 36 of 1988 was mandated to discharge the responsibilities of encouraging, promoting and coordinating foreign investments in Nigeria through the approval of pre-investment agreement on technical transfer, the issuance of new business approvals and expatriate quota and granting of approval status for imported capital in new ventures.

In practice, the IDCC, it was soon realised, was discriminatory to foreign investors and consequently became a disincentive to foreign investors who enthusiastically wanted to invest in Nigeria. Consequently this Agency failed in its assignment just like the SAP itself which was by design targeted at providing the requisite environment for the inflow of foreign investment into the country. It must be noted here that political instability coupled with other economic policies led to the failure of SAP which was introduced with laudable intentions.

2.6 The Nigerian Investment Promotion Commission

This Commission,[60] which replaced the IDCC, was established at the peak of privatisation, commercialisation and liberalisation policy in Nigeria. The establishment of this Commission was in itself motivated by the desire to encourage, promote and coordinate investments in the Nigerian economy. Section 1 of the Act which established the Commission, makes it a regulatory body charged with the responsibility to amongst other things perform the following functions:

(i) Coordinate and monitor all investment promotion activities in Nigeria.

(ii) Initiate and support measures for the enhancement of the investment climate in Nigeria for all classes of investors including both Nigerians and non-Nigerians.

(iii) To register and keep records of all enterprises to which the Act applies.

(iv) Identify specific investment areas and invite interested investors for participation.[61]

The Nigerian Investment Promotion Commission Act also contains ample stipulations for investment and the procedure for investing in Nigeria. Indeed, apart from the Oil and Gas sector and the enterprises contained in

---

[60] *Established by Nigerian Investment Promotion Commission Decree No. 16 of 1995 now NIPC Act.*
[61] *See section 4 of the NIPC Act.*

the negative list,[62] a foreign investor is permitted under sections 17 and 18 of the Act to invest and participate in any enterprise in Nigeria.

There is no doubt whatever that the foregoing efforts has as an underlying aim, the stimulation of the economy through the influx of foreign investment into Nigeria.

---

[62] *See Section 32 Ibid.*

CHAPTER THREE

IMPEDIMENTS TO THE FLOW OF FOREIGN INVESTMENTS INTO NIGERIA

3.1 POLITICAL INSTABILITY

In today's investment climate, the world is ever more committed to economic development, and foreign investment and other capital flows have become a vital component of that development. The international investment community is unanimous in accepting that foreign direct investment, particularly, plays a pivotal role in economic development. It provides a number of economic factors which are regarded as indispensable in this context. Amongst which are capital, technology and know-how. The volume of capital transfers through foreign investment is considerably larger than all forms of developmental aids both bilateral and multilateral, besides the foregoing, foreign investment facilitates access to world markets, to world wide distribution channels and other networks. Often times foreign investments contribute to the improvement of infrastructures in developing countries like telecommunication systems, roads and airports, to the training of the local workforce and to the development of local industries.

The foregoing has therefore led many developing countries, including Nigeria, to revise their previously reserved attitudes towards foreign investments and to adopt an open and warm attitude towards foreign investors. Today, developing countries compete for foreign investment and even strive to create conditions that are attractive to foreign investors.

At the outset, a foreign investor will require to understand the parameters, the environment and the nature of risk he will be exposed to before crossing the border to invest on a foreign shore. At present, cross-border transactions or international investments do not generally unfold in a "common policy framework", thus home state desirous of attracting foreign investments create the environment that eliminates the barriers and obstacles to the free moment of the flow of capital into its territory.

It is generally conceded that as a principle of international law, states may through regulation dictate the pace of their national economies and in this regard, states do have a wide discretion in the regulation of the activities of foreign investors. Consequently, foreign investors are generally subject to a plethora of regulations relating to employment, environmental protection, marketing and selling, and taxation laws of the host state. Thus host states have the right to determine which sectors of

the economy they would permit foreign investors to engage in, the financial limits to place on such investments, what restrictions if any, they would place on the import or export of materials, on the allocation of work permits, on remittal of profits, on the forms in which enterprises should be established and on taxes and other levies to be paid.

Foreign investors on the other hand, considering the doctrine of state sovereignty may consider the political climate, national legislations of the host state and other barriers before deciding to invest in a pentical state. In the same compass and flowing from the concomitant principle of sovereign equality, states are also taken to be subject to certain obligations towards other states to respect foreign nationals, including foreign investors operating within their state. States of origin of foreign investors are today concerned with acts of state which tend to discriminate against their nationals abroad.

Classical examples of state practice which became a major concern to the international community in relation to this serve to illustrate this point.

First, under the Nigerian indigenization programme which commenced in 1972[38], required foreign investors to divest themselves of holdings in certain sectors of the Nigerian economy. Exception was

[38] See Beveridge, F.C. "Taking Control of Foreign Investment: A ase Study of Nigeria" 40ICL1 (1991) 302, See also Sanda, K.A.O., The Challenge of Nigeria's Indigenization (Ibadan, Nigerian Institute of Social and Economic Research, 1982).

however, made to people of African descent resident in any of the African states.[2] This exception, one can say, appears to have been made to reduce the risk of retaliation against Nigerians with investments in such states. In any case, some economic and/or political grounds could probably be made out to satisfy the demands of international public policy in this case.[3]

The second instance relates to the expulsion from Uganda in the same 1972, of thousands of people of non-African origin, a measure which was directed against and affected in particular Asian residents. Besides suffering expulsion, these individuals suffered the loss of their property, private and/or commercial, an action which in a sense amounted de facto to expropriation. In the opinion of Boyd, this action constituted a breach of the prohibition on racial discrimination.[4]

It must therefore be noted that the wide discretion enjoyed by states in the treatment of foreign investments is fettered in principle by the customary international law prohibiting racial discrimination. In practice however, the scope for justifying discrimination in itself is very wide. As a result, most instances of indirect discrimination and many instances of

---

[2] That is, which permitted Nigerian Businessmen to participate in the relevant sectors of its economy.

[3] See further the Indonesian Nationalizations of Dutch assets contained in Domke, M. "Indonesian Nationalization Measures before Domestic Courts" 54 AJIL (1960) 305.

[4] See Boyd, F.C. '*Expropriation of Alien Property in International Law': A Study of Recent State Practice Concerning British Nationals*. (University of Nottingham, 1988). Chapter three. Note also the deportation of ECOWAS citizens from Nigeria by the Nigerian government in the 80s.

nationality-based discrimination will not be contrary to the international norms on racial discrimination. In which case, only the most blatant acts of racial discrimination against foreign investment could be regarded as unlawful under customary international law.[5]

This chapter therefore examines some of the challenges to the influx of foreign investment to Nigeria. In achieving this, the paper focuses on the wilful acts of the Nigerian state which discourages foreign investors, the political factors, the social and the environmental factors which impede the free flow of investments into Nigeria since independence in 1960. The objective of attracting foreign investment is the development of the Nigerian economy. The Nigerian government has over the years instituted laws and policies aimed at attracting foreign investments, regrettably, these efforts have not yielded the expedited results. This study inquires into the impediments that have pushed foreign investors to gravitate to other states from Nigeria.

To illustrate this point, the *Nigerian Tribune*[6] printed the following words in its front-page headline. "Worried Investors Sell Off Shares". Earlier on *The Guardian* had warned of the impending disaster under a front caption "Adamu Worried as Ghana emerges U.S Investors'

---

[5] See Generally, Breveridge, F.C. *The Treatment and Taxation of Foreign Investment under International Law* (Manchester University Press, 2000), p.13

[6] Thursday, 12th December, 1996.

favourite"[7]. Reporting further, *The Guardian* stated that the Nigerian Ambassador to the United States, Alhaji Hassan Adamu, was visibly worried at the turn of a possible shift in business activities from Nigeria to other Sub-Saharan countries. The Ambassador's efforts in mounting a campaign to promote American investment in Nigeria were sparked by the increased U.S. economic relations with Ghana.[8]

A similar alarm was again raised the following year by the *National Concord*[9] under a caption "Nigerian Investors Shift to South Africa, Asia". In the story the *National Concord* further reported that most foreign investors were diverting their investments to South African and Asian countries as a result of the country's harsh economic climate. Reasons advanced for this state of affairs range from political instability, insecurity, poor state of infrastructure, expropriation and investment unfriendly legislations, corruption, legal environment, taxation and the existence of a non-functioning public administration.

A greater percentage of Nigeria's years as an independent nation witnessed the governance of the nation by the military with its attendant characteristic of incessant coup'detats. To be more specific, between 1960 to 1999, the country enjoyed less than six years of democratic rule.

---

[7] Thursday, 21st November, 1996.
[8] p.15 ibid.
[9] 31st July, 1997.

Military dictatorship and economic development are strange bed fellows. The period of military rule in Nigeria drastically affected the country's ability to attract foreign investments. A substantial number of studies have revealed that political instability is a very strong impediment to the flow of foreign investment. For instance, a survey carried out by Alvin Wing reveals that political instability featured prominently as one of the main factors that influence the decision to invest in a particular territory.[10] Concurring with Alvin, Raghbir, while analysing the determinants of foreign investments, concluded that political instability was the most dominant influence on foreign investment flows.[11]

One of the major concerns shared by foreign investors in respect of political instability is inconsistency in legislations and policies. With each regime there is always the likelihood of change in policies and legislations. Some of the changes in legislations and policies have the effect of indirect expropriation on investments. For instance a change in the political leadership in Mexico in 1938 saw the New Mexican President, Lazaro Cárdenas nationalising the country's petroleum industry, which was then dominated by U.S. and U.K. Corporations. The

---

[10] See Wing Alvin, G. "*The Determinants and Distribution of FDI in Developing Countries*" in Creating a Favourable Environment for Foreign Investment, 1991.

[11] Raghbir, S.B. *Determinants of United States Private Direct Investment in Foreign Countries* (Kent State University, 1963).

President's action handed over to the Mexican government a monopoly in the exploitation of the country's oil and gas resources and in the production and marketing of petrochemicals. Even at the time, the president offered compensation to those corporations; the U.S. Oil Corporations pressurised their government to place an embargo on all the Mexican goods as a way of discouraging such future acts in other countries. The boycott and personal intervention of the American President, Franklin D. Roosevelt[12] succeeded in getting Mexico and the Oil Companies to arrive at a final settlement in 1943, under which the Oil Companies received US $24 million as compensation[13]. Interestingly the date of the nationalisation is still celebrated in Mexico today as a national holiday.

Nigeria found herself in this kind of situation when the successive military regimes introduced inconsistent legislations and policies which hold direct bearing on foreign investment. A good example can be found in the indigenisation policies that were introduced during the military regimes which drastically curtailed the influx of foreign investment into Nigeria. Even with the introduction of democratic rule in Nigeria, the way

[12] Under President Franklin D. Roosevelt's Good Neighbour Policy.
[13] See Yergin D., The Prize: The Epic Quest for Oil, Money and Power (1992) pp.271-279, see also Mexico, *The Economy, Oil,* http://countrystudies.us/mexico/78.htm.

and manner elections are conducted,[14] many investors are yet to be convinced of the country's political stability and are still wary of bringing their investments into Nigeria.

Commenting on the effect of political instability on foreign investment, Popoola state:

> Political unrest, armed conflict, low domestic investment levels and frequent changes in economic policies that affect business evolution of expected risks and returns were identified as the contributing factor to the decline.[15]

And in a fairly recent publication of the Geneva-based World Economic Forum[16], Nigeria was ranked 22nd out of the 23 African countries examined and the reasons given for the low ranking were political instability, military dictatorship and the lack of a clear direction in market-oriented economy.

Stressing the importance of good governance in economic development, Popoola concluded:

> There can be no doubt that Nigeria is in dire need of foreign investments; and the need is greater today than ever before.

---

[14] Many of which results into large scale political violence.

[15] See Popoola, A.O., "*Security, Stability, Foreign Investment and Economic Development in an Emerging Democracy: The Hyperactive of Good Governance*", in Foreign Investment Promotion in a Globalised World (Guobadia and Akper (eds), NALS, 2006) p.31.

[16] Carried out in Collaboration with the Harvard Institute for International Development. Entitled: "African Competitiveness Report, 1988".

> For the national economy to recover its momentum from the long period of little or no growth, a massive injection of foreign capital is needed. The World Bank estimate of the resource gap is $10 billion annually. Without a massive injection of foreign capital and investment in the national economy, the government target of an annual growth rate of 10 percent over the next few years will not be achieved. It goes without saying that the country must, among other things, more assiduously pursue the goals of good governance, in all its ramifications.[17]

A discussion on the barriers posed by political instability to the economic growth of Nigeria cannot be complete without restating the words of Nwabueze when he observed that the management of public affairs must be subjected to democratic principles and procedures i.e. equality, consultation, participation and supervision. Democratisation requires a genuine and meaningful, popular participation in politics and government, a free, virile, democratic, just and civil society. It demands equal treatment of all citizens by the state, the supremacy of the rule of law as opposed to the rule of force and an ordered, stable society, infused,

[17] Popoola, op. cit. p.35

as it were, with the spirit of liberty, democracy, and justice, the rule of law and order, and a recognition of the need to balance liberty with public order and state security.[18]

In concluding this discussion, one must agree with the summation of Franklin and Ahmed[19] that from the various considerations of the factors influencing inflows of foreign direct investment is that the principal determinants are the economic and political characteristics of each particular country.

3.2 EXPROPRIATION

The second factor that serves as a barrier to the flow of foreign investment is in the field of expropriation. Though definitions of the act of expropriation may vary, it is used to mean the taking of property, usually, though not necessary at all times, into public ownership. International law is brought to bear on the subject only where the property of foreign nationals is involved.[20] Speaking with the same tone, Dugan *et al.* defines Expropriation as:

---

[18] See generally, Nwabueze, B.O., *Military Rule and Social Justice in Nigeria*, (Spectrum Law Publishing, 1993).

[19] Franklin, R. and Ahmed, A., "*The Influence of Policy Instruments on Manufacturing, Direct Foreign Investment in Developing Countries*", Journal of International Business Studies, Winter, 1978.

[20] Beveridge, Op. Cit. p.13.

> The taking by a government of privately owned property, also known in the common law as eminent domain. Such taking is universally recognised as within the *inherent power* of a state over property located in its territory, and where the state expropriates only its own citizens' property, international law is not implicated.[21]

In light of the foregoing, expropriation implies an act of government of a state which interferes with private property.

Expropriation is therefore an act of nationalisation of private assets by a state regardless of whether the property is owned by the citizens or by foreign investors. International law can only be involved in an act of expropriation if the act involves the interest or property of foreign investors.

Expropriation is not per se a wrongful act under Customary International Law or under investment treaties unless certain other conditions are present. Westberg and Marchais adumbrate the position thus:

[21] See Dugan, C. and *et al. Investor State Avoitration*, (Oxford University Press, 2008), p.429.

> The general principle that a state may lawfully expropriates the property interests of a foreign non-state party located within its borders is universally recognised.[22]

International Law in relation to expropriation is concerned with the manner home states must treat foreign investors; expropriation therefore becomes a subset of the responsibility that a state has for injuries to nationals of another state. Expropriation by a state of assets of its nationals must thereof be distinguished from the expropriation of the assets of foreign investors. Commenting on this distinction, Dattu opined as follows:

> In so far as measures of expropriation only affect the nationals of the state carrying them out, there are no interests of foreigners to be protected and to date; international law has not limited a state's jurisdiction in this field.[23]

Expression a similar position, the U.S. Court in the case of HUIDIAN V. PHILIPPINE NATIONAL BANK[24] holds as follows:

---

[22] See Westberg, J.A. and Marchais, B.P., *General principles governing Foreign Investment as Articulated in Recent International Tribunal Awards and Writings of Publicist* (71CSID Rev-For.Inv.L.J. 1992) 453-454.

[23] Dattu, R., *A Journal from Havana to Paris: The Fifty-year Quest for the Elusive Multilateral Agreement on Investment* (24 Fordham Int'l L.J., 2000) 275 at 278-279.

[24] (1990) 9th Cir. 912 F.2d 1085

"Expropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law".[25]

The import of the foregoing assertions suggests that an action cannot lie against a state before international law for confiscating the assets of its citizens. Such citizens can seek redress within the legal system of the expropriating state. However where the assets or interests of foreign nationals are involved there are said to be rules of customary international law laying down certain minimum standards of treatment to be observed. Given the universal recognition of the sovereign rights of states, foreign investors do always hesitate to invest in a country where there is a high potential of expropriation of foreign assets.

Before directing the search light on how expropriation had been a hindering factor to the inflow of foreign investment to Nigeria it is pertinent at this point to examine the present day nature of expropriation. The law of expropriation, like other elements of international investment protection law, is lex ferenda.[26] Consequently, issues of particular interest in recent times include the types of property protected from expropriation, either through the terms of a treaty or through customary international

[25] At 1105 ibid

[26] That is, evolving overtime.

law.[27] Today expropriation take the form of a direct expropriation, in other words called outright nationalisation or it may take an indirect form, known as regulatory expropriation.

3.2.1 Direct Expropriation

Direct expropriation of foreign investment involves nationalisation, confiscation or physical seizure of a foreign investor's property or interest by a host state. Direct expropriation of the property of foreign investors not only constitutes a repudiation or breach of contract by the state with a national of another state, but it also amounts to a violation of public international law. Thus in the case of BRITISH PETROLEUM EXPLORATION CO. (LIBYA) LTD. V. GOVERNMENT OF THE LIBYAN ARAB REPUBLIC[28], it was held:

> The BP Nationalisation Law, and the action taken there under by the Respondent, do constitute a fundamental breach of the BP Concession as they amount to a total repudiation of the agreement and the obligations of the respondent there under, and, on the basis of rules of applicable systems of law too elementary and voluminous to require or permit citation… the taking by the Respondents of the property, rights and interests of the claimant

[27] The Law of expropriation deals with the treatment of investments after they are made. And customary international law, a country is free to refuse entry to an investment.
[28] (1973) 53 1.L.R 297.

clearly violates public international law as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character. Nearly two years have now passed since the nationalisation, and the fact that no offer of compensation has been made indicates that the taking was also confiscatory.[29]

Prior to the introduction of present day investment treaties[30], prohibition of expropriation under customary international law or Friendship, Commerce and Navigation[31] treaties principally provided for protection against foreign investors. In some other developments, states also espoused the claims of their nationals[32] on allegations that the property of their nationals had been expropriated. But in consideration of the universally recognised rights of states to nationalised assets within their jurisdiction, such confiscating state were placed under an obligation by international law to pay prompt and adequate compensation.

---

[29] At p.328, *See also the case of TEXACO OVERSEAS PETROLEUM CO/CALIFORNIA ASIATIC OIL CO. V. GOVERNMENT OF THE LIBYAN ARAB REPUBLIC (1978) 17 I.L.M.P.I.*, where it was held that "as state cannot invoke its sovereignty to disregard commitments freely undertaken… and cannot make null and void the rights of a contracting party which has performed its various obligations under the contract".

[30] Pakistan and Germany signed the First ever Bilateral Investment Treaty in 1959. current investment treaties provide a range of protections to foreign investors and their investments against expropriation, unfair and inequitable treatments.

[31] Popularly known as the FCN which provided that states could not expropriate foreign investment without paying compensation.

[32] In the exercise of diplomatic protection. Indeed, this represents the few claims adjudicated by the International Court of Justice. For example, the *FACTORY AT CHARZOW'S case, (1925), P.C.I.J.* (Ser. A) No. 13 and also *MAVROMMATIS JERUSALEM CONCESSION CASE (1925) P.C.I.J.* (Ser. A) No. 5.

Reviewing the evolution of the standard of compensation for the nationalisation of foreign investments, Dugan *et al.* assert:

> The classic rule describing the applicable standard of compensation for expropriation, which is often stated by quoting the "Hull Formula", was drawn from a 1938 letter sent by U.S. Secretary of State, Cordell Hull, to the Mexican government concerning properties owned by U.S. nationals and nationalised by Mexico. The Hull Formula of "Prompt, adequate and effective payment" seemed to define the law of international expropriation for the first half of the twentieth century.[33]

In 1938, following the nationalisation of properties of U.S. Nationals by Mexico, Cordell Hull, U.S. Secretary of State, wrote a letter, to the Mexican government, in which he stated:

> The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognised authorities on international law support its declaration that, under every rule of law and equity no government is entitled to expropriate private property, for

[33] Dugan, C.J. *et al.* op. cit. p.433.

> whatever purpose, without provisions for prompt, adequate, and effective payment therefore.[34]

The contents of this letter were later to become the standard for the payment of compensation for the confiscation of foreign investments.[35] In applying the Hull's doctrine, the court, in the case of WEST V. MULTIBANCO COMERMEX, S.A.[36], held:

> The right to expropriate property is coupled with and conditional on the obligation to make adequate, effective and prompt compensation. The legality of an expropriation is in fact dependent upon the observance of these requirements.[37]

Consequent upon the foregoing, in one of the earliest cases on expropriation, DELOCOA BAY AND EAST AFRICAN RAILROAD Co. (U.S. & GR. BRITAIN) V. PORTUGAL[38], the tribunal held that the cancellation, by Portugal of a concession contract owned by U.S. and British interests, amounted to an expropriation to which customary law[39] required full compensation. This dictum was also applied in CHORZOW

---

[34] See Hackworth, G., *Digest of International Law* (U.S., G.P.O. 1943) 657.
[35] See Norton, P.M., *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 A.M.J.I.L. 474 (1991), see also Schechter, O., Compensation for Expropriation, 78 A.M.J. Int'l L. 121 (1984).
[36] (1987) 9th Cir. 807 F.2d 820.
[37] At pp.832-833. ibid.
[38] (1900) Reported in Majorie Whiteman, 3 Damages Int'l L. 1694 (1943).
[39] As "Universally accepted rules of Law".

FACTORY CASE[40] where Germany sought reparation from Poland on behalf of two German companies for the expropriation of properties owned by the companies in areas that were transferred to Poland under the treaties that brought to an end World War I. the Tribunal held:

> Reparation must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed. It based this ruling both on the provisions of the relevant treaties between the states and on customary international law, stating full compensation was a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals.[41]

Following the same principles, the tribunal in the NORWEGIAN SHIPOWNERS CLAIM[42], held that contracts between citizens and U.S. Shipyards were property. When the U.S. Government took control of shipyards following its entry into World War I and did not complete the contracts or return payments, the tribunal found that its measures amounted to expropriation. The tribunal in coming to this conclusion

[40] Supra, note 32
[41] pp.47-49 ibid.
[42] I.R. Int'l Arb. Awards (1922) 307

relied on both U.S. Law and "international law based on the respect for private property".[43]

It is necessary to reiterate here that where direct expropriation of foreign investment occurs, the nationalising state must pay just compensation to the foreign investor[44] even where the nationalisation is lawful. Enforcing this premise, the tribunals in the case of AMERICAN INTERNATIONAL GROUP V. THE ISLAMIC REPUBLIC OF IRAN[45] declared as follows:

> It is a general principle of public international law that even in a case of lawful nationalisation the former owner of the nationalised property is normally entitled to compensation for the value of the property taken.[46]

The aforementioned general principle of international investment law relating to expropriation established under customary international law has today been codified and reflected in the 1987 Restatement of Foreign Relations Law of the United States[47] as follows:

---

[43] p.334 ibid.

[44] See *SOLA TILES V. IRAN* where it was held that the expropriation requirements held that the expropriation requirement of the treaty were the same standard required by general International Law, quoted in Dugan, op. cit. p.437.

[45] *(1983) 4 Iran – U.S. C.T.R. 96*

[46] See UN General Assembly Resolutions in response to the Newly Independent States for rights of self-determination including rights to expropriate without the obligation to pay full compensation.

[47] Section 712 of 19 & 7 Restatement (Third) of Foreign Relations of the United States.

> A state is responsible under international law for injury resulting from:
>
> (1) a taking by the state of the property of a national of another state that:
>
> (a) is not for public purposes, or
>
> (b) is discriminatory, or
>
> (c) is not accompanied by provision for just compensation.
>
> For compensation to be just under this subsection, it must, in the absence of exceptional circumstances, be in an amount equivalent to the value of the property taken and be paid at the time of taking, or within a reasonable time thereafter with interest from the date of taking, and in a form economically usable by the foreign national.[48]

In view of the foregoing, international law is today very clear 'that the expropriation of foreign investors' property or interests can only be done so on the conditions that it is done in a non-discriminatory manner, for a public purpose, and most importantly on payment of full compensation. But more interesting and heart warming is the fact that a greater percentage of Bilateral or Multilateral Investment Treaties today

---

[48] ibid.

contain provisions on the treatment of expropriations. This is confirmed by the following 2006 study of the United Nations Conference on Trade and Development:

> Most agreements include the same four requirements for a lawful expropriation namely, public purpose, non-discrimination, due process and payment of compensation. Furthermore most BITs (Bilateral Investment Treaties) 'have similar provision regarding the standard of compensation. Notwithstanding some variation in language, the overwhelming majority of BITs provide for prompt, adequate and effective compensation, based on the market or genuine value of the investment. However, BITs differ on the degree of specificity and sophistication concerning the calculation and payment of compensation. The normative convergence among the BITs regarding the conditions for expropriation reflects the important domestic reforms that most developing countries have undertaken during the last 20 years to improve their domestic investment climate.[49]

[49] UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rule Making 52* (2007).

It is therefore a settled fact in law that the physical seizure of property of foreign investors' without compensation paid by the state constitutes a direct expropriation which in turn constitutes an impediment to the flow of foreign investment. Indeed, the records of international investment law are replete with situations of outright physical seizure of mines, oil and gas fields, factories, businesses, and land.

Nigeria is not an exception in this regard. In the early post-independence period, there were calls upon the new government to nationalise the interests and properties of foreign investors. During this period, the general fear was that the Nigerian economy was dominated by foreigners[50]. These calls were however resisted by the then Governor-General who also made it clear that the government was not going to nationalise the properties and industries owned by the foreign investors. This policy was, however, not maintained by the military that overthrew the civilian government in Nigeria. The military government consequently introduced a policy of indigenisation[51] which not only reserved some businesses exclusively for Nigerians, but also proceeded to nationalise

---

[50] Trade and related services were then controlled by foreign investors who imported both capital and advanced technology.

[51] Effected by Nigerian Enterprises Promotion Act. No. 4 of 1972 subsequently replaced by Nigerian Enterprises Promotion Act No. 3 of 1977 (Now repealed too).

properties and interests of foreign investors.[52] the Nigerian government in 1972 nationalised the equity and interests of foreign investors who were directed to divest themselves from certain sectors of the Nigerian economy. The interests of Shell British Petroleum were subsequently expropriated directly.[53] These developments in Nigeria at this time couple with the report published by OECD which attempted to analyse the link between expropriatory action and foreign investment flows[54], many foreigners became distracted from investing in Nigeria. With this antecedent, direct expropriation is still visible as an impediment to the flow of foreign investment into Nigeria.

3.2.2 Indirect or Regulatory Expropriation

Regulatory expropriation in other words referred to as creeping expropriation refers to a form of expropriation which is effected through a series of acts initiated or tolerated by the government at the end of which the foreign investor is deprived of the economic use of his or its property.[55] By this type of expropriation, a government regulation which

---

[52] See Beveridge, F.C., *"Taking control of foreign investment; A case study of Nigeria"* 40 ICLQ (1991) 302.

[53] See Biervtecker, T.J., *Multinationals, the state, and control of the Nigerian Economy* (Princeton University Press, 1987) see also Osunbor, O.A., "Nigeria's Investment Laws and the state control of Multinationals' 31CSID-FILJ (1988) 38.

[54] OECD Development Centre, *The Relaqtion of Expropriatory Action by Developing Countries to foreign investment flows* (OECD, 1972).

[55] See Brower, C.N. and Rueschke, J.O., *the Tran-United States claims Tribunal* (The Hague: Martinus Njhoff Publishers, 1998) '?4590.

either renders an investment illegal or the foreign investor incapable of operating will produce the same effect as direct expropriation.[56] With the gradual demise of formal or direct expropriation in the last two decades, regulatory taking or creeping expropriation is today becoming the commonest method through which states interfere with the property or interests of foreign investors. With these developments it is becoming increasingly difficult to ascertain the kinds of state acts that constitute expropriation. This means any determination of whether or not there has been a regulatory or indirect expropriation must be dependant on the particular facts of the dispute.

Indeed, the issue becomes more contentious under circumstances where there does not exist any physical seizure or outright transfer of title, but instead where a government enacts a measure which interferes with the foreign investor's proprietary interests or rights or even diminishes the value of a property or property rights. Conversely, international investment jurisprudence today point to the fact that such governmental interference or other measures' share of seizure can at some point constitute an expropriation. For instance, in TIPPETTS, ABBETT,

---

[56] See Walde, T., Kolo, A.L., "*Environmental Regulation, Investment Protection and Regulatory Taking in International Law, 50 Int'l & GCoup LQ 811 (2001).* See also Al-Qureshi, Z., "Indirect Expropriation in the field of Petroleum 5(6) JWIT 897 (2004), Dolzer, R.O., "Indirect Expropriation of Alien Property", I ICSID Rev. – FILJ 41 (1986).

MCCARTHY, STRATTON V. TAMS-AFFA CONSULTING ENGINEERS OF IRAN, THE GOVT. OF THE ISLAMIC REPUBLIC OF IRAN & ORS[57], the tribunal found expropriation and thereby concluded: "A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected". Similarly in the case of STARRET HOUSING CORPORATION V. GOVT. OF THE ISLAMIC REPUBLIC OF IRAN[58], the tribunal made the following observations:

> The government of Iran did not issue any law or decree according to which the investment expressly was nationalised or expropriated. However, it is recognised in international law that measures taken by a state can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the state does not purport to have expropriated them and the legal titled to the property formally remains with the original owner.[59]

---

[57] (1984) 6 Iran-US L. Trib. Rep. 219.
[58] (1983) 4 Iran-US CL. Trib. Rep. 122.
[59] Ibid.

The decision in Starret Housing was followed in TECMED V. UNITED MEXICAN STATE[60] where the Mexican Government's refusal to renew a permit to operate a landfill that it purchased and the closure of Landfill meant that "the economic or commercial value directly or indirectly associated with those operations and activities and with the assets earmarked for such operations and activities was irremediably destroyed". The Tribunal thereby concluded that:

> Under international law, the owner is also deprived of property where the use of enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary.[61]

The convention establishing the Multilateral Investment Guarantee Agency[62] describes a regulatory taking or creeping expropriation as:

> Any legislative action or administrative action or mission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from his investment, which the exception of non-discriminatory measures of general application which the governments normally take for

---

[60] *ICSID case No. ARB (AF)/00/2, (2004) 43 I.L.M. 133*
[61] Ibid.
[62] MIGA

> the purpose of regulating economic activity in their territories.[63]

The foregoing therefore, suggests that the most determinant factor asserting the occurrence of indirect expropriation is the effect or consequences of the government's measures on the foreign investor's property. Thus by implication, a government's intent or purpose for enacting a regulation or taking a particular measure may not be of any consideration as that of the measure's consequences on the investment. In view of this, the tribunal in TECMED's case noted[64] that:

> The government's intention is less important than the effects of the measure on the owner of the assets or on the benefits arising from such assets affected by the measures and the form of deprivation measures is less important than its actual effects.

Following the same principle, the Tribunal in BILOUNE V. GHANA INVESTMENT CENTRE[65], came to the same conclusion where the tribunal found that:

> The conjunction of the stop work order, the demolition of the investor's construction project, the summons of the investor

[63] Article 11 (ii) of the Convention
[64] Supra, note 60
[65] *(1990) 95 I.L.R. 184.*

> to governmental offices, the arrest of the investor, the detention of the investor and the deportation of the investor had the effect of causing the irreparable cessation of work on the project.[66]

In the light of the above, some of the regulatory measures and acts of coercion meted out to foreign investors by the Nigerian government amount to indirect expropriation. For example, the introduction of the indigenisation policies and legislations which outlawed or made illegal or deprived foreign investors' participation in some businesses in Nigeria grossly affected the interests and property rights of foreign investors.[67] Other examples can be found in the prosecution of foreign investors such as the Vaswani brothers who were arbitrary deported from Nigeria leaving behind all their investments. This conduct on the part of the Nigerian government was viewed as indirect expropriation.

Regrettably, in the late 1960s the Federal Government of Nigeria, under military leadership, succumbed to the calls and pressure of allowing Nigerians take over the control and ownership of the Nigerian economy. The expectation of the government's policy was to ensure that business

---

[66] At 209 ibid. *See also the case of MIDDLE EAST CEMENT V. ARAB REPUBLIC OF EGYPT, ICSID case No. ARB 99/6 delivered on April 12, 2002.*
[67] See the Nigerian Government Policies and legislations during the indigenization//era, particularly those listed infra, notes 69.

and investment practices in Nigeria was brought into terms with UN General Assembly Resolution on Permanent Sovereignty over Natural Resources.[68] And pursuant to this, the Nigerian government enacted the Companies Act of 1968[69], the Banking Act, 1969[70], the Petroleum Act, 1969[71], the Copyright Act, 1970[72], the Patents and Designs Act, 1970[73], and above all the Nigerian Enterprises Promotion Act, 1972[74], which as earlier started were aimed at precluding the participation of foreigners in some enterprises in Nigeria[75], while in some other enterprises listed under schedules II and III the equity shares were to be shared between Nigerians and foreign investors in the ratio of 60:40 and 40:60 respectively.

Commenting on the negative impact of the Nigerian governmental measures to the inflow of foreign investments, Okon observed as follows:

> Though the Indigenisation Act had the object of encouraging local entrepreneurship, it also, to an extent, prevented the growth of foreign investment in Nigeria especially with government's strict

---

[68] Resolution (1803) XVII of 14th December, 1962 which was passed to satisfy the yearning of the newly independent states and the socialist states.
[69] *No. 51 of 1968*
[70] *No. 1 of 1969*
[71] *No. 51 of 1969*
[72] *No. 61 of 1970*
[73] *No. 60 of 1970*
[74] *No. 4 of 1972 as amended in 1973, 74 and 1977 before it was eventually repealed in 1995.*
[75] Schedule I ibid. Pursuant to these regulations, the Nigerian Government also introduced a policy of Nigerianisation of prostitutions held by expatriates. See further, Akanle, O., "Regulation of "Trade and Investment in Nigeria" in regulation of Trade and Investment in Era of structural Adjustment: The African Experience" (Ojomo, M.A. *et al.* eds) NIALS 1995, p.43.

policy of regulation of foreign investment through an expatriate quota policy exchange regulation and other sundry laws and policies which tended to further restrict importation of foreign capital.[76]

There is no doubt that most of these policies and legislations which constitute regulatory or creeping expropriation contributed greatly in impeding the inflow of foreign investments into Nigeria.

3.3 Lack of Basic Infrastructure

One of the major reasons given for Nigeria's failure to attract the much desired foreign investments despite the efforts made by the successive Nigerian Government right from the regime of General Ibrahim Basbangida to that of President Olusegun Obasanjo, is the inadequacy of the basic infrastructures in Nigeria. The basic infrastructures which have been and are still being lacked in Nigeria include, electricity, water, roads, telecommunication[77] services, oil and gas supply[77], transportation and a host of others.

---

[76] See Okon, E.E., "*Foreign Investment and National Security in Developing Countries Under the Globalised Environment: The Nigerian Perspective*" in Guobasdia & Akper (eds) op. cit. p.117 at 153

[77] With the introduction of GSM services, the telephone system has improved a little bit, but sadly, the land lines are far from being in operation in Nigeria.

[77] It is contradictory that Nigeria, an oil producing country, does not have enough oil and gas supply for domestic use

Gem refers to infrastructure as a generic term, used in describing the basic requirements or facilities that support economic and social activities in a developed economy, and covers roads, bridges, railways, steerage treatment, power generation and distribution, telecommunication, water, airports, seaports, transportation, etc.[79] In other words, basic infrastructure means the requisite tools that are required as a vehicle for economic development. In Nigeria, these tools are referred to as the public benefits which the government is under the obligation to confer. The near absence of these basic tools makes cost of production in all spheres of life very high. This no doubt slows the pace of economic development and serves as a hindrance to the inflow of foreign investment into the country.

Commentators on the state of infrastructure in Nigeria are unanimous that the high operational and production cost is a subject of major concern to many desiring foreign investors. According to Obitayo[80]:

> A major concern of foreign investors with Nigeria is the burden of high operating cost which impact adversely on domestic supply. It makes investment highly unprofitable relative to the rest of the world. Deteriorating infrastructural support services have

[79] See Gem, C., Business Dictionary, 1974.
[80] Obitayo, K.M. then a Deputy Director, Economic Policy Unit, Central Bank of Nigeria.

contributed enormously to the escalating production cost which undermines Nigeria's global competitiveness for capital. Over 80 percent of firms operating in Nigeria generate electricity privately, dig their own boreholes for water and buy poles for telephone wires to factory sites.[81]

The same concerns were earlier on echoed by the *Nigeria Punch* newspaper in these words:

> … the present state of our infrastructural facilities does not hold out much hope for entrepreneurial activities especially in the areas of power and telecommunications. Nigeria's telephone network is grossly inadequate while electricity generation remains epileptic. These twin problems have constituted the country into a high cost production area with the attendant negative effect on product pricing and business expansion. No doubt, this situation will pose a great challenge to investors in Nigeria in the next millennium.[82]

It is rather unfortunate that the words of Punch Newspaper made over ten years ago still represent the infrastructural situation in Nigeria

[81] Obitayo, K.M., Image building and Investment. Generation – Property for Nigeria in Guobadia & Akper (eds) Op. Cit. p. 51 at p.60.
[82] See *The Punch* newspaper of Thursday, May 25th, 1998, p.17

up-to-date. Relatedly, Obadan also considers inadequate infrastructure a major obstacle to the influx of foreign investments into Nigeria. To him:

> Policy must continue to focus on adequate provision and rehabilitation of infrastructure: fuel supply, water supply, transportation, telecommunications, etc. as a critical element of an enabling environment for private sector held growth.[83]

The conclusion that can be drawn from the foregoing commentaries is that basic infrastructure is a sine qua non for the survival of any business. This has constituted a major concern to foreign investors whose major aim for seeking to invest in Nigeria is to make profit.

The present state of infrastructure in Nigeria is bad and if urgent steps are not taken to address it, may get worse. And until Nigeria rises up to these challenges, foreign investment inflow will continue to elude the country.

3.4 NATIONAL INSECURITY AND UNFAVOURABLE BUSINESS CLIMATE

The problem of national insecurity and the unhealthy business climate is another major barrier to the flow of foreign investments in Nigeria. The prevailing insecurity and the incessant violent activities in

---

[83] See Obadan, M.I., International Trade and Globalization: The Socio-Political and Economic Realities for Nigeria, in Guobadia op. cit. p.201.

the country have not only discouraged many intending foreign investors from investing into the country but have also prompted many foreign investors into shifting their investments to other jurisdictions. The picture of national insecurity was clearly pointed out by *The Vanguard* Newspaper in these words:

> The guns are still booming in Warri and the Niger-Delta. Ijaws versus Itsekiris; Ijaws versus Ilajes. Ogonis killed themselves and were in turn killed by the state; they soak the creeks in blood; they torch their assets with the fire of hatred! Move up land to the cradle of the Yoruba race, Ile-Ife. The bloodlettings between the Ifes and the Modakekes have left hundreds dead, thousands maimed and billion naira assets wasted. The war is far from being over. Hoodlums have been replaying the Niger Delta war in the jungles of Ife-land, since August, 1977. What of the Jukuns against the Kutebs? These reflect hundreds of our new "civil war, North, East, West, South, etc. waiting to be exploited for partisan politics.[84]

If the statement of *The Vanguard* Newspaper made 10 years ago appears to be an exaggeration, which it wasn't, the present situation is

[84] *Vanguard Newspaper* of Thursday, January 14, 1999, p.9.

even worse. Recounting the role of insecurity as an obstacle to the economic development of Nigeria and as a factor impeding the inflow of foreign investment, Okon succinctly observed in the following words:

> From the second half of the 1980s, ethnic and religious crisis became the order of the day. Armed robbers took residents of most of the commercial towns in Niger hostage and the assassination of prominent politicians and industrialists became fairly regular occurrences. The Nigeria Police became helpless, as its men could not contain the high level of crime, extreme violence by ethnic groups and of course, the general insecurity in the country. To worsen the situation, the then Military President, General Babangida (rtd) annulled 'the June 12, 1993 presidential election, and late General Abacha ordered the killing of the controversial environmental activist Ken Saro Wiwa when the Heads of Commonwealth Nations were still meeting. The political crisis that followed the annulment of the June 12, 1993 presidential election were such that no reasonable foreigner could think of investing in Nigeria. Also, the suspension of Nigeria by the Commonwealth caused citizens and business

> organisations from other Commonwealth nations to abandon the idea of investing in Nigeria.[85]

The problem of national insecurity in Nigeria today has gone beyond that of political violence. Many foreign investors are subject of attack themselves. There are instances of kidnappings of foreign investors, almost on daily basis, particularly within the Niger-Delta area.

Properties and investments of the foreigners also come under direct attacks. Situations of oil bunkering and the destructions of oil installations of foreign investors are all examples of the state of insecurity threatening foreign investment in Nigeria. The endless insecurity in Nigeria which range from ethnic conflicts to religious clashes, restiveness in the oil producing communities, the emergence of ethnic militia, intra-ethnic and/or communal disturbances, escalating crime wave will no doubt over-shadow whatever incentives that the Nigerian government may provide to attract foreign investment. No foreign investor will consciously invest in an environment where there are heightened insecurity and where the protection of his investment cannot be guaranteed.[86]

---

[85] Okon, op. cit., pp.153-154.

[86] See Quattara, A.D., "*Opening and Liberalising Markets in Africa – A Response to Globalisation*". A Keynote Address delivered I Berhim, 2/12/1998, where the said "even if right economic policies are intermitted no progress will be possible if armed conflicts persist."

3.5 CORRUPTION AND LACK OF TRANSPARENCY IN GOVERNANCE

Most foreign investors often have difficulties in transacting businesses outside their jurisdictions on grounds of inability to access applicable norms existing in those other jurisdictions. Corruption and lack of transparency also constitute various obstacles in this sphere. Studies have revealed that corruption has eaten deeply into the body system of Nigeria.

There is a high level of corruption in both the private and public sectors of the economy as it is today made evident by the number of public officers who are being prosecuted by the Economic and Financial Crimes Commission.[87] Illustratively, Chief Alamasiegha and Chief Lucky Igbinedion[88], Chief Tafa Balogun[89], Chief Bode George[90] have all been convicted of corrupt practices.

Not too long ago, the government of President Olusegun Obasanjo identified at least US 4 billion dollars said to have been looted by the late military Head of State, General Sani Abacha. Foreign investors have also

---

[87] An Agency of the Federal Government of Nigeria established to investigate, prevent and persecute financial crimes including corruption.

[88] Both former State Governor convicted on charges of corruption and unlawfully enriching themselves from state resources.

[89] Former Inspector-General of Police

[90] A prominent political and former Chairman of Nigeria Ports Authority convicted on charges of corruption

been mentioned as being involved in some of the corrupt practices. They are said to offer bribe to Nigerian politicians to obtain juicy contracts and other concessions.[91] It does appear that corruption is generally endemic in developing economies. The drawback of corruption is enormous as the flow of foreign investments and gains accruable from profitable business operations stand threatened by the level of corruption, fraud, graft, misappropriation of authorized funds and mismanagement of authorised fund and mismanagement of the signet. Activities of fraudsters are a source of concern and they erode foreign investors' confidence in the system.[92]

The place of transparency, accountability and probity in reassuring and building the confidence of foreign investors cannot be over stated in the efforts put in place by the government in enacting anti-corruption legislations and putting in place the relevant agencies, namely, the Economic and Financial Crimes Commission[93], and the Independent Corrupt Practices Commission[94] are good steps in the right direction. There is however, a great need to back up these efforts with a culture of

---

[91] The Siemens and Haliburton's bribery scandals
[92] Popoola, Op. Cit., p.43 and Obitayo, Op. Cit. p.62
[93] EFCC
[94] ICPC

accountability which will frown at and serve as the guarantee against corruption.

Nigeria has for quite sometime now put in a lot of efforts aimed at attracting foreign investments into the country. These efforts have yielded some fruitful results as can be seen through the presence of some foreign investors in Nigeria, but it is still very clear that there still exist a very wide margin between the expected inflow of foreign investors and those already on ground.

It is seemingly unfortunate that the investment promotion incentives and the investment guarantees put forward by Nigeria have been enveloped by the strong factors that still impede the influx of the expected foreign investments into the country.

This chapter observed and noted that these obstacles are so strong that if not removed Nigeria cannot meet her desired goal of attracting the inflow of capital into the national economy. The steps required to be taken in removing these obstacles and the role which law can play in achieving this will be discussed in the next chapter.

CHAPTER FOUR

INTERNATIONAL LEGAL FRAMEWORK FOR THE PROMOTION AND PROTECTION OF FOREIGN INVESTMENTS

4.1 NATURE OF CROSS-BORDER INVESTMENT REGULATIONS

In the world today, much of the economic development and the social transformation that have occurred in recent decades have fundamentally been influenced by transnational business activities. The United Nations on its own part, as an international centre for consensus-building, has in this direction developed instruments for international cooperation to foster a supportive international economic environment. The generation of wealth and prosperity at the global level has to a great extent been so uneven and this has been so to the extent that the economic imbalances are seen to exacerbate social problems and political instability in virtually every region of the world.

Foreign investment has today become a vital tool for ensuring economic expansion and globalization geared towards ensuring human welfare, sustainable development, the eradication of poverty, fair trade and the reduction of crippling foreign debt. With the dramatic growth of

foreign investment, many countries, particularly the developing nations have continued to put in place legal instruments for the promotion, and to open their economies to such investments. The international community has also in this connection established mechanisms and institutions to assist developing states to attract foreign investments.

Cross-border investments and law are traditionally tied together. Regulatory regimes are required in defining the role of host states towards foreign investors and in addition for purposes of creating mechanisms and procedures for resolving or settlement of disputes in relation to such obligations. This paper focuses on the significance of law as the most important instrument for effecting cross-border investments.

Over the years, the international investments communities have come to realise that the absence of appropriate legal instruments impeded the expansion of cross-border investments and in addition was responsible for the incessant disputes that were existing between host states and foreign investors.

Law is the key to cross-border investments. Foreign investors have a variety of choices as regards the territories to export their capital. Security becomes the central issue that investors take not consideration in

deciding where to invest. Commenting on the justification for the evolution of investment regulatory regimes, Akinsanya stated:

> Private investors invest to make profits and not for reasons of benevolence. Thus, if they make profits they expect, albeit not unnaturally, to keep them, subject to payment of appropriate taxes to the local authorities, if they acquire property, they expect to be entitled to keep it. The feeling of insecurity in these respects is perhaps, the major deterrent to the flow of direct foreign investment in less-developed countries…[1]

It is difficult to disagree with Akinsanya's observations given that all over the world, one of the fundamental factors for international investment protection is to minimise foreign investor's insecurity.

To Dugan *et al.*, one of the principal purposes of the global investment protection regime:

> Is to reduce this investor insecurity, increase investment, and reduce poverty, especially in the developing world. Opportunities for investment exist throughout the world, and the market for capital placement is driven by the realistic rate

[1] Akinsanya, A. *International protection of Direct Foreign Investment in the Third World,* 36 Int'l Corp. L.Q. 58 (1987).

> of return investors can expect. The real rate of return meanwhile is determined not only by the expected income of a given project, but by the risks – to which a given investment will be subject.[2]

It is in respect of the foregoing and in cognisance of the benefits derivable from cross-border investments that even sovereign states submit themselves to the investment arbitral institutions by which they raise the sword of Damocles high over their heads. This further assures potential investors that an arbitral tribunal will vindicate their risk expectation; even if the state eventually opt to disregard its obligations.[3]

Some commentators also made similar observations thus:

> It is at first sight perhaps difficult to understand why governments would voluntarily limit their sovereignty by submitting to such processes of arbitration-enforced discipline. One needs to realise, though,that by accepting such external, politically less malleable discipline, a country gains in reputation, in lowering its political risks reputation and enhancing its ability to participate and benefits fully

[2] Dugan, C. *et al. Investor-State Arbitration* (New York: Oxford University Press, 2008) p.6
[3] Ibid.

> from the global economy. Governments who don't are seen as higher risk and therefore penalised, usually with good reason, in many ways by investors and the global markets. Submitting to such external disciplines also provides governments with a defence against domestic pressure groups – business lobbies and ideological interest groups – which can often capture the domestic regulatory machinery and manoeuvre it for protectionist policies which in the end damage the country at large and the wealth-creating potential of the global economy.[4]

There is no doubt that when countries submit themselves to these arrangements, a lot of investors become convinced and are resultantly more readily prepared to invest in such countries. This invariably means that investment regulatory regimes do facilitate increases in investment flows. Assessing the impact of Bilateral Investment Treaties[5] in the flow of foreign investments, Salacuse and Sullivan concluded as follows:

> But it is clear that a U.S. BIT is more correlated with FDI inflows than other BITs… The regration results indicate that

[4] See Wailer, T. and Walde, T., "*Investment Arbitration under the Energy Charter in the light of New NAFTA precedents*". Towards a Global code of conduct for Economic Regulation, http://www.casandoil.com/ogel/samples/frearticle/article-5/htm

[5] Community referred to as BITs

> the presence of a U.S. BIT has large, positive and significant association with a country's overall FDI inflows… If a developing country truly wishes to promote foreign investment, it is better to sign a BIT with protection standards, like those advocated by the United States than over with weaker standards as evidenced by certain other OECD countries. Signing a U.S BIT may also tend to lead to increased FDI flows from other OECD countries because OECD investors by virtue of the MFNB clause… gain the protection of the high protective standards in U.S. BITs.[6]

Historically, there are records where government actions caused economic disasters to foreign investors. For instance, Mexico's President, Lazaro Sardenas, in 1938, nationalisation of the countries viable petroleum industry caused a lot of economic set back to the investors. Consequently, situations whereby governments enter into binding obligations aimed at securing the interests of foreign investors certainly paves the way fort the inflow of foreign investments into such countries.

---

[6] Salacuse, J. and Sullivan, N., "*Do BITs really work: An evaluation of Bilateral Investment Treaties and their Grand Bargain*", 46 Harv. Int'l L. J. 67, 106-7 (2005). See also Egger, P. and Praffermayr, M., "*The impact of Bilateral Investment Treaties on Foreign Direct Investment*", 32 J. Comp. Econ. 788 (2004).

The modern investment regime is "codified in a vast network of bilateral investment treaties, supported by an ever-evolving body of customary international law".[7] In very broad terms, these BITs and treaties do provide high standard protections against arbitral expropriations, discriminatory acts of states. BITs also provide principles of fair and equitable treatment and the full protection and security of cross-border investments. Instructively, under the BITs where a foreign investor is aggrieved or has caused to feel that his rights have been violated, the treaty affords him the opportunity to lay his complaint and to seek for remedies before an international arbitration tribunal. Further to the foregoing, these treaties have today eliminated the political and diplomatic barriers that had hitherto existed under customary international law. Prior to the evaluation of the investment regulatory regimes, cross-border investors were usually confronted with serious obstacles in the course of seeking redress before the judicial systems of host states. Studies carried out by Cornell and Handley[8] suggest that Western investors encountered a lot of difficulties in the settlement of investment disputes before arbitral and judicial institutions in Pakistan and

---

[7] See Dugan, op. cit. p.2.

[8] See Cornell P. and Handley, A., "*Himpruna and Hub: International Arbitration in Developing Countries*". Medley's Int'l Arb. Rep. Sept. 2000.

Indonesia.[9] International investment treaty system, therefore provides protection against local bias and prejudices.[10]

Commenting on this, Dugan posited:

> Until the second half of the twentieth century, foreign investors and traders faced a serous and immediate barrier to judicial remedies for uncompensated expropriation and other harm suffered at the hands of most governments. Both the local courts and the judiciary of the investor's home state were unlikely to adjudicate such a dispute, out of difference to sovereign immunity. Such immunity was widely viewed as absolute, even if the foreign investor's claim would have been cognisable against a private party in similar circumstances.[11]

Expressing his opinion on the issue with respect to civil law systems, Von Hennig's concluded as follows:

> The development of the restrictive theory regarding state immunity has its basis in the Napoleonic system which was created in the first decade of the nineteenth century. At that time, following the absolutist approach, no one could sue the

---

[9] Ibid. p.39
[10] See Gaffney, J.P. *Due process in world trade Organisation*, 14AM.U. Int'l L. Rev. (1999) 1173
[11] Dugan, Op. cit. p.14

> state. However, there was a struggle for more than a century over the means for making the state responsible for its actions and wrongs.[12]

In consequence, therefore, foreign investors were denied remedies by local courts in cases where host states had caused damage to foreign investors or the state had violated the rights of the investors under the investment contracts. Another concern faced by foreign investors in relation to the enforcement obligation of host states, was the inefficiency of local courts particularly those of developing countries who often lacked responsive, robust legal systems capable of effectively and speedily resolving complex issues.

A classical example can be found in the case of UNION CSARBIDE CORP GAS PLANT DISASTER AT BHOPAL, INDIA[13] where toxic gas leakage at a chemical gas Plant owned by Union Carbide India Limited[14] resulted into the death of 2,000 persons and 200,000 injuries. Regrettably, instead of the state of India to allow the resolution of the dispute in Indian Courts, rather the government of India enacted a law vesting in the government the exclusive right to represent Indian plaintiffs

---

[12] See Van Hennings, R., "*25 Anniversary of the Foreign Sovereign Immunities Act: European convention on state immunity and other International Aspects of Sovereign Immunity"* 9 Williamette J. Int'l L. & Disp. Res. 185, 190 (2001)

[13] *809 F.2d 195 (2d cir.) 484 U.S. 871 (1987)*

[14] A company incorporated under Indian Law but Majority-owned by Unon Carbide Corporation of New York

anywhere in the world. Consequently, the Indian government espoused the claims of the Indian citizens in New York federal courts. The defendants promptly sought the transfer of the case back to India, but the Indian government resisted this move on the grounds of inefficiency of its own courts. The government further argued before the New York court that India's judicial system suffered from "procedural and discovery deficiencies that would thwart the victims' quest for justice".[15] The U.S. Federal courts would be a more appropriate forum for the litigants. Fundamentally, the Indian government's characterisation of its own judicial system is indicative of the negative experiences of many cross-border investors prior to the advent of the new legal regime.

The legal hurdles encountered by foreign investors in seeking remedies against their claims were not the only impediments. Political barriers constituted another hurdle to the attempts by foreign investors to recover their investments. For instance during the struggle for the establishment of the New International Economic Order, the developing countries and socialist states fought against the development of customary international law standards for the protection of foreign investment against uncompensated expropriation. Pursuant to this, the states

[15] Ibid.

sponsored several UN General Assembly Resolutions which reserved for them a wide discretion to protect their economic interests. Most cross-border investors considered these resolutions as being detrimental to them. Of particular note in this regard is the UN General Assembly Resolution 1803 of 1962[16] which gave jurisdiction to domestic law of host states over investments matters generally and the issues of payment of appropriated assets of interests.[17] Specifically, articles 3 and 4 of the UN resolution 1803 provide:

> In cases where authorisation is granted by the terms thereof, by the national legislation in force, and by international law… Nationalisation expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law…

[16] *Entitled "Permanent sovereignty over Natural Resources G.A. Res., UN Doc. A/5217 (196). See also the Declaration on the Establishment of the New International Economic Order, G.A. Res. 3201 of 1974.*

[17] Incidentally, the Developed Countries advocated for prompt, adequate and effective compensation.

These provisions of UN General Assembly Resolution 1803 to a great extent influenced the development of customary international law and most particularly the Hull formula applied as a standard for the compensation for appropriated properties. Sequel to the global realisation of the inadequacies of both national and international systems in the provision of remedies for state interference orf nationalisation of proprietary rights or interests of foreign investors during the second half of the twentieth century prompted the development, depoliticised alternatives.

Today, the legal mechanisms that have developed to attract and protect foreign investments include international investment contracts, bilateral and multilateral treaties, institutions for the settlement of investment disputes and national legislations for the protection of investments.

4.2 INTERNATIONAL INVESTMENT CONTRACTS

An international investment contract connotes the movement of items or capital across national boundaries of states. To this end, an international investment contract must necessarily involve the interplay of

different legal systems.[18] In relation to this, the foreign investors do insist from the outset that the proper law of the contract must be chosen to govern the whole contract or some select aspects of the contract. In addition to this, a decision must also be taken choosing a court or a tribunal to exercise jurisdiction over the contract and the methods of settling the disputes. These are the elements that place an international investment contract on a different level from that of a domestic contract which is naturally a subject of national law and disputes arising from it falling within the jurisdiction of courts or tribunals of the state of the contract. Besides, the degree of risks involved in an international investment contract also differs from that of a domestic commercial contract. For instance, a domestic commercial contract for the sale of goods will be deemed to have been executed the very moment the property in the goods is passed over the price paid. Whereas with respect to an International Investment contract, the duration is usually longer and involves a wide range of complex issues.[19]

Commenting on the subject, Sornarajah opined as follows:

> Even in the simplest international transaction, the risks involved are accentuated by factors such as longer duration

[18] See Koppenol-Laforce, M., *International Contract: Aspects of Jurisdiction, Arbitration and private international law* (London: Sweet and Maxwell, 1996).
[19] That is the state where the contract is concluded.

> of performance of contract, the contract has with different legal systems, the multiplicity of the parties and the ancillary transaction involved. Much of the task of the law in the transaction is devoted to the reduction of the risk. The risk of non-payment of price is eliminated by the device of payment through documentary letters of credit. The risk of damage or destruction of property during transit is reduced through insurance of the goods. The reduction and avoidance of risk is a principal function of the law in even the simplest of international transactions.[20]

International Investment Contracts also involve sovereign risks which are not present in commercial contracts.[21] Most of the investment transactions are made with host states to which the investor exports his capital. In the past, most of the hosts states neglected or refused to discharge their obligations under these contracts and always ever ready to use sovereign immunity to refuse to submit before judicial or arbitral institutions. In some other instances the sovereign host state party could change he law which will either frustrate the foreign investor or frustrate

[20] Sornarajah, M., *The settlement of Foreign Investment Disputes*, (Kluwer Law International, 2000) p.26

[21] Even those which are international in character.

the nature of his business. This usually left the foreign investor with no remedy before the domestic law which was binding on him.

In the light of this, foreign investors today that insist investment contracts be made subject to laws of other states than those of the host state.

4.3 CLASSIFICATION OF FOREIGN INVESTMENT CONTRACTS

International investment contracts vary depending on the nature of the business to which it relates. Basically, cross-border investment contracts are made either in the manufacturing, natural resources or the services sector. It has been observed elsewhere that though some of these "contracts share similar features but obviously, industries and within those sectors, have devised contracts, which are specific to these industries and sectors".[22] Consequently, for instance, in the natural resources industry, the concession agreement is commonly used but the production sharing agreement is the most common international investment used in the petroleum industry. Fundamentally, international investment contracts are classified into.

[22] See Sornarajah, Op. cit. p.31

4.3.1 Concession Agreement

Concession agreements grant the foreign investors the right to explore, and exploit natural resources in the host state within a specified period of time over a delineated area. In consideration of the concession granted to the foreign investor, the investor is obligated to the quantity of the resources exploited. Until revoked, concession agreements concede virtually the sovereign rights over the concession area. For instance, the first concession granted by Nigeria was in favour of shell B.P for 30 years and for the entire land mass of Nigeria. The nature and contents of concession agreements has greatly changed in recent times with the host states still retaining a good level of control over the concession area. For instance, the petroleum authority of Thailand Act, 1978, provides for the power of the state to control and monitor the functions of the concessionaire. Indeed, most concession today give ministerial control over the award of the concession. One other interesting feature of the concession agreements is the inclusion of the obligation for the transfer of technology and training of nationals of host states by foreign investor. Another significant instrument used by host states in controlling the activities of the concession holder is the vesting in the states of the power to control the pricing of the products under the concession arrangements.

This state participation in the activities of the foreign investor ensures that the state without any feeling of alienation will not expropriate the proprietary interests of the foreign investors. This to some extent gives the foreign investor the assurance that his investment is secured.

4.3.2 Production Sharing Agreement

Specific to the petroleum sector, production sharing agreements or contracts are the modern version of concession agreements.[23]

Sornarajah is of the view that production sharing agreements were:

> Pioneered by Pertamina, the Indonesian State Oil Agency and were taken as the model by other petroleum producing states. The contract reflects the winds of change that have swept over the petroleum industry. The concession agreements which were made earlier reflected the absence of power in the oil producing states and involved a virtual surrender of sovereign rights to the foreign corporation. With the oil crisis of the 1970s brought about by the oil producing states acting as a cohesive unit in settling prices and terms in

[23] Ibid p.45

> the oil industry, the power balance passed from oil corporations to the new states.[24]

In practical terms, the developments in the global petroleum sector are now reflected in the new investment contract in the petroleum industry. In almost all oil producing jurisdictions, the production sharing contracts are executed between the host states owned oil corproations[25] in which national legislations vest the proprietary right of the foreign investors, who are mostly multinational investors. The balancing factor in this form of arrangement is that the risk of exploration or searching for the oil lies with the foreign investor. But at the point where the oil is found, the ownership of the oil in its natural state vests in the host state oil corporation with a substantial portion belonging to the foreign investor. The joy of the departure from the concession arrangements is the modern production sharing agreement which illustrates the influence of international law in the contents of foreign investment agreements. It needs be noted here that the production sharing agreement was conceptualised at a time when the developing states were agitating for the doctrine of permanent sovereignty over natural resources, and in pursuant thereto the oil producing states established a cartel to further promote and

---

[24] Ibid.

[25] The Nigerian state oil corporation vested with such powers is the Nigerian National Petroleum Corporation – NNPC.

protect their interests. Be that as it may, the production sharing contract from the face of it gave the power of dominion in the industry to host states and this to a great extent reduced the tension and insecurity pervading in the area of investments in the sector. This development no doubt triggered more investments in the sector.

4.3.3 The Joint Venture Agreement

Joint venture agreements evolved to reduce the prevalent risks of expropriation of assets and investments of foreign investors by host states.

Joint venture agreement usually referred to as marriage of convenience is today one of the commonest agreements in the foreign investment transactions. Interestingly, the use of joint venture arrangements is not restricted to a particular sector or industry but rather it can be utilised in a wide range of industries such as petroleum, natural resources, energy, construction and even manufacturing. At the national levels, most states, particularly the developing states, require that foreign investors can only conduct business in their jurisdiction only through joint venture arrangements with local business partners. Coincidentally, foreign investors today, for fear of expropriation, are more confident of the security of their investments through the joint venture arrangements. As far as developing countries are concerned, joint venture agreements are

devices that could enmesh the objectives of development with the interests of the foreign investor.

From the point of view of commitment, host states consider joint venture agreements as the most appropriate form of entry for foreign investments for different reasons. First of all, relational investments are viewed as involving commitments to the host state from which there could not be ready withdrawal if economic situations were to take a worse turn.[26] The resultant effect of this is that, it will be very difficult for a cross-border investor to pull out his investment, under a joint venture arrangement, in times of economic crisis.

Carrasco and Thomas illustrate this point with the Asian economic crisis which confirms the wisdom of states established legal frameworks which ensure relational investment contracts are made in the state by foreign investors.[27] Beside this point, the relational investment provides a guarantee that upon the relocation by the foreign investor, the local investor will be well empowered to carry on with the investment – having acquired the requisite technological and managerial skills to run the

[26] For capital flight during times of economic crisis will further accentuate the crisis

[27] See Carrasco, E.R. and Thomas, R., "*Encouraging Relational Investment and Controlling Portfolio Investment in Developing Countries in the Aftermath of the Mexican Financial Crisis*" (1996) 34 Columbia J. Trans'l L. 539

venture. Joint venture agreements have therefore become a useful tool in the facilitation of the flow of foreign investment.

4.3.4 Turnkey Contracts

Turnkey contracts have today become one of the vehicles through which foreign investors export their capital across the borders. They involve the manufacture of facilities by the foreign investors particularly in situations where the host state lacks the necessary technical know-how or expertise to execute a proposed project or venture. The instrumentality of turnkey contracts entails the commission of a foreign investor by the host state or its entity to construct or install a project such as the building of an airport or installation of a factory. The fundamental factor here is that the investor is required to handle every aspect of the project to its logical conclusion, in the circumstance the host state relies heavily on the expertise of the foreign investor. Modern turnkey contracts require that the foreign investor is made to participate in the management and control of the project upon completion. In some other developments, the foreign investors are given the additional burden of marketing the products of the project.

It is worth noting that the modern turnkey contract eliminates sharp practices where foreign investors install obsolete machineries for host

states and disappear. Their participation in the projects after completion ensures the quality of work done by the investor and the quality of the products of the project. It is also not unusual to find turnkey contracts today containing provisions for the transfer of technology in respect of the project through the training of nationals of the home state.

This is one area where the security of the investment is the least threatened of all the international investment arrangements. The reason is not far-fetched; the project itself belongs to the host state which will take charge of its security. In precise terms, the ownership of the project under the turnkey arrangement is in local hands while the operational and managerial control is in the hands of the foreign investors. With regulatory bodies and control mechanisms put in place, the fear of foreign investors integrating the projects into their multinational ventures will be erased.

4.3.5 Build, Operate and Transfer Agreement

The Board of Investments of the Philippines describes the Build, Operate and Transfer Agreements in the following terms:

> The BOT scheme is a commercial arrangement between the government and the private contractor, the contractor undertakes the construction of and financing of an infrastructural facility for

> the government with the agreement that the contractor shall operate and maintain the facility for an agreed period, the contractor shall be allowed to charge the facility users, tolls, fees and other charges to enable him to recover both his investment and operating expenses plus a reasonable rate of return. The facility is turned-over to the government when the agreed period ends.[39]

From this description, the BOT arrangement enables a foreign investor to invest abroad by building and operating a facility so as to recover his investment plus a significant amount of profit thereafter. Such facilities may extend to projects like building of ports, highways, dams, power generation plants, water supply systems and industrial estates. [40]

In pursuit of the arrangement, the foreign investor may need to establish a local company in the host state to facilitate establishing the company as a joint venture company along with a local partner. In addition to this, the builder/operator may have to obtain an investment license in accordance with the provisions of the host state. It must be pointed out that state that permits foreign investors to enter into this form of arrangement usually put in place legislations which define the status and control of the device.

---

[39] See the Board of Investment, Philippines, "*Primer on Build-Operate-Transfer (BOT) and Build-Transfer Schemes"*, Act No. 6957 (1990)

[40] There is actually no exhaustive definition of the types of projects on which such contacts could be employed.

In Vietnam for example, the instrument permitting BOT specifies that the "state bodies authorized to enter into a contract with the BOT company shall be ministries, general departments or departments and provincial or municipal people's committees.[41] By implication, the ministry or agency responsible for the sector in which the project is carried out is endowed with the supervisory powers over it.

Apart from the aforementioned types of international investment contracts, there are many other contractual arrangements which are executed, also on daily basis, to facilitate the influx of foreign investments. These include equipment leasing contracts, construction contracts, financial support contracts etc. All these arrangements are aimed at securing and protecting the interests of both the host states and foreign investors.

4.4 BILATERAL INVESTMENT TREATIES

The adoption of Bilateral Investment Treaties has become one of the most important developments in the facilitation and protection of

[41] Circular on BOT issued by the State Committee for cooperation and investment of 28th February 1994.

foreign investments. Germany and Pakistan were the first states to enter into a Bilateral Investment Treaty. [42]

Conceptually, BITs are instruments designed to project foreign direct investment by requiring uniform treatment of foreign investors, particularly in relation to the expatriation of profits and the settlement of disputes. BITs therefore create substantive legal rights under customary international law which essentially subrogate the insurer to the investor's rights. Such subrogation rights may be enforced in a national or international forum.[43] The main objectives of BITs is the protection of cross-border investments and largely cover equity investments, contractual rights and IPR rights. The nature of protection provided by BITs is in respect of prompt, adequate, freely convertible at the market rate of exchange compensation, with interest, in the event of a nationalization or expropriation of the private investment. They also seek to regulate currency transfers under conditions favourable to the foreign investor and also prescribe arbitration as the mechanism for the resolution of the investment disputes. BITs were conceived as instruments through

---

[42] *Germany - Pakistan BIT of 25 November, 1959 for the promotion and protection of foreign investment.*

[43] See Sarkar, R., *Transnational Business Law: A Developmental Respective* (Klumwar Law International, 2003) p. 236

which host states can attract foreign investments through protection of investment guarantees.[44] A model BIT is presented here as Appendix II.

The proliferation of BITs have been so dramatic in the last twenty years. This has to some extent been attributed to perceived erosion of customary international law with respect to foreign investment, as earlier stated here during the New International Economic Order period. [45]

4.4.1 Theoretical Underpinnings of Bilateral Investment Treaties

Vandevelde commenting on the theoretical underpinning of BITs posited three philosophic dispositions as describing and shaping the relationship of the state to economic activity undertaken by its private citizens:

i. economic liberalism

ii. economic nationalism, and

iii. Market economics. [46]

For purpose of clarity, these theories will be classified here as a prelude to analysis on the nature of the international legal framework for foreign direct investment.

---

[44] After the adoption of the Germany – Pakistan BIT of 1959, the adoption and use of BITs was sporadic until the 1980s and of the over 2,495 BITs, more than 1,900 were concluded only after 1987. By this day, a wider group of countries, including Nigeria, have concluded BITs.

[45] Denza, E. and Brooks, S., "*Investment Protection Treaties: United Kingdom Experience*", 36, Int'l & Comp. L. Q. 908, 909, (1987).

[46] Vandevelde, K., "*The political Economy of a Bilateral Investment Treaty*", 92 A. S. I. L. 621, 628 (1998)

Historically, Economic Liberalism in the tradition of John Locke, Adam Smith and David Richardo emerged as a critique of mercantilism, and advocated free markets and individual liberties free of state regulation. [47] To them,[48] the role of the state should be confined to protecting private prosperity and contract rights. The free movement of capital and goods across-borders is generally favoured along the lines of export-led growth. Liberal protagonists therefore believed that the market rather than the state, should direct the flow of investments, and that market barriers should be removed to permit such capital flow to occur without impediment. Economic liberalism not only favours the free movement of capital, but also the necessary inputs into capitalist production, namely, labour and technology. [49]

Economic nationalism, on the other hand based on the work of Thomas Hobbes and others supported the rise of nation-state. This approach supported the belief that economic policy should be subordinate to the political needs of the state. In plain terms, economic activities should be restricted to the extent necessary to enhance the political

---

[47] Sarkar, Op. Cit. P. 238

[48] The Liberal economic political thinkers.

[49] See generally, Arkar, T., *Development Law and international finance* (2nd ed., Kluwer Law International, 2002), Pp.31 – 34.

objectives of the state.[50] Consequently, this theory supports active state participation and intervention in regulating the market such as controlling investment flows, imposing tariffs and taxes, instituting investment-screening measures, and restricting capital repatriation were supported as measures to promote, yet regulate, foreign investment.

Pursuant to the foregoing, in many developing nations, those state-led interventionist policies came in a form of import substitution industrialization whereby indigenous economic growth was sponsored by the state, principally to overcome colonial and neo-colonial legacies.[51]

Under Marxist economics, an outgrowth of economic nationalism but a highly political critique of economic liberalism,[52] foreign investment was viewed with suspicion as a means of neo-colonial domination by developed states leading to under-development. In practical terms, this often translated into the net export of raw materials, capital goods, and capital resources out of developing countries and into developed nations' economies, thereby widening the gap between the two in economic as well as political terms.

In view of this, massive scrutiny and screening of proposed foreign investments was undertaken by such Marxist-socialist theorists or policy-

---

[50] See Vandevelde, op. cit. P. 622 - 23
[51] Sarkar, Op. Cit. P. 239
[52] see *IFC, Lessons of Experience, 5 Foreign Direct Investment,* "Executive Summary", (2001).

makers. Marxist economics therefore advocates for sustainable economic growth along with the equitable distribution of the wealth created thereby.[53]

In the final analysis, based on the theoretical backdrop, BITs are by concept instruments of economic liberalism in so far as they promote the protection of cross-border investments from the perspective of the overseas investor. In significant terms, the contents of most BITs tend to foster the overall protection of these investments once they are made. It is in this regard that Vandevelde further posits that the economic liberal investment regime that supports BITs is predicated on three principles; first, investment neutrality,[54] investment security[55] and market facilitation.[56]

4.4.2 Major Components of BITs

Bilateral investments treaties usually require that the following protections and guarantees be provided by host states: (1) fair and equitable treatment to foreign investors; (2) free repatriation of capital earnings; (3) prompt, adequate and effective compensation in furtherance only of a public purposes and (4) certain agreements may specify that

[53] An issue not addressed in economic nationalist policies.
[54] Non-interference by the state
[55] State protection of overseas investment from the standpoint of the foreign investor
[56] Estate corrections of certain market failures, see Vandevelde, loc. Cit.

binding arbitrations be used as a means of resolving investment disputes. [57] The BITs further hamper host governments from imposing taxing, export quotes, local content or local labour requirements on foreign investors as a condition to establishing, expanding or maintaining investments in –country.[58] While these requirements may be introduced with the aim of preventing "creeping expropriation", uncompensated takings, or other indirect expropriatory acts such as onerous taxation, the compulsory sale of part of an investment or the imposition of significant controls on the management of the investment, the signatory country may have a different view point. Such acts may be seen by the host government as being regulatory in nature or designed to improve their trade balances, or foster the growth of indigenous industries in support of important economic and political agendas.[59] We will now proceed to discuss the highpoints of BITs.

4.4.3 Protection of Investments against Expropriation

The main focus of BITs is to provide for the protection of foreign investments made in the host state; thereby making investment security to be the main purpose of the agreement. The underlying target of the

---

[57] See Robin, P., "*The BIT Won't Bite: The American Bilateral Investment Treaty Program*" 33 Am U. L. Rev. P. 942

[58] Ibid. P. 953

[59] Ibid.

protection is to prevent the host state from expropriating, nationalizing or indirectly taking the property of the investor. The concept of investment has been properly explained in the preceding paper but suffice to say here that expropriation takes place when the host state exercises her power of eminent domain.[60]

The first point of consideration in determining whether expropriation has occurred is the identification of the property of the foreign investor alleged to have been taken by the host state. Commenting on this as far back as 1982, Judge Rosalyn Higgins[61] stated:

> I am very struck by the almost total absence of any analysis of conceptual aspects of property. So far as the concept of property itself is concerned, it is as if we international lawyers say: property has been defined for us by municipal legal systems; and in any event, we know property when we see it. But how can we know if an individual has host property rights unless we really understand what property is?[62]

---

[60] A common law term that describes a situation where the state arbitrarily takes the property of the foreign nester.
[61] In the lecture she presented at the Hague Academy of International Law.
[62] Higgins, R., "*The taking of property by the state Recent Developments in International Law*" 176 Recoil des cours 321, (1982)

In remedying this situation, Most BITs today contain detailed provisions that specify the types of investments or properties of foreign investors that are protected against expropriation. It is worth observing that the specifications of treaties regarding the kinds of investments protected against expropriation goes beyond the scope of the investors' properties protected under customary international law.[63] It therefore, means that in determining whether a particular property or investment is a subject of protection, recourse must be had to the provisions of the particular BIT governing the situation. But in situations where the BIT is silent on the issue, it will be left to the tribunal to determine whether the property in question or the proprietary interest in issue is within the scope of protection under customary international law.[64] In the jurisprudence of international investment protection, issues have arisen as to whether or not contractual rights,[65] particularly contracts with state entities fall within the definition of property protected against expropriation. In the OSCAR CHINN case,[66] the arbitral tribunal concluded that a ship owner had no "vested right" in continued profits contemplated in a contract, just because prices for shipped commodities were high when the owner started

---

[63] *See S. D. MYERS V GOVT OF CANADA, 40 ILM 1408 (2001)*
[64] Under Customary International Law, not all forms of property are held to be capable of expropriation.
[65] As a subset of property the law of expropriation.
[66] *(1934) P. C. I. J. (ser. A/B), No. 63, at 65, 88.*

his business. In a similar vein, the tribunal, in the case of MCHARD, ROBERTS, WALLACE AND TODD V. ISLAMIC REPUBLIC OF IRAN,[67] rejected a claim of expropriation of shares based only on evidence of a contract breach.

In another development, the tribunal in the case of LIBYAN AMERICAN OIL CO (hereinafter LIAMCO) V. LIBYAN ARAB REPUBLIC,[68] held that "nationalization of concession rights…. If not discriminatory and not accompanied by a wrongful act or conduct, is not unlawful. The tribunal further held as follows:

> It is well known that property in its general meaning is of two kinds: corporeal and incorporeal. The first, by unanimous opinion of jurists, cover all physical things, such as chattels lands and various other things of material nature. On the other hand, incorporeal property comprises all interests and rights which, though incapable of immediate material composition, may produce corporeal things or may be evaluated in financial and economic terms. In other words, incorporeal property includes those rights that have a pecuniary or monetary value.

---

[67] *13 IRAN – U.S. Cl. Trib. Rep. 286, 302 (1986).* The tribunal held that there was no expropriation even though Iranian government's breach of service contact deprived claimant of only source of income.

[68]

Concession rights, as those of the present dispute, maybe included under the class of incorporeal property. This assertion is recognized by international precedents, as was held for instance by the permanent court of Arbitration in its Award developed on 13th October, 1922 in the dispute between the United States of America and Kingdom of Norway. This view is likewise in harmony with municipal law of most legal systems, and with the spirit of Islamic jurisprudence.[69]

The right of licensees to protection against any taking has been held by the tribunal in the case of CME V CZECH REPUBLIC,[70] where the Czech's government altered the exclusive rights and duties of the investor to operate the television station was held to constitute the "legal basing" for protection against expropriation. Consequent to foregoing, an investor's claim to vested property rights or reasonable under a concession contract, licensing agreement, or other commercial contract with a governmental entity may be enhanced by the presence of a stabilization clause, which will typically provide that the host government will not alter laws during the term of the agreement so as to prejudice the

[69] Supra at p. 189
[70] UNCITRAL, partial award of September 3, 2001, 593, 599 where the alteration of the operator's license indirectly destroyed his investment and though the investor's asset remained untouched, he had no business to use the assets for.

investors rights. To buttress the point further, investors have claimed that, even in the event of the non-existence of a stabilization clause an investment agreement should benefit from the rule of Pacta sunt servanda, as in the case of treaties when states are bound by their commitments in the treaties they have signed.[71] But the question which may arise at this point is whether a state's commitment embodied in a permit or a license and not in a contract can still invoke the application of the rule of pacta sunt servanda, to this question, many foreign investors still claim and arbitrators have agreed with them that, the resulting right may amount to protected property under international law.[72] For instance in the case of TECMED V UNITED MEXICAN STATES,[73] where the Mexican government's refusal to renew a permit to operate a landfill that it purchased and the closure of landfill meant that "the economic or commercial value directly or indirectly associated with those operations and activities and with the assets earmarked for such operations and activities was irremediably destroyed.

In spite the position of customary international law with respect to the nature of property that is protected against expropriation, the first point of call in determining the type of investment that is protected by a

[71] Note that the rule of pacta sunt servanda is the basis of every contractual relationship.
[72] See Jennings, R. Y. "*State contracts in international law*", 37 Brit. Y. B. Int'l L. 156 (1975)
[73] *ICSID case No. ARB (AF)/00/2 (May 29, 2003), 43 I.L.M. 133 (2004)*

BIT still remains the BIT itself. Most BITs contain explicit terms on expropriation. A classical example can be found in the succinct language of the Argentina – United States BIT, thus:

> Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization (expropriation) except for a public purpose; in non-discriminatory manner, upon payment of prompt, adequate and effective compensation; and in accordance with the due process of law and the several principles of treatment provided for in Article 11(2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or become known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable and be freely transferable at the prevailing market rate of exchange on the date of expropriation.[74]

The foregoing clearly explains in summary the basic principles on expropriation that investment treaties have generally adopted and of

[74] *Art. IV (I) of the Treaty between the United States and the Argentine Republic concerning the reciprocal encouragement and protection of investment*, Nov. 14, 1991, 31, I.L.M. 124 (1992)

which the customary international law also embraces. In the same vein, Article 1110 of the North American Free Trade Agreement[75] provides:

1. No party may directly or indirectly nationalize or expropriate an investment of an investor of another party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

   a. for a public purpose;

   b. on a non-discriminatory basis;

   c. in accordance with due process

   d. on payment of compensation in accordance with paragraphs 2 through 6.

2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation") and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value

[75] NAFTA

including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3. Compensation shall be paid without delay and be fully realizable.

The tribunals have construed these provisions of the BITs to award damages to investors against host states, even where such acts of states do not amount to physical or actual nationalization of the assets of investors. Thus in the case of TIPPETTS, ABBETT, McCARTHY, STRATTON V. TAMSAFFA CONSULTING ENGINEERS OF IRAN, THE GOVERNMENT OF THE ISLAMIC REP. OF IRAN & OTHERS.[76] The tribunal reached the conclusion that:

> A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected.[77]

BITs have therefore, continued to give assurance to investors of the commitments by states to the security and protection of their investments against expropriation.

4.4.4 Requirement for Fair and Equitable Treatment and Full Protection and Security

---

[76] *Case No. 7, 6 Iran – US C.L. Trib. Rep. 219 (June 22, 1984).*
[77] See also the TECMED'S Case supra.

BITs also provide for the obligation of contracting parties to ensure "fair and equitable treatment" and "full protection and security" to foreign investors. This obligation traces its origin to the International Law minimum standard of treatment of aliens and which affirms that states must grant to aliens, regardless of their domestic legislation, certain rights created by international law.[78]

Under the international investment regulatory regime, fair and equitable treatment and full protection and security are generally recognized as "absolute" or "objective" protections.[79]

Fair and equitable treatment suggests that a host state must treat the investors of another party and their investments no worse than it treats its own investors and their investments. The standard of fair and equitable treatment has today become a highly and internationally debated concept in investment protection regime. Often times this debate relates to contest between investors and host states whereas investors insist on giving the legal terms a literally and broad interpretation, the host states on the other hand strive to narrow and limit the scope of protection of this standard of treatment as much as possible. The fair and equitable treatment has in recent times become the catchword of modern BITS and it is for this

---

[78] See Vagts, D., *Minimum Standard, in 3 Encyclopedia of public International Law*, 215 (R. Bernhardt ed., 1992).
[79] Dugan, et al. op. cit. P. 491

stipulation that BITS have become the trigger for foreign investment. Fair and equitable treatment has indeed become the protective principle that investors most frequently utilize.

Article 1105 of NAFTA provides that a party may not treat investments of an investor of another party worse than this minimum standard irrespective of the manner in which the other party treats other investors and their investments. This minimum standard contained in Article 1105 of NAFTA was given a judicial interpretation in the case of S.D. Myers, Inc. V. Government of Canada as follows:

> The minimum standard of treatment provision of the NAFTA is similar to clauses contained in bilateral investment treaties. The inclusion of a "minimum standard" provision is necessary to avoid what might otherwise be a gap. A government might treat an investor in a harsh, injurious and unjust manner but do so in a way that is no different than the treatment inflicted on its own nationals. The "minimum standard" is a floor below which treatment of foreign investors must not fall[80]

[80] S.D. Myers, Supra.

A survey carried out by the statistics department of the United Nations Conference on Trade and Development[71] indicates that at the end of the year 2005, out of almost 2,495 BITs, approximately 1,900 had entered into force with the BITs incorporating these standards. It is as a result of this wide acceptability of these treaty standards that many observers do today contend that they have by this ubiquity alone become part of customary international law. To these commentators, who accept the evolutionary view of custom in this area; suggest that the fair and equitable standard could be an independent rule of customary international law.[72]

With respect to full protection and security, most investment treaties require that host states provide foreign investors and their investments "full protection and security". As is the case with the standard of fair treatment, the requirement for full protection, the content of the obligation to ensure full protection has been subject to wide ranging debate. This requirement places obligation on host states to take certain actions to safeguard the property of foreign investors.[73] BITs rarely provide any guide to decision makers in relation to the meaning of "full

---

[71] UNCTAD, the entry into force of Bilateral Investment Treaties (BITs), available at http://www.unclad.org/.en/docs/webitelia 20069 en.pdf.

[72] See Schwebel, S.M. *The influence investment treaties on Customary Law,* 98 Am. Soc.y.i nt'lL Proc.27 (2009).

[73] *See Art. 11(2)(9), Argentina – U.S. BIT (1994), Art. 4(1) China – Germany BIT (2003)*

protection and security". The tribunal in SALUKA V. CZECH REPUBLIC[74] clearly provide a guide for state parties as follows:

> The obligation incumbent on the host state is an obligation of vigilance, in the sense that the host state shall take all measures necessary to ensure the full enjoyment of protection and security of its investments and should not be permitted to invoke its own legislation to detract from any such obligation.

In this regard, the standard obliges the host states to adopt all reasonable[75] measures to protect assets and property from threats or attacks which may target particularly foreigners or certain groups of foreigners.[76] Commenting on the concept and scope of full protection and security, Dugan *et al.,* stated:

> While the concept of protection and security was taking root in international commercial treaties, customary international law was developing in the area of state responsibility for the protection of aliens and their property. Both Treaties and Customary Law appear to have focused on the physical security of foreigners and their

[74] UNCITRAL, Partial Award of March 17, 2006.
[75] See Zeither, H.F. *The Guarantee of "Full Protection and Security*" in Investment Treaties Regarding Harmacauled by Private Actors, 3 Stockholm Int'l Arb. Rev. 1(2005).
[76] OECD, Fair and Equitable Standard in International Investment Law (Working Paper on International Investment, 2004.)

> property. This emphasis rose out of an apprehension of the risk of xenophobic violence and the inadequacy of local police forces in host states after World War I. A typical example of such a case was never described above which involved the murder of an American citizen in Mexico. Another notable case (which took place before World War I) involved the lynching of eleven Italian citizens by a New Orleans Mob… The protection standard that developed in this context imposed on states a duty of due diligence. This duty, at the time, required states to provide aliens and their property with a reasonable level of police protection, against harm done by none state actors.[77]

In view of the foregoing it can be safely concluded that the standard of “full protection and security” not only protects foreign investors against destructive actions by a government or its instrumentalities, but it may well impose state liability for harm caused by third parties. It is equally important to note that the standard of full protection and security can also be invoked against a host state for omissions to act. This in the case of WENA V. EGYPT[78] the Egyptian Hotels Company (EHC), a public company affiliated with the Egyptian tourism authority, and Wena Hotels,

---

[77] Dugan et al loc. Cit.

[78] *ICSID Case No. ARB/98/4 (Award of Dec. 8, 2000), 41 I.L.M 896 (2002).*

a British Company, entered into leasehold arrangements to develop and operate two hotels, one in Luxor and the other in Cairo. Soon after the lease contracts were signed, the parties disagreed as to their respective obligations under the contract. These disagreements culminated to the seizure of the hotels by the EHC. The tribunal held Egypt liable for its failure to prevent EHC from taking the hotels although it was aware of EHCs plans and for its subsequent failure to restore the hotels to Wena.

In similar circumstances, in the case of ASIAN AGRICULTURAL PRODUCTS LTD. V. SRI LANKA[79] AAPL a Hong Kong Corporation, entered into a joint venture with Serendib Seafoods Ltd., which was to cultivate and export shrimp to Japan. Shortly after Serendib started operations, the area where the farm was located came under the control of Tamil rebels. Despite Serendib's cooperation with Sri Lankan officials in identifying members of farm's staff who were aiding the rebels, government forces attacked and destroyed the farm. As a result, AAPL initiated ICSID arbitration under the Sri Lanka United Kingdom BIT. The company claimed a violation of Article 2(2) of the BIT which required full protection and security. In this connection, AAPL insisted that this provision imposed strict liability upon the state for all harm that had

[79] *ICSID Case No 0 ARB/87/3 (Award of Dec. 8, 2000), 41 ILM 896 (2002).*

befallen the company, whatever its cause. While the tribunal rejected this extreme interpretation, it nevertheless found that Sri Lanka had failed to provide the requisite level of protection.

It does appear that this strict construction of the "full protection and security" change in the BIT imposes too much of a higher duty on host states which may have to devote almost half of the state resources guiding against any harm to the investments. There is no doubt that these strict interpretations by the tribunals may have negative effects on the developing countries. But more recently some arbitral tribunals have interpreted full protection and security change more broadly by concluding that the government's duty to protect foreign investors and their investments extends beyond physical security.[80]

4.4.5 Umbrella Clauses

Umbrella clauses represent another device by which BITs provide investors with another layer of protection. Through the umbrella clause, host states are required to observe the obligations and honour the commitments they have undertaken vis-à-vis foreign investments. In other

[80] For instance, the host state is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued. See ENRON CORP. & PONDEROSA ASSETS L.P. V. ARGENTINE REPUBLIC, ICSID CASE No. ARB/01/3 (AWARD) of May 22, 2007).

words the umbrella compels host state to observe their undertakings, the sanctity of their contracts and to respect clauses.[81] Prior to the advent of umbrella clauses, there was a cluster of authorities where a breach of a contract by a state didn't necessarily amounted to a breach of international law.[82] Umbrella clauses therefore stepped in to redress this shortcoming in the foreign investment regime and effectively created a cause of action under international law for breach of contract. By this, BITs have succeeded in providing additional protection and remedies to foreign investors.

According to Sinclair, one of the main rationales for this extension was to make clear that the concept of Pacta Sunt Servanda, which applies to state-to-state relationships, also applies to relationships between investors and states.[83] Commenting on the rationale for the emergence of the umbrella clauses in BITs, the tribunal in the case of EUREKO V. POLAND[84] held as follows:

> The provenance of "umbrella clauses" has been traced to proposals of Elihu Lauterpacht in connection with legal

[81] Walde, T.W. *The "umbrella" clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 6(2) J. World Inv. & Trade 184, (2005) at 192.

[82] See Schwebel, S. *On whether the Breach by a state of a Contract with an Alien is a Breach of International Law at the Time of Its Codification: Essays in Honour of Roberto Ago* (A. Giuffre 1987).

[83] See Sinclair, A. *The origins of the Umbrella Clause in the International Law of Investment Protection,* 20 Arb. Int'l 411 (2004).

[84] *UNCITRAL Partial Award, ICC 98 (Award of August 19, 2005).*

> advice he gave in 1954 in respect of the Iranian Consortium agreement, described in detail in an article in Arbitration International by Anthony Sinclair. It found expression in Article 11 of a draft Convention on Investments Abroad (the Abs-Shawcross Draft") of 1959, which provided: "Each party shall at all times ensure the observance of any undertakings which it may have given in relation to investments made by nationals of any other party".

Today, almost all the BITs contain the umbrella clause provision.[85] For instance the umbrella clause in the Pakistan-Switzerland BIT provides:

> Each contracting party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other contracting party.[86]

The incorporation of umbrella clauses in BITs has contributed immensely toward the resolution of many investment disputes which arose primarily from the failure of states to observe the commitments they have promised to abide by. As a result, any decision by a state to

---

[85] See Article 11(2)(c) of the Argentina-United States BIT and Article 2 of the U.K. Model BIT which provides that "Each contracting party shall observe any obligation it may have entered into with regard investments of nationals or companies of other contracting parties".

[86] See Article 11 of the Pakistan-Switzerland BIT.

nationalize the assets of a foreign investor would be violating the anti-expropriation and anti-discrimination treaty provisions – the umbrella clauses would be applied against such a state. The clauses no doubt are triggers to the influx of foreign investments to states.

4.5 MULTILATERAL INVESTMENT TREATIES

Outside Bilateral Investment Treaties, the international community has made several attempts at formulating a single, comprehensive multilateral protection treaty to serve as an international instrument for the protection of the rights of foreign investors and at the same time balance the interests of host and benefiting state. Unfortunately, the international investing community has not succeeded in establishing this treaty. For instance the OECD proposed instrument of 1967 was not adopted and in the same vein, an attempt in the 1990s to draft a multilateral agreement on investment failed.[87] In spite of the failure by the international community to establish a singular multilateral treaty for the protection of foreign investments, regional economic cooperation have resulted into the conclusion of regional multilateral investment treaties. Some of regional investment treaties will be discussed here briefly:

---

[87] See Kelly, G. *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations,* 39 Colum. J. Transnational Law 483 (2001).

(a) *The Lome Conventions:* These series of treaties today known collectively as the Lome Conventions[88] were the first set of multilateral instruments which embodied investment protection treaties for the purpose of governing economic relations between the European Union, and the African, Carribean, and Pacific (ACP) group of states. Factually, the European Development Fund (EDF) which is the major instrument for community aid for development cooperation in the ACP countries and the overseas countries and Territories (OCT), and which finances infrastructure projects in the ACP countries, and the European governments were interested in providing protection for western contractors involved in these projects. As a result, Lome 111[89] and Lome IV[90] were adopted and they incorporated arbitration clauses similar to those found in BITs.[91] For example Lome 111 provided in this regard as follows:

Any dispute arising between the authorities of an ACP state and a contractor supplier or provider of services, candidate or tenderer, on the occasion of the placing or performance of a contract financed by the Fund (EDF) shall be settled by arbitration in accordance with procedural rules adopted by the council of ministers.

---

[88] See Amissah, A. *The ACP/EEC Conciliation and Arbitration Rules*, 8 Arb. Int'l 167(1992).

[89] *Third ACP-EEC convention, signed at Lome on Dec. 8 1984 (Lome 111), 24 1 L.M. 574 (1985).*

[90] *Fourth ACP-EEC Convention, signed at Lome on Dec. 15, 1989 (Lome IV) 29 1.L.M. 783 (1991).*

[91] But however, they are more limited in scope and more complex than BITs.

These conventions have contributed a lot to the settlement of investment disputes between the member states.

(b) *North American Free Trade Agreement (NAFTA):* The NAFTA agreement which entered into force on January 1, 1994 was concluded between the United States of America, Canada and Mexico.[92] This multilateral agreement created a free trade area among the parties for the following purposes:

(i) to eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the parties;

(ii) To promote conditions of fair competition in the free trade area;

(iii) To Increase substantial investment opportunities in the territories of the parties.

(iv) To create effective procedures for the implementation and application of the NAFTA agreement and for the resolution of disputes.[93]

(c) **The Association of South East Asian Nations**

This agreement was concluded between the governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of

[92] Concluded on 17th December, 1992, 32 1.L.M. 289(1993).
[93] See Article 102 of the NAFTA Agreement

Philippines, the Republic of Singapore, and the Kingdom of Thailand on 15th December, 1987. The major objective of the agreement is the promotion and protection of investments made within ASEAN member states by nationals and companies of other ASEAN members.[94] Interestingly, the agreement created various host state obligations for the provision of favourable conditions for qualifying investments including the simplification of investment procedures and approval processes. The agreement also imposes obligations on member states to ensure transparency and predictability by providing up-to-date public information on laws and regulations, to accord fair and equitable treatment and full protection and security to foreign investors from member states and to pay compensation in the event of expropriation. [95]

(d) Economic Community of West African States (ECOWAS)

This Multilateral Treaty was signed on 28th May, 1975 between West African States including Nigeria for the provision of economic integration and development amongst member states. The ECOWAS Treaty provides for the removal of certain trade barriers and restrictions and for the reciprocal treatment of investors between member states. Apart from economic corporation, the Treaty also provides for an increase

---

[94] See Article 11 of the ASEAN Agreement

[95] See Rubin, N. & Kinsella, *International Investment, Political Risk and Dispute Resolution* (Oceana Publications, 2005) 199-200.

in political and cultural cooperation between member states. It's rather sad to note that no significant impact has been made by the ECOWAS in improving the economic development of member states or in attracting foreign investments into such states compared with the achievements recorded under NAFTA and ASEAN.

4.6 POLITICAL AND LEGAL RISK INSURANCE

In the course of the investment, foreign investors are bound to face non-commercial risks in the form of political instability and an unstable or unpredictable legal environment in the host country. To Sakar,

> Typically, political and economic volatility in the form of currency inconvertibility, expropriation, expropriation by the host government, and political violence are risks that may be mitigated against by procuring political risk insurance from bilateral or multilateral agencies.[81]

To this end, public financed risk insurance programmes are designed to encourage the flow of private investment to developing countries by mitigating the political and legal risks associated with such foreign investments.[82] Some of these agencies are:

[81] Sarkar, *Transnational Business Law* op. cit. p. 255.
[82] Ibid.

4.6.1 Multilateral Investment Guarantee Agency (MIGA)

MIGA is an investment insurance affiliate of the World Bank. It was established in 1988 with the objective of facilitating the flow of private investment for productive purposes to developing member countries. MIGA offers foreign investors long-term political risk insurance particularly coverage against the risks of expropriation, currency transfer, war and civil disturbance. Besides the foregoing, MIGA also provides advisory services to investors and also carries out promotional programmes, disseminates, information on investment opportunities, and provides technical assistances on the investment promotion capabilities.[83]

It is instructive to note here that under these arrangements, it is the responsibility of MIGA to define the eligibility of investors on the basis of nationality insofar as its insurance covers are not available to nationals of the host country.[84] In addition, it is a mandatory condition that the investment must be located in the territory of a developing member country and must be with the consent of the beneficiary host state.

The investment must also be economically sound and supportive of the development of the host country and such an investment must also be

[83] Since its inception in 1988, MIGA has issued more than 650 guarantees for projects in 85 developing countries facilitating more than $50 billion in foreign direct investment.
[84] Article 13 (a) (i) of the Convention Establishing the Multilateral Investment Guarantee Agency.

in compliant with the host country's laws and regulations, and providing fair and equitable treatment of the investor in legally protecting the covered investment.[85]

4.6.2 Overseas Private Investment Corporation (OPIC)

This is a U.S. bilateral government agency which provides political risk insurance for U.S. investors abroad. The antecedent of the U.S. Government Programme for the provision of insurance policies for investments dates back to 1948, but OPIC was formed on 30th December, 1969. The mandate of OPIC is to mobilize U.S. private investment capital in support of the economic growth of developing nations and transitional economies.[86] The focus is the protection of U.S. foreign investment against political risks factors. At present OPIC has insurance programmes in other countries and which covers equity investments, technical assistance agreements, leases and other types of structured finance for the political risks of expropriation, currency inconvertibility and political violence such as war, hostile actions, civil war, revolution, civil strife etc.[87]

---

[85] Ibid.

[86] See Ellinidis, G., "*Foreign Direct Investment in Developing and Newly Liberalized Nations*" 4 Detroit C.L.J. Int'l & practice.

[87] Sarkar, op. cit. Pp. 255 – 256.

4.6.3 National Investment Legislations

Domestic national investment regimes also play a key role in the modern international investment that governs the protection of foreign investment. As early as the 1960s, the international investment community saw the need that national investment laws could constitute one of the sources of consent of parties to submit their future sources to arbitration.[88] Notably, many of the earliest ICSID investment arbitration cases were initiated based on national investment legislation.[89]

BITs also provide for national treatment, or prohibit expropriation without compensation.[90] While quite a good number of them contained provisions on dispute resolution which allows direct investor – state arbitration similar to the clause in BITs. It must be observed here that the impact of national legislation has been dramatically diminished as a result of the prevalence and dominance of BITs.

The desire to promote the flow of foreign investment has led the international investment community to adopt a series of actions, ranging from the adoption of bilateral and multilateral treaties to state commitments for the provision of full protection and security so as to

---

[88] See Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between stated and nationalities of other states 18th March, 1965. Available at http://www.worldbank.org/icsid/basicdoc/partB-section05/htm++02

[89] See Southern pacific properties V. Arab Republic of Egypt. ICSID case No. ARB/84/03 (1992).

[90] For instance, see Article 2 (on national treatment) and Article 4 (on expropriation) of Albanian Law on Foreign Investment (1993) available at http://pbosnia.kentlaw.edu/resoures/legal/albanian/forinv.htm.

ensure the increase in such flows. In this direction, the World Bank has also played a vital role to promote foreign investments. The Bank has been a key actor in the establishment of insurance institutions for the provision of policies to foreign investors against political risks and the institution for the settlement of investment disputes, the centre for the settlement of investment disputes, ICSID.

These investment regulatory regimes have indeed triggered the inflow of foreign investments in recent times.

CHAPTER FIVE

NIGERIAN LEGISLATION AS A FRAMEWORK FOR FACILITATING FOREIGN INVESTMENTS IN NIGERIA

5.1 THE STATUTORY FRAMEWORK FOR FACILITATING FOREIGN INVESTMENT

Nigeria in the recent past, taking a hint from the rise in the global trend towards investment protectionalism, developed legislations and policy measures specifically designed towards facilitating investment.

The privatization policy and exit of public funds from flagship industries by the Nigerian government was aimed at providing a boost to private investment including foreign direct investment. Indeed, within this period, quite a good number of African countries adapted legislations and policy measures in creating a favourable business climate conducive for foreign investment.

To Odiase-Alagimenlen[1], Foreign investment promotion and protection can be instituted in various ways. He opined further that:

> It could be through the means of policy outlook enunciated by the Government, and/or the operation of a legal regime. The institutional mechanism comprises the means by which

[1] Then Senior Research Fellow, Nigerian Institute of Advanced Legal Studies

> the intentions therewith are implemented. The policy outlook is mostly contained in the development plans and the budgets of the state. In the case of the regime ....this could be contained in an agreement, whether individually or collectively.
>
> Alternatively, it could be included in a particular law, which affects that sector of the economy alone, or affects investors in a particular environment. It could also be contained in a general law, which affects the whole economy[2].

The adaption of these measures by Nigeria and other African states was responsive to some of the factors that were adduced to have been responsible for the low inflow of foreign investment into the country despite the efforts made at attracting foreign investments into Nigeria. For instance, commenting on the causes for the poor response of foreign investors, Wale Obayomi concluded that;

> The situation was mind boggling in the period before the present democratic dispensation. Reasons are

[2] Odiase-Alagimenlen, "*An Appraisal of the Legal and Promotion and Protection in Nigeria*" in Guobadia and Akper, eds., Foreign Investment Promotion. NALS, 2006, P.5.

peculiar to Nigeria; others are common to most African states. Among these reasons are;

a) Political instability arising from the annulment of June 12, 1993 election which up till now is still shaking the confidence of investors in the country, given the risks of discontinuity in the democratic process.

   Presently, the assassination of political opponents by the present crop of politicians continues to send dangerous signals to foreign investors that the country is not safe for investment, and the financial implication that it entails.

b) Bad governance as evidenced in wrong economic policies and policy instability/inconsistency;

c) Macroeconomic instability;

d) Trade barriers through high customs and excise tariffs and an outright ban on imports;

e) High import cycle and difficulty in the clearing of goods at the ports due to burdensome clearing

procedures and the recent inspection of all imported goods;

f) Poor infrastructure.........[3]

With this kind of situation on ground, the country was left with no choice than to embark on such policies and measures that would remove the bottlenecks and facilitate foreign investment.

This chapter therefore examines the efforts of the Nigeria Government aimed at setting the minimum standards for the treatment and protection of foreign investment as a panacea for facilitating the influx of foreign investment into the country.

In an attempt to give effect to the country's desire to attract foreign investors to invest their capital into the country, Nigeria introduced quite a number of legislations. Some of these legislations which will be analysed here include;

5.1.1 The Nigerian Investment Promotion Commission (NIPC) Act 1995

The NIPC Act, which repealed the Industrial Development Co-ordination committee Decree[4], is a general statute established to guide,

[3] Obayomi, W., "*Investment Incentives and Guarantees in Nigeria*". Being a Paper presented at a Workshop on Foreign Investment and Business Law in Nigeria. Organised by the Nigerian Institute of Advanced legal Studies, Thursday 21st March (1996).

[4] *No 36 of 1988 under which an Industrial Development Committee (IDC) was established.*

assist and protect potential foreign investors and it applies to the totality of the Nigerian economy. At inception, this Act was designed to facilitate the inflow and promote foreign investments into the country. This Act therefore prescribes the terms and conditions which a foreign investor must comply with, in investing in Nigeria[5].

The primary objective of this Act is the establishment of an investment environment suitable for foreign investors and the setting up of an institution to coordinate investment activities in the country. Consequently, the Act established the Nigerian Investment Promotion Commission to facilitate the entry process for investment into the country.

Part II of the Act empowers the commission to encourage, promote and monitor all activities relating to investment in Nigeria. Specifically section 4 of the Act gives the commission the responsibility of:

i. Initiating and fostering measures to enhance the nation's investment climate for all investors,

ii. Promoting investments within and outside Nigeria

iii. Collecting and disseminating information concerning investment opportunities and services of investment capital as well as advising

---

[5] It is in this regard that this Act has been categorized as a general investment promotion Law. See Section 17 of the Act.

on the availability, choice or suitability of partners in joint-ventures; and

iv. Providing and disseminating of up-to-date information on incentives available to investors.

It is apt to describe the commission as a 'one stop shop' for investors given the responsibilities it is charged with under the Act. Projectably, the existence of this kind of body will facilitate in no small measure foreign investment into the country.

A fundamental policy shift by the Nigerian Government with regards to foreign investment was demonstrated under Part V of this Act. Apart from the items listed under section 17 of the Act, a foreign investor can participate in any sector of the economy. The NIPC Act provides that with the exception of the following;

(a) Petroleum enterprises

(b) Production of arms, ammunition etc;

(c) Production of and dealing in Narcotic drugs and psychotropic substances;

(d) Production of military and paramilitary wears and accoutrement, including those of the police, customs immigration and prison

service, a non-Nigerian may invest and participate in the operation of any enterprise in Nigeria[6].

The exemption of the petroleum industry from the enterprises that non-Nigerians are permitted to participate in, is understandable. It might well be that the Nigerian Government intends to maintain the status quo in this industry where the government exercises direct control in partnership with other operators. Presumably, the petroleum sector being the most strategic industry in the country, guarantees are already provided to intending investors in the sector. Other sectors listed under section 17 of the Act are already prohibited for both Nigerians and non-Nigerians alike on grounds of public policy.

The provision of section 17 of the Act is a clear example of the relaxation of foreign investment regimes by many countries aimed at encouraging the influx of FDI[7].

It is instructive to note here that this situation is prevalent in developing countries[8]. This development got strengthened by the emergence of more Bilateral Investment Treaties entered into by developing countries as safeguards for the promotion and protection of

---

[6] *See also sections 18 and 32 of the NIPC Act.*
[7] See UNCTAD-DTC I (1995) Report" Transnational Corporations and Competitiveness", Transnational Corporation V. 4 No. 3 of December, 1995.
[8] See the UNCTAD Report, ibid, which specifically mentioned such developing countries like Tanzania, Zambia, Ghana, Algeria, Malawi, Uganda Namibia, Nigeria etc

foreign investments. Commendably, Nigeria has concluded quite a few of these Bilateral Treaties[9]. The Bilateral Treaty Concluded with the United Kingdom[10] is reproduced here as Appendix I.

Besides the provisions of section 17, the Act further provides foreign investors with the following incentives:

(a) Guarantee of unconditional transferability of funds in freely convertible currency of dividends or profits attributable to the investment;

(b) Transferability of 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 a state or liquidation of the enterprise or any interest attributable to the investment[11].

These direct provisions on the promotion of investment are aimed at creating a viable and favourable investment climate to encourage potential investors to transfer their capital or interests into Nigeria.

---

[9] Nigeria has signed BITS with Turkey, United Kingdom, France, Germany, Spain, Netherlands, Republic of Korea

[10] The Treaty entered into force on 11th December, 1990.

[11] *See Section 24 of the Act.*

To further remove the fears of intending investors and to assure them of adequate protection for their proprietary interests against acts of expropriation, section 25 of the Act provides;

(1) Subject to subsections (2) and (3) of this section –

a. No enterprise shall be nationalized or expropriated by any government of the Federation; and

b. No person who owns whether wholly or in part the capital of any enterprise shall be compelled by law to surrender his interest in the capital to any other person.

(2) There shall be no acquisition of an enterprise to which this (Act) applies by the Federal Government unless the acquisition is with national interest or for a public purpose and under a law which makes provision for;

a. Payment of fair and adequate compensation;..."

It is instructive to note that the liberalisation policy enshrined in section 24 of the Act is to ensure and guarantee the free inflow of capital into the country. And section 25 of the Act assures the investor that such capital imported into the country will not be lost even where due to

overriding public purpose or national interests the property of the foreign investor is nationalized[12].

The NIPC Act also provides for a procedure for the settlement of dispute arising between any Government in Nigeria and a foreign investor. In this regard the Act provides that such disputes be settled within the framework of the agreement where there exists a bilateral or multilateral agreement on the protection of investment concluded between the Nigerian Government and the Home government of the foreign investor. The Act also provides for the settlement of investment disputes under any other national or international machinery for dispute settlement which the parties may have agreed upon. Section 26(3) of the Act gives the parties the freedom for the resolution of their disagreements under ICSID Rules[13].

5.1.2 The Foreign Exchange Monitoring and Miscellaneous Provisions Act, 1995

This Legislation established the Autonomous Foreign Exchange Market with the primary aim of liberalizing the foreign exchange regime to facilitate the free importation, convertibility and reparation of foreign

[12] Interestingly, foreign investors can now freely repatriate such compensation in convertible currency.
[13] *International Centre for Settlement of Investment Disputes (ICSID) Rules of 1984.*

exchange from Nigeria.[91] In furtherance of the foregoing, the Act permits the operation of domiciliary accounts for foreign exchange transactions.[92] Interestingly, the Act also encourages investment in shares by both residents and non-residents in any currency.

To compliment the provisions of the NIPC Act,[93] the Foreign Exchange Act allows for the free importation of goods into Nigeria so long as such goods are not prohibited and consequently payment of a fair return for the value of such goods is made by way of letter of credit or other internationally accepted modes of payment.

In giving practical effect to the purpose of the Act, Section 37(1) of the Act provides that extant legislation such as the Bill of Exchange Act, the Bank and Other Financial Institutions Act, the Central Bank of Nigeria Act, etc. should be read with such modifications as to bring them to conform with the provisions of the FEMMP Act.

A critical perusal of the provisions of the Foreign Exchange Act indicates that the primary intention of the Act is the promotion of the in-flow of foreign investment, hence, the freedom given to foreign investors to import and export their capital as well as the acquisition of securities

---

[91] *See Sections 3, 12, 13 and 15 of the Act*
[92] *See Section 17 of the Act.*
[93] *See Section 17 of the NIPC Act, Ibid.*

and purchase of goods. For instance, Section 15(1) and (4) of the Act provides:

> (1) Any person may invest in any enterprise or security with foreign currency or capital imported into Nigeria through an authorized Dealer either by telegraphic transfer, cheques or other negotiable instruments converted into Naira in the market in accordance with the provisions of this Decree (sic).
>
> (2) Foreign currency imported into Nigeria and invested in any enterprise pursuant to sub-section (1) of the section shall be guaranteed unconditional transferability through an authorized Dealer in freely convertible currency, relating to:
>
> a. Dividends or profits (net of taxes) attributable to the investment;
>
> b. Payments in respect of loan servicing where a foreign loan has been obtained; and
>
> c. The remittance of proceeds (net of all taxes) and other obligations in the event of sale or liquidation

of the enterprise or any interest attributable to the investment.[94]

The combined effect of the provisions of the FEMM Act and NIPC Act has basically removed some of the restrictions that were hitherto a clog to the inflow of foreign investment in the country. It need be mentioned here that prior to the advent of the two legislation, the stringent exchange control regulations prevented foreign investors from freely importing their capital into the country and exporting their profit from the country.

5.1.3 The Nigerian Export Processing Zones Act, 1992

The Nigerian Export Processing Zones Act,[95] aims at delineating an area for purposes of encouraging foreign investors to establish their business enterprises particularly with respect to the production of goods for export. As a prelude to the passing of this instrument, Nigeria's policy on this was articulated by the Export Processing Zones scheme that was introduced in 1991 pursuant to the first Nigerian Export Processing Zones Act.[96]

---

[94] These provisions all falls within the provisions of Section 17 of NIPC Act.
[95] *No. 63 of 1992.*
[96] *No. 34 of 1991*

The 1992 Act[97] repealed the 1991 Act and made provision for the grant of incentives for investors and enterprises operating within the zones with a view to attract foreign investment into Nigeria.

Pursuant to the foregoing, all permissible goods imported into the country for use in the zones are exempted from import duty,[98] the rationale being that the goods produced as a result of this will be exported thereby paving the way for the country to earn foreign exchange. Consequent upon the foregoing, the Export Processing Zone which is sited at Calabar enjoys free import and export duties under the condition that the production within the zone is targeted at the export market. It is worth observing that due to the pull of Nigeria's large market, most of the goods produced at this zone are consumed within the country.[99]

Section 12 of the NEPZ Act allows any authorized enterprise to import into a processing zone, free of customs duty, any capital goods, consumer goods and raw materials, components or articles intended to be used for the purposes of and in connection with an approved activity, including any article for the construction, alteration, reconstruction, extension or repair of premises in a zone or for equipping such premises.

---

[97] *Commonly referred to as the NEPZ Act*
[98] *See Section 8 of the Act*
[99] Quite contrary to original purpose for setting up the zone.

In addition to the foregoing, Section 18(1) of the NEPZ Act further provides the following incentives:

(a) The non-applicability of legislative provisions pertaining to taxes, levies, duties and foreign exchange regulations within the zones;

(b) The right to repatriate foreign capital investment in the zones at any time with capital appreciation of the investments;

(c) The right to remit profits and dividends earned by foreign investors in the zones;

(d) The non-requirement of import or export licenses;

(e) Allowing up to 100% foreign ownership of business in the zones;

(f) Allowing companies operating in the zones to employ foreign managers and qualified personnel.

Appraising these incentives, Guobadia opines that:

> The export processing zones scheme is a clear attempt to attract foreign investment into the country. The incentives provided by the NEPZ Act as well as the provisions of the other statutes discussed earlier are attractive and do address some of the underlying concerns of the would-be foreign investor referred to earlier. This is, however, not all that is required of the legal framework. For it to be meaningful and

> useful to the foreign investor, it must be certain in the long term.[100]

It is difficult to disagree with Guabadia's conclusions because in the long run a very serious investor must be definitely concerned with the certainty in the enforcement of the agreed terms in times of dispute. There is no doubt however that the provisions of the NEPZ Act, when properly given effect, would go a long way in facilitating the inflow of foreign investment.

5.1.4 The Minerals and Mining Act, 1999

Another milestone in the development of legislations for the facilitation of foreign investment is the Minerals and Mining Act[101] which can rightly be referred to as an investment law in the mining sub-sector of the Nigerian economy.[102] In this regard, section 18 of the Act provides investors with such incentives as capital allowances of 75% of the certified true capital expenditure incurred in the year of investment and 50% in subsequent years. Furthermore, the Act permits that the investor can carry forward losses in each financial year not exceeding the value of capital allowance for the year. In the same breadth, the investor is entitled to an investment.

---

[100] Guobadia, D.A., Ibid., p.89
[101]
[102]

Similar to the provisions of the NIPC Act, the investor is permitted to freely transfer funds for servicing of foreign loans and in the event of sale or even liquidation of the operations when a foreign loan was procured for financing the investment.[103] Section 22 of the Act gives the investor a 3-year tax relief from the commencement of operations. This period can be extended for another period of two years. It must be noted here that this extension of the period of tax relief is not automatic, hence the minister can only approve the extension of the period if he is satisfied as to:

(a) The rate of expansion, standard of efficiency and the level of development of the company in operations;

(b) Implementation of any conditions upon which the lease is granted;

(c) Training and development of Nigerian personnel in the operation concerned.[104]

Another important provision of this Act is that the Act incorporates some provisions of the NIPC and FEMMP Act covering investment guarantees like the transferability of funds and compensation for nationalization. Illustratably, section 2(1) of the Law stipulates that sections 24 and 25(1) and (2) of the NIPC Act "shall apply to any foreign investment made by

[103] *See Section 20 of the Act*
[104] *See Section 21 of the Act*

any company granted a mining lease under this decree". Section 15 of the FEMMP Act on the other hand is incorporated into the Minerals and Mining Act by section 23(2) of the Act.[105] The primary purpose of importing these provisions into this Act is to give assurance to foreign investors with respect to issues like nationalization, repatriation of profits, sourcing of imported capital and repatriation of the principal failure at the collapse of the enterprise.

5.2 TAX RELIEF AND TAXATION INCENTIVES

One other area which has been a constant source of worry to foreign investors is states' exercise of tax powers. Overtime, international law has recognized the bases of state jurisdiction on tax activities.[106] Commenting on state jurisdiction over taxation, Fiana states:

> Jurisdiction connotes the power of the state to prescribe and enforce its laws and is traditionally described by reference to a set of connections expressed as legal principles, which justify the exercise of such power in relation to particular facts. Thus territoriality, nationality, passive personality, protection of the state, universality and extra-territoriality are all recognized bases of jurisdiction in international legal

[105] i.e. the Minerals and Mining Act, 1999
[106] As stemming from principles of customary international law.

> discourse and debate centres on their applicability or acceptability in particular circumstances. Typically, lawyers will attempt to identify the basis on which jurisdiction over certain actors or transactions might be claimed by various states seen as having some connection with or interest in the parties or events in question, an attempt is made to prioritise these potential claims.[107]

In the exercise of this sovereign power, states must recognize the implications on the quest for foreign investment. In this bid, tax regimes have become very important aspect of incentives aimed at facilitating the inflow of foreign investment.

In Nigeria, despite the fact that in the administration of taxes, the three tiers of government exercise some authority in the collection of the taxes, the federal government is the sole authority that legislates foreign investment taxation. For instance, the Industrial Development (Income Tax Relief) Act, 1990[108] was promulgated to provide tax relief to industries designed as pioneer industries so as to encourage the development of the Nigerian industry by foreign investors. This Act stipulates the requirements an industry will meet before it can be granted

---

[107] *See Beveridge, Op. Cit.*

[108] *Cap. 179 LFN 1990. Prior to this other tax incentives were contained in the Companies Income Tax Act, 1979, the Petroleum Profits Tax Act, 1959.*

pioneer status. Consequently, where an industry is conferred with such status, it will be entitled to income tax relief for three years subject to renewal for another one or a further period of two years. However, such an extension can only be granted when the appropriate authority is satisfied with the performance of the company in respect of the following:

(a) expansion, standard of efficiency and level of development;

(b) implementation of any scheme:

    (i) for the utilization of local materials in the processes of the company; and

    (ii) for the training and development of Nigerian personnel in the relevant industry.

Besides the foregoing, the relative importance of the industry to the national economy must also be taken into consideration before the grant of the tax relief will be renewed.

In similar circumstances, the Capital Gains Tax on stock and shares was abolished in 1998 with the sole aim of encouraging foreign participation in the capital market. Besides the foregoing, there are special tax incentives such as those in the agricultural sector which enjoys a 5-7

year tax holiday and a capital allowance of 95% for equipment, solid minerals and the Gas industry.[109]

In supplementing the incentives in the gas industry, the three-year tax holiday which was introduced by the 1997 budget for natural gas exploring companies was extended to 5 years[110]. It does appear that these tax incentives have gone a long way in supporting the promotion of foreign investment into Nigeria.

5.3 Settlement of Investment Disputes

Nigeria has acceded to many investment dispute resolution mechanisms with a view to giving assurances to foreign investors of her willingness to submit any dispute between the Federal government and a foreign investor to a mutually acceptable dispute resolution mechanism. In giving effect to this commitment, Nigeria incorporated the United Nations Commission on International Trade Law[111] rules and the UNCITRAL Model law into the Nigerian Law. These rules constitute substantially the provisions of the Arbitration and Conciliation Act, 1988. This Act provides a quick confidential and efficient means of resolving

---

[109] *The Nigerian LNG (Fiscal Incentives, Guarantees and Assurances) Act, 1990 and also the Associated Gas Fiscal Agreement, 1992.*

[110] This is restricted to companies that has utilized associated gas for commercial purposes.

[111] UNCITRAL

disputes involving a foreign investor and can be viewed as an incentive to encourage a foreign investor to move his capital into the country.

Of most importance to the foreign investor is Nigeria's ratification of the International Centre for the Settlement of Investment Disputes[112] Convention. By this, any investment dispute arising between Nigeria and a foreign investor will be settled under the ICSID Rules by the Centre.[113] The Centre was established for the resolution of investment disputes involving state parties. It is a veritable instrument for the protection of foreign investments. Under the ICSID Rules, a state party can expunge the rights of its citizens to initiate an action before the centre. A very interesting aspect of the ICSID rules is its provisions on the enforcement of its arbitral awards. ICSID Arbitral Awards are enforced by states as if they are judgements of their final courts. In addition, immunity clauses which are used in preventing the enforcement of international commercial arbitral awards as is the case under the New York Convention are not applicable under ICSID Rules.

Nigeria's membership of ICSID is therefore a demonstration of her desire to encourage the inflow of foreign investment. Nigeria has further to the foregoing, adopted the ICSID draft in the NIPC Act. Section 26(3)

[112] ICSID
[113] Id.

thereof provides that the ICSID Rules shall be applied in the settlement of disputes between the Federal Government of Nigeria and a foreign investor. In the opinion of Odiase-Alegimenlen, the settlement of investment dispute under this mechanism is a fruitful way of reassuring foreign investor, and, that,

> It is therefore to encourage confidence in the system that states usually draft an international code on dispute settlement. This is the ICSID draft code. Evidence of the existence of a dispute resolution code that conforms to the ICSID Code normally serves as an incentive to the foreign investor who is then assured that there is an established mechanism for resolving disputes that, in its operation is likely to be fair and just.[114]

There is no doubt that, although there exists dispute settlement mechanism under Nigeria's legal system, foreign investors will have more confidence under the ICSID mechanism than have their disputes adjudicated upon by Nigeria's national courts.

There is every need to note here that besides the foregoing mechanisms adopted by the Nigerian government, there today exists an

[114] Odiase-Alegimenlen, Op. cit., p.22

independent commercial arbitration forum in the country known as the Regional Centre for International Commercial Arbitration[115] with the primary objective of handling foreign investment disputes. Notably, this centre performs effectively the function of investment dispute resolution. A very important characteristic of the centre is that it administers the UNCITRAL rules and also enforces arbitral awards. Given the fact that this centre is a private sector initiative, foreign investors are likely to have more confidence in the centre than the public based mechanisms established by the government.

---

[115] With offices in Lagos

CHAPTER SIX

CONCLUSION

6.1 SUMMARY

This work examined the conceptual framework of foreign investment generally. In this direction, the work attempted to examine the theoretical underpinnings of foreign investment and its various forms. The research also examined the developmental stages of foreign investment activities in Nigeria. In examining this, the research investigated into the factors militating against the free flow of foreign investments into Nigeria.

In the course of this research, we found that Nigeria has for a long period of time witnessed a very serious civil war and other internal disturbances that have caused or exacerbated famines and epidemics for years. To this end, the country compared to many other nations of the world, became much poorer, both in absolute and relative terms.

The country has only a small industrial and manufacturing infrastructure. Most of the natural resources the country is endowed with are exported for refining, development and manufacture in other parts of the world. In spite of the existence and abundance of low-cost labour, few Nigerians are engaged in industrial jobs. Many Multinational investors

due to lack of basic infrastructure, political stability and skilled work force makes Nigeria an undesirable location for setting up plants or factories. The resultant effect of the foregoing is a low rate of foreign investment in Nigeria.

The current state of Nigerian economy is a product of the policies of the colonial administration of Nigeria as a colony of Great Britain. During the colonial rule, there was no conscious attempt on the part of the colonial masters to invest directly on the shores of Nigeria or to even promote or facilitate the inflow of such foreign investments into Nigeria. On the contrary, Nigeria was seen as a viable source for the raw materials that were required for the satisfaction of the thirst of the imperial exchequers. Consequently, raw materials were exported from the Nigerian soil to Europe to satisfy the needs of the European industries. The much desired industries that would have kick started the economic development of Nigeria were not established during the colonial period.

At independence, Nigeria was faced with the reality that, even though richly endowed with natural resources, her economy was grossly underdeveloped and that in fact she ranked amongst the poorest and the worst underdeveloped economies of the world.

In her early days as a nation, Nigeria became a consumer nation. Faced with this situation, Nigeria saw international economic cooperation as the only way out of the situation. In view of this, the country's quest for international economic cooperation is as old as its age as a sovereign state. Foreign investment is the most potent instrument for achieving international economic cooperation. Nigeria has therefore through the years taken a lot of steps and measures aimed at attracting foreign investments into the country.

The research further examined the various attempts made by successive regimes in Nigeria aimed at attracting the much desired foreign investments. The research noted that there is a difference between colonial independence and economic independence. And that economic independence is not automatically attained by the mere attainment of political independence. The research discovered that in the Nigerian case even though at independence, the political control was transferred to Nigerians the economy was still under the control of the foreigners who were not prepared to exercise it for the benefit and development of Nigeria. The research also noted that the efforts made to attract foreign investments into the country has yielded a very few dividends.

The research therefore examined the factors that had continued to impede the rapid development of the Foreign Investment regime in the country. The factors range from poor infrastructural developments, persistent political and social instability, governmental interference with the rights and proprietary interests of foreign investors, lack of national commitment to international obligations, corruption to unfavourable investment regimes.

The research also examined the various mechanisms employed by the international investment community for the promotion and protection of foreign investments. In relation to this, the research notes that countries today enter into bilateral and multilateral arrangements which promote and protect foreign investments. Such bilateral treaties contain clauses where host countries undertake not to expropriate or nationalise the properties of foreign investors and where such interests are expropriated, to pay prompt and adequate compensation. Through these treaties, host countries further undertake to provide full security and protection to foreign investments and to be bound by the terms of the treaties or obligations created by the treaties.

6.2 FINDINGS

Nigeria has made a lot of efforts in creating a conducive environment for investment activities in the country. These efforts range from passing investment friendly legislations to the granting of numerous incentives to intending foreign investors but unfortunately the result is below expectation given the quantum of efforts made in this direction. The factors that impeded the inflow of foreign investments into the country as far back as 30 years ago are still very much alive. For example, the basic infrastructures are still underdeveloped as they have always been. This research found that the level of insecurity in the country is getting worse than had previously been the case with the rate of kidnappings of foreign investors on the increase on daily basis. The state of insecurity is so bad that reasonable foreign investors will not be encouraged to move their investments into Nigeria.

It is also found that even though the Nigerian government has passed legislations aimed at curbing the menace of corruption, corruption is still prevalent in both the public and private sectors with the active participation of law enforcement agencies. Regrettably, Transnational Corporations are also being indicted in some of these corrupt practices.

Further to the foregoing, the research has so far made the following specific findings:

1. That the basic infrastructures which are required to be in place to attract foreign investments are lacking in Nigeria. These basic infrastructures include electricity, transport system, water, communication, etc. No foreign investor will be willing to commit capital or resources in an environment where the basic operational tools are lacking.

2. This research similarly found that there is a high level of social insecurity and political instability in the country. There exist incidents of attacks on the investments and even the persons of foreign investors in Nigeria particularly in the Niger Delta area. In addition, internal armed conflicts and tensions are reportedly on the increase. Apart from the foregoing, the military rule and political instability that the country found herself in for the greater part of her political life is a strong contributory factor for discouraging foreign investors from investing in the country.

3. Unfavourable investment legislation that had for a long time found its way into the Nigerian statutes books have played a key role in impeding the influx of foreign investments into the country. The research found that successive military regimes introduced legislation and policies

that were aimed at preventing foreigners from investing in some segments of the Nigerian economy. These steps not only discouraged intending investors but also succeeded in pushing out from Nigeria some foreign investors that had already invested in the country.

4. The research further found that the high level of corruption that has become part of Nigeria's national life is a serious constraint to the promotion of foreign investment in Nigeria. While efforts are being made by the government to curb corruption through the establishment of anti-corruption agencies, at present, there exists no visible sign that these efforts are achieving any meaningful results.

5. It is also found that there is no clear national focus or objective for a sincere quest for the inflow of foreign investments. It is sad to note that persons who are charged with the responsibility of promoting the much needed foreign investment only pursue their personal interests and very much so at the expense of national interests.

6. Inspite of the efforts by the Nigerian government to grant incentives to foreign investors and the introduction of legislations to create a favourable business climate, this has not translated into a high inflow of foreign investment into the country.

7. The work further reveals that the challenge before Nigeria is for the country to enter into international co- operation with other countries and in the course of doing so, she must utilize its vulnerable resources to build an internally consistent, self-sustaining and favourable economy that can compete and be able to access the available international institutions for facilitating economic development.

8. The work also disclosed that for Nigeria to participate effectively and reap the full benefits of globalization, the country must first restructure her economy, democratic value system and societal attitudes. The truth being that no amount of incentives can influence a foreign investor to invest in a country where there is no national security.

9. The work also discovered that the best option available for Nigeria in facilitating the inflow of foreign investment is to establish a favourable business environment for both local and foreign investors. This can only be achieved through the removal of the impediments identified in this work.

6.3 RECOMMENDATIONS

1. Nigeria must clearly identify her goal on foreign investment and back it up with meticulous planning. In reality, this is the success story behind the Chinese and Japanese in economic

development. In marshalling these goals conscious efforts must be made to recognize the factors that motivate foreign investors to invest in a particular climate.

2. More than ever before there is an urgent need to put in place a legal regime that will ensure the provision of the basic and requisite infrastructure. Given that Nigeria is endowed with enviable natural resources that yield high income, what the country needs at the moment are infrastructural oriented appropriation laws that will herald the rapid developments in this area.

3. Budget monitoring and implementation mechanism must be put in place with appropriate sanctions. Such sanctions to be applied against any misappropriation or misapplication of appropriated funds or budgetary provisions.

4. There is also an urgent need to review the investment legal regime so as to remove all such unfavourable laws that militate against the influx of foreign investments into the country. In doing this, an insight must be made to the strategies employed by other regimes in such jurisdictions that have succeeded in attracting foreign investment.

5. Nigeria must as matter of urgency conclude such bilateral or multilateral treaties that facilitate the promotion and protection of foreign investments.

6. The fight against corruption must be sincere and purposeful. In this regard, there should be no sacred cows in the punishment of culprits and government must stop paying lip service to the campaign against corruption.

7. Both Legal and institutional mechanisms must be put in place to provide security and to curb the high level of violence and armed conflicts in the country. Special measures must be taken to provide security and full protection to foreign investments and the lives of the foreign investors.

8. Legal and institutional mechanisms should be introduced in the country's financial sector so as to give confidence to foreign investors. In this direction, the present reforms in the Banking sector must be institutionalised and sustained.

9. There is also an urgent need to review the country's foreign policies with a view to strengthening Nigeria's commitment in the discharge of her international obligations. This will go a long

way in building the confidence of foreign investors and to influence their decision to import their capital into Nigeria.

10. It is also suggested that further incentives be granted to foreigners to induce them into bringing their investments into the country. This will no doubt entail the review of the country's tax laws.

11. National legislation must be introduced to demonstrate government's undertaking not to introduce regulations or policies to frustrate foreign investment except for purposes of public interest which in such cases must be backed by the payment of prompt and adequate compensation.

12. It is further suggested that Nigeria introduce a free market policy. This policy that was adopted by China resulted in attracting foreign investment and trade from the west into that country. To achieve this, government must privatize most of its unproductive state owned enterprises, such as PHCN, Railway system which are at the core of its infrastructural development. Although the Nigerian government, quite recently, introduced quite a number of measures in addressing this, including the

privatization of quite a good number of state owned enterprises, the problem is still acute.

13. There is an urgent need for Nigeria to enter into Free Trade Agreement (FTA) with other countries. A Free Trade Agreement represents an arrangement arrived at between two or more countries, to reciprocally reduce or eliminate tariffs and other trade restrictions. But more importantly, Free Trade Agreements go a long way in addressing social and economic issues affected by trade policy, such as environmental and labour standards and investment and intellectual property rights. A notable example of FTA is the North America Free Trade Agreement (NAFTA). It is hoped that this arrangement will promote foreign investments in the country. This expectation is premised upon the fact that FTAs usually introduce investment rules that require member countries to treat nationals of each country in the manner as domestic investors. Furthermore, such agreements provide foreign investors with specific rights, such as repatriation of profits and capital, fair compensation for expropriation; international arbitration in state-investor disputes. A model FTA is presented here as Appendix III. Most often

times, foreign investors do require host states to submit to international arbitration or settlement of disputes involving monetary damages for violations of FTA investments rules.

6.4 CONTRIBUTION TO KNOWLEDGE

1. The failure of the Nigerian Government to create an appropriate favourable environment for investment activities of foreign investors has resulted into the very low inflow of foreign investors into Nigeria. Apart from the identified constraints, the failure of the Nigerian Government to act transparently in the face of challenges faced by foreign investors is a sufficient reason for them to feel quite vulnerable and to conclude that their investments are made hostage in Nigeria. Consequently, identifying those constraints and suggesting the appropriate legal framework for removing the road blocks to the inflow of investment into the country becomes a significant contribution to knowledge.
2. This work is a significant contribution to the existing literature in this area. There is no doubt that, although this area is not a virgin land, the in-depth analysis carried out in this work on the impediments to foreign investments into Nigeria has opened new interests in this area.

3. The work has established the importance of foreign investment as an instrument for international co-operation and economic development in Nigeria.
4. Furthermore, this work has succeeded in exposing the fact that Law is a veritable instrument for facilitating foreign investments into Nigeria.
5. This work also reveals that there are lapses in all the efforts and measures Nigeria had adopted so far in facilitating the inflow of foreign investments and that there must be a major shift in the measures adopted and the country must first of all, set its priorities right.

6.5 SUGGESTIONS FOR FURTHER RESEARCH

The inability of Nigeria to attract foreign investments given the abundance of natural resources the country is endowed with necessitated this research.

In carrying out the research, discussions were limited to the impediments militating against the free inflow of foreign investments into the country and the role which law can play in changing the situation. The choice of the topic was to fulfil a burning desire to have an in-depth analysis of the factors responsible for the failure to attract foreign

investments into Nigeria despite the enormous foreign investment incentives provided by the Nigerian Government and the efforts made in increasing a favourable investment regime.

In most developing countries, particularly African States, the perennial atmosphere of insecurity contributes greatly in discouraging foreign investors from transferring their capital to these countries. There is an urgent need to inquire into the factors responsible for this state of insecurity within the African states. Questions such as whether there is a deliberate ploy by external elements to under develop African nations economically, or whether such problems are self- induced by Africans themselves needs to be critically examined.

In addition to the foregoing, Nigeria like most of the other African countries cannot compete favourably in the global economic arena. In the same vein, Nigeria like many other countries cannot meet up with her commitments under the World Trade Organization. There is therefore a need for further research that will inquire into the factors responsible for the inability of most developing nations to exercise any economic advantage that will enable them participate effectively in the global economic competetiveness.

WORKS CITED

Books

Ademola, A., *Economic: A Simplified Approach,* 2nd Ed. Vol. 2 (1999).

Adeniran, T., *Introduction to International Relations,* (Ibadan), Mac-Millan Nig. Publishing Ltd., 1988)

Adrianse, P., *Confiscation in Private International Law,* (The Hague; Martinus Nighoff)

Ajomo, M. A., *The Dimensions and Legal Framework of International Investment Agreement in Nigeria: The Joint Venture Model:* In Ajomo, M. A (eds) New Dimensions in Nigeria Law (Lagos: N.I.A.L.S 1989)

Akehurst, M., *A Modern Introduction to International Law*, 3rd ed. (London)

Akin-George, J., *Industrial and Economic Development in Nigeria: Selected issues*, (Lagos: Malt House Press Ltd., 2002) Akinsanya, A. A., *The Expropriation of Multinational Property in the Third World,* (U.S.A Praeger, 1980)

Alegimenlen, O.A. *An appraisal of the Legal and Institutional Regime for Foreign Investment Promotion and Protection in Nigeria* in Guobadia, A. and Akper, P. Ibid.

Bernard S., "*Contracts Between States and Foreign Nationals: Assessment*" in Smith, Galston, and Levit sky (eds) International Contracts (New York: Eagle Wood Publisher, 1988).

Beveridge, F.C., *The Treatment and Taxation of Foreign Investment under International Law*. (Manchester University Press, 2000).

Bhalla, V. K., *Investment Management: Security Analysis Portfolio Management*, 10th ed. (Ram Nagar, New–Delli, 2004)

Bhalla, V.K. Investment Management: Security Analysis, Portfolio Management. 10th Ed. (Ram Nagar, New Delhi – 110055)

Biervtecker, T.J. *Multinationals, the State and Control of the Nigerian Economy,* (Princeton University Press, 1987).

Brower, C.N. and Ruesche, J.O., *The Trans-United States Claims Tribunal*, (The Hague, Martinus Njhoff Publishers, 1998).

Dattu, R., *A Journey from Havana to Paris: The Fifty-year Quest for the Elusive Multilateral Agreement on Investment,* (24 Fordham Int'l. J. 2000).

Delupis, I., *Finance and Protection of Investments in Developing Countries* (Essex: Gower Press Ltd., 1973)

Diaku, I. *Industrial Finance in Nigeria.* (Lagos: Longman, 1989)

Dugan, C. and *et al. Investor State Arbitration*, (Oxford University Press, 2008).

Dunning, J., *Studies in International Investment*. (London: George Allen and Unwin, 1970).

Fawcet, J. E., *Some Effects of Nationalization of Foreign Properties,* (British yearbook of International Law, 1980) p 369.

Friedman, S., *Expropriation in International Law* (Cambridge: University Press 1959).

Graham, E. and Krugman, P., *Foreign Direct Investment in the United States* (1991).

Hackworth, G., *Digest of International Law,* (U.S. G.P.O. 1943).

Kroufol, Z., *Protection of Foreign Investment*, (Netherlands: A.W. Sijth off International Publishing Co., N. V. 1972).

Levy, H., *Introduction to Investment* (South-Western College Publishers, 1996).

Merriam-Webster, *Webster's Third New International Dictionary, Vol. II* (Chicago: Encyclopaedia Britannica Inc., 1981).

Norton, P.M. *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, (85 A.M.I.L., 1991).

Nwabueze, B.O. *Military Rule and Social Justice in Nigeria*, (Ibadan, Spectrum Law Publishing, 1993).

Nwogugu E. I., *The Legal Problems of Foreign Investment in Developing Countries* (Manchester University Press, 1965).

Obitayo, K.M., *Image Building and Investment Generation – Prospects for Nigeria.* In Guobadia and Akper (eds.) Op. cit. p.51.

Offiong, D.A., *Imperialism and Dependency.* (Enugu: Fourth Dimensions, 1980).

Okon, E.E., *Foreign Investment and National Security in Developing Countries under the Globalised Environment: The Nigerian Perspective* in Guobadia, A. and Akper, P. (eds.). Foreign Investment in a Globalised World, (Lagos: NIALS, 2006).

Osunbor, O. A., "*Opportunities for Direct Foreign Investment in Nigeria in the Industrial and Manufacturing Sectors* (Proceedings of a workshop on strategies for creating a Favourable Legal and Economic Environment for Foreign investment in Nigeria, March, 1990, Abuja).

Popoola, A., *Foreign Investment in the 21st Century: Nigerian Perspective in Yinka Omorogbe (ed): International Law and Development: Strategies at the Threshold of the Twenty First Century*, Nigerian Society of International Law, 27th Annual Conference, August 14-18, 1993.

Pritchard, R., *The Transformation of Foreign Investment Law – More than a Pendulum Swing* (1997), 7ICCLR, 233-234.

Raghbir, S.B. *Determinants of United State Private Direct Investment in Foreign Countries*, Kent State University, (1973).

Reuber, G., *Private Foreign Investment in Development* (Oxford: Clarendon Press, 1973).

Sanda, K.A.O., *The Challenge of Nigeria's Indigenisation*, Ibadan, Nigeria Institute of Social and Economic Research, 1982.

Schechter, O., *Compensation for Expropriation,* (78 A.M.J. Int'L J., 1984).

Simmond, R., *International Business and Multinational Enterprises* (Illinois, R. D. Irtwin USA, 1977).

Sornarajah, M. *International Law on Foreign Investment* (Cambridge University Press, 1991), p.4.

Sornarajah, M., *The International Law of Foreign Investment* (Cambridge: Grotius Publications, 1994)

Sullivan, A. & Sheffrin, M.S. *Economics: Principles in Action*. (New Jersey, Upper Sadde River, 2003).

The New Encyclopaedia Britannica, Vol. 6 (Chicago: Encyclopaedia Britannic Inc., 1986).

The New Standard Encyclopaedia, Vol. 7.

Vernon, *Sovereignty at Bay: The Multinational Spread of U.S. Enterprise* (Harmondsworth: Penguin, 1973)

Wallace, D. C., *Foreign Investment in the 1990s: A New Climate in the Third World* (Amsterdam: Martinus Nijhoff Publishers, 1990)

Westberg, J.A. and Marchais, B.P. *General Principles Governing Foreign Investment as Articulated in Recent International Tribunal Awards and Writings of Publicist* (71CSID Rer-For Inv. L.J. 1992).

Yergin, D., *The Prize: The Epic Quest for Oil Money and Power*, (1992).

Journals/Monographs

Adegbite, S., "Direct Foreign Investment – Its Promotion and Prospects", 11th Omolayole Annual Lecture delivered in Lagos on 22nd November, 1995.

Adetunji, W., Accessing the Global Market; Benefit, Challenges and Prospects for Nigerian Entities; in securities market journal, Vol. 10

Akanle, O., "Regulation of Trade and Investment in Nigeria" in Ojomo, M.A. *et al.* (eds.), *Regulation of Trade and Investment in Era of Structural Adjustment: The African Experience.* NIALS, 1995.

Akor, M.E. Multinations (Jos, Department of Economics), p.5.

Al-Quereshi, Z., "Indirect Expropriation in the Field of Petroleum" *5(6) JWIT 897,* 2004.

Aluko, S. A., "The Case for Rapid Industrialization in Nigeria in the quarterly Journal of Nigeria, University of Ife, April, 1970.

Aluko, S.A. "The Case for Rapid Industrialisation in Nigeria" in quarterly Journal of Administration, April 1978.

Asante, Stability of Contractual Relations in the Transnational Investment Process, 28 ICLQ 409 (1999)

Behrmen, J.N. "The Multinational Enterprise: Its Initiatives and Governmental Reactions" Journal of International Law and Economics, Vol. 6, No. 2, Jan. 1972.

Beveridge, F.C., "Taking Control of Foreign Investment: A Case Study of Nigeria" in *40 ICLI,* 1991.

Boyd, F.C., "Expropriation of Alien Property in International Law" in A Study of Recent State Practices Concerning British Nationals, University of Nottingham, 1988.

Dolzer, R.O., "Indirect Expropriation of Alien Property". *ICSID Rev-FILJ 41,* 1986.

Domke, M. "Indonesian Nationalisation Measures before Domestic Courts" *54 AJIL,* 1960.

Franklin, R. and Ahmed, A., "The Influence of Policy Instruments on Manufacturing, Direct Foreign Investment in Developing

Countries", *Journal of International Business Studies*, Winter, 1978.

IMF, Balance of Payment Manual (1980), Par. 408.

Lardy, N.R. "Economic Engine Foreign Trade and Investment in China" in the Brookings Review, Vol. 14, No. 1 (Winter, 1996).

Modibo, T., "Comparative Perspectives on the National Legal Institution Framework for Foreign Investment in Africa" in Zambia Law Journal Vol. 12 (1980)

Obadan, M.I., "International Trade and Globalisation: The Socio-Political and Economic Realities for Nigeria in Goubadia & Akper (eds.)

Obitayo, K.M., "Image Building and Investment: Generation – Property for Nigeria" in Goubadia & Akper (eds).

Odozie, V., "An overview of Foreign Investment in Nigeria: 1960-1995, CBN Research Department Occasional Paper, No. 11.

Oji, E. O. *et al,* "Globalization and New Perspective in Corporate Governance", A paper presented at NALT Conference May, 2004

Okon, E.E., "Foreign Investment and National Security in Developing Countries under the Globalised Environment: The Nigerian Perspective". In Goubadia & Akper (eds).

Osunbor, O.A., "Nigeria's Investment Law and the State Control of Multinationals", *31CSID-FILT* 1988.

Peters, D. "Foreign Investment in the Broadcasting Industry in Nigeria: Prospects and Challenges" Modern Practice Journal of Finance and Investment Law, Vol. 3, No. 2, April 1999.

Popoola, A.O. "Security, Stability, Foreign Investment and Economic Development in an Emerging Democracy: The Hyperactive of Good Governance", in Goubadia and Akper (eds), *Foreign Investment Promotion in a Globalised World,* NALS, 2006.

Qutarra, A.D., "Opening and Liberalising Markets in Africa – A Response to Globalisation" (A Keynote Address delivered in Berlin 2/12/1998).

Teck-Wong and Stoever, A.W. "Foreign Investment and Economic Development in Singapore. A policy-oriented Approach" in the Journal of Developing Areas, Vol. 30, No. 3, April 1996.

United Nations Conference on Trade and Development – check www.united.org.

Walde, T. and Kolo, A.I., "Environmental Regulation, Investment Protection and Regulatory Taking in International Law", 50 Int'l & Coup LQ811, 2001.

Wing Alvin, G., "The Determinants and Distribution of FDI in Developing Countries" in *Creating a Favourable Environment for Foreign Investment*, 1991.

Magazines/Newspapers

Business Times, Lagos, Monday May 23rd, 1998

National Concord, 31st July, 1997.

Nigerian Tribune, Thursday, 12th December, 1996.

The Guardian, Thursday, 21st November, 1996.

The Punch, Thursday, 25th May, 1998.

The Vanguard, Thursday, 14th January, 1999.

Thisday Newspaper Report of Monday, 23rd July, 2007.

Reports

Mexico, The Economy, O.T. http/countrystudies.us/mexico/78.htm.

African Competitiveness Report, 1988. World Economic Forum, Geneva.

Restatement (Third of Foreign Relations Law of the United States).

UNCTAD, Bilateral Investment Treaties 1995-2006: Trends in Investment Rule Making 52, 2007.

OECD Development Centre, The Relation of Expropriatory Action by Developing Countries of Foreign Investment Flows, OECD 1972.

APPENDIX I

AGREEMENT

BETWEEN THE GOVERNMENT OF THE FEDERAL REPUBLIC OF NIGERIA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

The Government of the Federal Republic of Nigeria and the Government of the United Kingdom of Great Britain and Northern Ireland (hereinafter referred to as "the Contracting Parties");

Desiring to create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State;

Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative, will contribute to development and will increase prosperity in both State;

Recognising the right of each Contracting Party to define the conditions under which foreign investment can be received and the investor's duty to respect the host country's sovereignty and laws;

Have agreed as follows:

ARTICLE I

DEFINITIONS

For the purposes of the Agreement:

(a) "Investment" means every kind of asset and in particular, though not exclusively, includes;

i. Movable and immovable property and any other property rights such as mortgages, liens or pledges;

ii. Shares in and stock and debentures of a country;

iii. Claims to money or to any performance under contract having a financial value;

iv. Intellectual property rights, technical process, know-how and goodwill;

v. Business concessions conferred by law or under contract, including concession to search for, cultivate, extract or exploit natural resources.

A change in the form in which assets are invested does not affect their character as investments and the term "investment" includes all investments, whether made before or after the date of entry into force of this Agreement; the alteration of the asset shall not be contrary to the

initial approval granted to the investment by the Contracting Party in whose territory the investment is made;

(b) "returns" means the amount yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees;

(c) "Nationals" means, with regard to either Contracting Party, natural person having the nationality of that Contracting Party;

(d) "Companies" Means, with regard to either contracting party, corporations, firms, associations and other legal persons incorporated or constituted under the law in force in any part of each Contracting Party or in any territory to which this Agreement is extended in accordance with the provision of Article II;

(e) "territory", which includes the territorial sea and any maritime area situated beyond the territorial sea of the State concerned which has been or might in the future be designated under their national laws in accordance with international law as an area within which they may exercise rights with regard to the sea-bed and subsoil and the natural resources, means;

i. In respect of the Federal Republic of Nigeria; as defined by the constitution of the Federal Republic of Nigeria.

ii. In respect of the United Kingdom; Great Britain and Northern Ireland and any territory to which this Agreement is extended in accordance with the provisions of Article 11 hereof.

ARTICLE 2

Promotion and Protection of Investment

1. Each Contracting Party shall within the limits of its resources encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall for an investments only extend to investment, whether made before or after the coming into force of this Agreement, which is specifically approved in writing by the Contracting Party in whose territory the investment has been made or is subject to the laws in force in the territory of the Contracting Party concerned and to the conditions, if any, upon which such approval shall have been granted.

2. Investments of nationals or companies of each Contracting party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way

impair by unreasonable or discriminatory measures the management, maintenance, use enjoyment or disposal of investment in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.

ARTICLE 3

National Treatment and Most-Favoured-Nation Provisions

1. Neither Contracting Party shall in its territory subject investment or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.

2. Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

3. Notwithstanding the provisions of paragraphs (1) and (2) of this Article, either Contracting Party may grant to its own nationals and companies special incentives in order to stimulate the creation of local industries, provided they do not significantly affect the investment and activities of nationals and companies of the other Contracting Party in connection with an investment.

ARTICLE 4

Compensation for Losses

(1) Nationals or companies of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owning to war or to other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own nationals or companies or to nationals or companies of any third State.

(2) Without prejudice to paragraph (1) of this Article, nationals and companies of one Contracting Party who in any of the situations

referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from:

a. Requisitioning of their property by its forces or authorities, or

b. Destruction of their property by its forces or authorities, which was not caused in combat action or was not required by the necessity of the situation, shall be accorded restitution or adequate compensation. Resulting payments shall be freely transferable.

ARTICLE 5

Expropriation

1. Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal policies of that party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending appropriation became public knowledge, whichever is

the earlier, shall include interest at the prevalent commercial rate until the date of payment, shall be made without delay, and shall be effectively realisable and be freely transferable. The nationals or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of the contracting Party making the expropriation, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

2. Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such national or companies of the other contracting party who are owners of those shares.

ARTICLE 6

Repatriation of Investment and Returns

(1) Each Contracting Party shall in respect of investments guarantee to nationals or companies of the other contracting party the unrestricted transfer to the country where they reside of their investments and returns.

(2) Transfers of currency shall be effected without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the National or Company making the investment and the Contracting Party concerned Unless otherwise agreed by the National or Company making the investment transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.

ARTICLE 7

Exceptions

The provisions in this Agreement relative to the grant of treatment not less favourable than that accorded to the nationals or companies of either Contracting Party or of any third State shall not be construed so as to oblige one Contracting Party to extend to the nationals or companies of

the other the benefit of any treatment, preference or privilege resulting from:

(a) Any existing or future free trade zone, customs union or regional economic organisation or any similar international agreement to which wither of the contracting Parties is or may become a party, or

(b) Any international agreement or arrangement relating wholly or mainly to taxation or ay domestic legislation relating wholly or mainly to taxation,

ARTICLE 8

Reference to International Centre for Settlement of Investment Disputes

(1) Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes between States and Nationals of other States (hereinafter referred to as "the Centre") for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (hereafter called "the Convention") opened for signature at Washington on 18 March 1965 any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an

investment of the later in the territory of the former. A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute are owned by nationals or companies of the other Contracting Party shall, in accordance with Article 25 (2)(b) of the Convention, be treated for the purposes of the Convention as a company of the other Contracting Party. If any such dispute should arise and agreement cannot be reached within three months between the parties to the dispute through pursuit of local remedies or otherwise, then, if the national or company affected also consents in writing to submit the dispute to the Centre for settlement by conciliation or arbitration under the Convention, either party may institute proceedings by addressing a request to under the Convention, either party may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre as provided in Articles 28 and 36 of the Convention. In the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure the nationals or company affected shall have the right to choose. The Contracting Party which is a party to the dispute shall not raise as an objection at any stage of

the proceedings or enforcement of an award the fact that the national or company which is the other party to the dispute has received in pursuance of an insurance contract an indemnity in respect of some or all of his or its losses.

(2) Neither Contracting Party shall pursue a dispute through the diplomatic channel after the dispute has been referred to the Centre unless:

a. The Secretary-General of the Centre, or a conciliation commission or an arbitral tribunal constituted by it, decides that the dispute is not within the jurisdiction of the tribunal constituted by it, decides that the dispute is not within the jurisdiction of the Centre, or

b. The other Contracting party should fail to abide by or comply with any award rendered by an arbitral tribunal.

ARTICLE 9

Disputes between the Contracting Parties

(1) Disputes between the contracting Parties concerning the interpretation or application of this Agreement should, if possible, be settled through the diplomatic channel,

(2) If a dispute between the Contracting parties cannot thus be settled, it shall upon the request of either Contracting Party be submitted to an arbitral tribunals.

(3) Such an arbitral tribunal shall be constituted for each individual case in the following way. Within two months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State who on approval by the two contracting parties shall be appointed chairman of the Tribunal. The chairman shall be appointed within two months from the date of appointment of the other two members.

(4) If within the periods specified in paragraph (3) of this Article the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any

necessary appointments. If the President is a national of either Contracting party or if he is otherwise prevented from discharging the said function, the vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said function, the Member of the International Court of Justice next in seniority who is not a national of either Contracting party shall be invited to make the necessary appointments.

(5) The arbitral tribunal shall reach its decisions by a majority of votes. Such decision shall be binding on both Contracting Parties. Each contracting Party shall bear the cost of its own member of the tribunal and of its representation in the arbitral proceedings; the cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The Tribunal may, however, in its decisions direct that a higher proportion of costs shall be borne by one of the two Contracting parties, and this award shall be binding on both Contracting Parties. The Tribunal shall determine its own procedure.

ARTICLE 10

Subrogation

(1) If one Contracting Party or its designated agency makes a payment under an indemnity given in respect of an investment in the territory of the other contracting Party, the latter contracting Party shall recognise the assignment to the former Contracting Party or its designated Agency by law or by legal transaction of all the rights and claims of the party indemnified and that the former contracting Party or its designated Agency is entitled to exercise such rights and enforce such claims by virtue of subrogation to the same extent as the party indemnified

(2) The former Contracting Party or its designated Agency shall be entitled in all circumstances to the same treatment in respect of the rights and claims acquired by it by virtue of the assignment and any payments received in pursuance of those rights and claims as the party indemnified was entitled to receive by virtue of this Agreement in respect of the investment concerned and its related returns.

(3) Any payments received by the Former Contracting Party or its designated Agency in pursuance of the rights and claims acquired

shall be freely available to the former Contracting Party for the purpose of meeting any expenditure incurred in the territory of the latter Contracting Party.

ARTICLE 11

Territorial Extension

At the time of signature of this Agreement, or at any time thereafter, the provisions of this Agreement may be extended to such territories for whose international relations the Government of the United Kingdom is responsible as may be agreed between the Contracting parties in an Exchange of Notes.

ARTICLE 12

Amendment or Revision

Any amendment to or revisions of this Agreement shall be in writing and shall come into effect when confirmed by both Contracting Parties in an Exchange of Notes.

ARTICLE 13

Entry into Force

This Agreement shall enter into force on signature.

ARTICLE 14

Duration and Termination

This Agreement shall remain in force for an initial period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination to the other. Provided that in respect of investments made at any time before the termination of the Agreements, its provisions shall continue in effect with respect to such investments for a period of fifteen years from the date of termination and without prejudice to the application thereafter of the rules of general international law.

In witness whereof the undersigned, duly authorised thereto by their respecting Governments, have signed this Agreement.

For the Government of
The Federal Republic of
Nigeria

MOHAMMED YAHAYA

For the Government of
the United Kingdom of
Great Britain and
Northern Ireland

TIMOTHY SAINSBURY

APPENDIX II

2004 Model BIT

TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF (Country) CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

The Government of the United States of America and the Government of (Country) (hereinafter the "Parties");

Desiring to promote greater economic cooperation between them with respect to investment by nationals and enterprises of one Party in the territory of the other Party;

Reorganizing that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;

Agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards;

Reorganizing the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration;

Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights;

Having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment;

Have agreed as follows:

SECTION A

Article I: Definitions

For the purpose of this Treaty:

"central level of government" means:

(a) For the United States, the federal level of government; and
(b) For (Country); [___]

"Centre" means the International Centre for Settlement of Investment Disputes ("ICSID") established by the ICSID Convention.

"**claimant"** means an investor of a Party that is a party to an investment dispute with the other Party.

"covered investment" means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Treaty or established, acquired, or expanded hereafter.

Disputing parties" means the claimant and the respondent.

"**disputing party"** means either the claimant or the respondent.

"**enterprise"** means any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise.

Enterprise of a Party" means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.

"existing" means in effect on the date of entry into force of this Treaty.

"freely usable currency" means "freely usable currency" as determined by the International Monetary Fund under its *Articles of Agreement.*

“GATS” means the *General Agreement on Trade in Services*, contained in Annex 1B to the WTO Agreement.

“**government procurement”** means the process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale, or use in the production or supply of goods or services for commercial sale or resale.

“ICSID Additional Facility Rules” means the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for settlement of Investment Disputes.*

“ICSID Convention” means the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States,* done at Panama, January 30, 1975.)

“investment” means every aspect that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

(a) an enterprise;

(b) shares, stock, and other forms of equity participation in an enterprise;

(c) bonds, debentures, other debt instruments, and loans;[116]

(d) futures, options, and other derivatives;

(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;

---

[116] Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

(f) intellectual property rights;

(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;[117] [118]

(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

"investment agreement" means a written agreement[119] between a national authority[120] of a Party and a covered investment or an investor of the other Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor.

(a) With respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale;

(b) To supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or

(c) To undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government.

---

[117] Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.

[118] The term "investment" does not include an order or judgement entered in a judicial or administrative action.

[119] "Written agreement" refers to an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 30 [Governing Law](2). For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a decree, order, or judgement, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.

[120] For purposes of this definition, "national authority" means (a) for the United States, an authority at the central level of government; and (b) for[Country], [ ].

“investment authorization”[121]means an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of the other Party.

“investor of a non-Party” means, with respect to a Party, an investor that attempts to make, is making, or has made an investment in the territory of that Party, that is not an investor of either Party.

“investor of a Party” means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.

“measure” includes any law, regulation, procedure, requirement or practice.

“national” means:

(a) for the United States, a natural person who is a national of the United States as defined in Title III of the Immigration and Nationality Act; and
(b) for [Country], [___].

New York Convention” means the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* done at New York, June 10, 1958.

“non-disputing Party” means the Party that is not a party to an investment dispute.

“person” means a natural person or an enterprise.

“person of a Party” means a national or an enterprise of a Party.

“protected information” means confidential business information or information that is privileged or otherwise protected from disclosure under a Party’s law.

---

[121] For greater certainty, action taken by a Party to enforce laws of general application, such as competition laws, are not encompassed within this definition.

"regional level of government" means:

(a) for the United States, a state of the United States, the District of Columbia, or Puerto Rico; and
(b) for [Country], [___].

"respondent" means the Party that is a party to an investment dispute.

"Secretary-General" means the Secretary-General of ICSID.

"state enterprise" means an enterprise owned, or controlled through ownership interests, by a Party.

"territory" means:

(a) with respect to the United States, [___].
(b) With respect to [Country,] [___].

"TRIPS Agreement" *Means The Agreement on Trade-Related Aspects of Intellectual Property, Rights,* contained in annex 1C to the WTO Agreement.[122]

"UNCITRAL arbitration Rules" means that the arbitration rules of the United Nations Commission on International Trade Law.

"WTO Agreement" means the *Marrakesh Agreement Establishing the World Trade Organisation*, done on April 15, 1994.

Article 2: Scope and Coverage

1. This treaty applies to measures adopted or maintained by a party relating to:
(a) Investors of the other Party;
(b) Covered investments; and
(c) With respect to Articles 8 [Performance Requirements], 12 [Investment and Environment], and 13 [Investment and Labour], all investments in the territory of the Party
2. A Party's obligations under Section A shall apply:

---

[122] For greater certainty, "TRIPS Agreement" includes any waiver in force between the Parties of any provision of the TRIPS Agreement granted by WTO Members in accordance with the WTO Agreement.

(a) To a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party; and
(b) To the political subdivisions of that Party.

3. For greater certainty, this Treaty does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Treaty.

Article 3: National Treatment

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the treatment accorded, in like circumstances, by that regional level of government to natural persons resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments.

Article 4: Most-Favored-Nation Treatment

1. Each party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Article 5: Minimum Standard of Treatment[123]

1. Each party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.

4. Notwithstanding article 14 (Non-Conforming Measures) (5)(b) (subsidies and grants), each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

5. Notwithstanding paragraph 4, if an investor of a Party, in the situations referred to in paragraph 4, suffers a loss in the territory of the other Party resulting from:

(a) requisitioning of its covered investment or part thereof by the latter's forces or authorities; or

---

[123] Article 5 [Minimum Standard of Treatment] shall be interpreted in accordance with Annex A.

(b) Destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

The latter Party shall provide the investor restitution, compensation, or both, as appropriate, for such loss. Any compensation shall be prompt, adequate, and effective in accordance with Article 6 (Expropriation and Compensation) (2) through (4), *mutatis mutandis.*

6. Paragraph 4 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 3 (National Treatment) but for Article 14 (Non-Conforming Measures)(5)(b) (subsidies and grants).

Article 6: Expropriation and Compensation[124]

1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except

(a) for a public purpose;

(b) In a non-discriminatory manner;

(c) On payment of prompt, adequate, and effective compensation; and

(d) In accordance with due process of law and Article 5 [Minimum Standard Treatment](1) through (3).

2. The compensation referred to in paragraph 1(c) shall:

(a) be paid without delay;

(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation");

(c) Not reflect any change in value occurring because the intended expropriation had become known earlier; and

[124] Article 6 [Expropriation] shall be interpreted in accordance with Annexes A and B.

(d) Be fully realizable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation referred to in paragraph 1(c) – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:

(a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus

(b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement.

Article 7: Transfers

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:

(a) contributions to capital;

(b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;

(c) interest, royalty payments, management fees, and technical assistance and other fees;

(d) payments made under a contract, including a loan agreement;

(e) payments made pursuant to Article 5 [Minimum Standard of Treatment](4) and (5) and Article 6 [Expropriation and Compensation]; and

(f) payments arising out of a dispute.

2. Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.

3. Each Party shall permit returns in kind relating to a covered investment to be made as authorized or specified in a written agreement between the Party and a covered investment or an investor of the other Party.

4. Notwithstanding paragraphs 1 through 3, a Party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to:

(a) bankruptcy, insolvency, or the protection of the rights of creditors;

(b) issuing, trading, or dealing in securities, futures, options, or derivatives;

(c) criminal or penal offenses;

(d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or

(e) ensuring compliance with orders or judgements in judicial or administrative proceedings.

Article 8: Performance Requirements

1. Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in

its territory, impose or enforce any requirement or enforce any commitment or undertakings.[125]

(a) to export a given level or percentage of goods or services;

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;

(e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

(f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory; or

(g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market.

2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any requirement:

(a) to achieve a given level or percentage of domestic content;

(b) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

[125] For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a “commitment or undertaking” for the purposes of paragraph 1.

(c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or

(d) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

3. (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

(b) Paragraph 1(f) does not apply:

(i) when a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or

(ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws.[126]

(c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c) and (f), and (a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

[126] The Parties recognize that a patent does not necessarily confer market power.

(i) necessary to secure compliance with laws and regulations that are not inconsistent with this Treaty;

(ii) necessary to protect human, animal, or plant life or health; or

(iii) related to the conservation of living or non-living exhaustible natural resources.

(d) Paragraphs 1(a), (b) and (c) and 2(a) and (b), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.

(e) Paragraphs 1(b), (c), (f) and (g), and 2(a) and (b), do not apply to government procurement.

(f) Paragraphs 2(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

4. For greater certainty, paragraphs 1 and 2 do not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.

5. This Article does not preclude enforcement of any commitment, undertaking, or requirement between private parties, where a Party did not impose or require the commitment, undertaking, or requirement.

Article 9: Senior Management and Boards of Directors

1. Neither Party may require that an enterprise of that Party that is a covered investment appoint to senior management positions natural persons of any particular nationality.

2. A Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

Article 10: Publication of Laws and Decisions Respecting Investment

1. Each Party shall ensure that its:

   (a) laws, regulations, procedures and administrative rulings of general application; and

   (b) adjudicatory decisions

respecting any matter covered by this Treaty are promptly published or otherwise made publicly available.

3. For purposes of this Article, "administrative ruling of general application" means an administrative ruling or interpretation that applies to all persons and fact situations that fall generally within its ambit and that establishes a norm of conduct but does not include:

   (a) a determination or ruling made in an administrative or quasi-judicial proceeding that applies to a particular covered investment or investor of the other Party in a specific case; or

   (b) a ruling that adjudicates with respect to a particular act or practice.

Article 11: Transparency

1. Contact Points

   (a) Each Party shall designate a contact point or points to facilitate communications between the Parties on any matter covered by this Treaty.

   (b) On the request of the other Party, the contact point(s) shall identify the office or official responsible for the matter and assist, as necessary, in facilitating communication with the requesting Party.

2. Publication

To the extent possible, each Party shall:

   (a) publish in advance any measure referred to in Article 10(1)(a) that it proposes to adopt; and

(b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.

3. Provision of Information

(a) On request of the other Party, a Party shall promptly provide information and respond to questions pertaining to any actual or proposed measure that the requesting Party considers might materially affect the operation of this Treaty or otherwise substantially affect its interests under this Treaty.

(b) Any request or information under this paragraph shall be provided to the other Party through the relevant contact points.

(c) Any information provided under this paragraph shall be without prejudice as to whether the measure is consistent with this Treaty.

4. Administrative Proceedings

With a view to administering in a consistent, impartial, and reasonable manner all measures referred to in Article 10(1)(a), each Party shall ensure that in its administrative proceedings applying such measures to particular covered investments or investors of the other Party in specific cases:

(a) wherever possible, covered investments or investors of the other Party that are directly affected by a proceeding are provided reasonable notice, in accordance with domestic procedures, when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated, and a general description of any issues in controversy;

(b) such persons are afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, when time, the nature of the proceeding, and the public interest permit; and

(c) its procedures are in accordance with domestic laws.

5. Review and Appeal

(a) Each Party shall establish or maintain judicial, quasi-judicial, or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of final administrative actions regarding matters covered by this Treaty. Such tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.

(b) Each Party shall ensure that, in any such tribunals or procedures, the parties to the proceeding are provided with the right to:

(i) a reasonable opportunity to support or defend their respective positions; and

(ii) a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority.

(c) Each Party shall ensure, subject to appeal or further review as provided in its domestic law, that such decisions shall be implemented by, and shall govern the practice of, the offices or authorities with respect to the administrative action at issue.

Article 12: Investment and Environment

1. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws.[127] Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. If a Party considers that the other Party has offered such an

[127] For the United States, "laws" for purposes of this Article means an act of the United States Congress or regulations promulgated pursuant to an act of the United States Congress that is enforceable by action of the central level of government.

encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

2. Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

Article 13: Investment and Labour

1. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labour laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labour rights referred to in paragraph 2 as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

2. For purposes of this Article, "labour laws" means each Party's statutes or regulations,[128] or provisions thereof, that are directly related to the following internationally recognized labour rights:

(a) the right of association;

(b) the right to organize and bargain collectively;

(c) a prohibition on the use of any form of forced or compulsory labour;

(d) labour protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labour; and

---

[128] For the United States, "statutes or regulations" for purposes of this Article means an act of the United States Congress or regulations promulgated pursuant to an act of the United States Congress that is enforceable by action of the central level of government.

(e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

Article 14: Non-Conforming Measures

1. Article 3 [National Treatment], [Most-Favored-Nation Treatment], 8 [Performance Requirements], and 9 [Senior Management and Boards of Directors] do not apply to:

(a) any existing non-conforming measure that is maintained by a Party at:

(i) the central level of government, as set out by that Party in its Schedule to Annex I or Annex III,

(ii) a regional level of government, as set out by that Party in its Schedule to Annex I or Annex III, or

(iii) a local level of government;

(b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or

(c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 3 [National Treatment], 4 [Most-Favored Nation Treatment], 8 [Performance Requirements], or 9 [Senior Management and Boards of Directors].

2. Article 3 [National Treatment], 4 [Most-Favored Nation Treatment], 8 [Performance Requirements], or 9 [Senior Management and Boards of Directors] do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its schedule to Annex II.

3. Neither Party may, under any measure adopted after the date of entry into force of this Treaty and covered by its Schedule to Annex II, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Articles 3 [National Treatment], 4 [Most-Favored Nation Treatment] do not apply to any measure covered by an exception to, or derogation from, the obligations under Article 3 or of the TRIPS Agreement, as specifically provided in those Articles and in Article 5 of the TRIPS Agreement.

5. Article 3 [National Treatment], 4 [Most-Favored Nation Treatment], and 9 [Senior Management and Boards of Directors] do not apply to:

(a) government procurement; or

(b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.

Article 15: Special Formalities and Information Requirements

1. Nothing in Article 3 [National Treatment] shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that investors be residents of the Party or that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of the other Party and covered investments pursuant to this Treaty.

2. Notwithstanding Articles 3 [National Treatment] and 4 [Most-Favored-Nation Treatment], a Party may require an investor of the other Party or its covered investment to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect any confidential business information from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

Article 16: Non-Derogation

This Treaty shall not derogate from any of the following that entitle an investor of a Party or a covered investment to treatment more favourable than that accorded by this Treaty:

1. laws or regulations, administrative practices or procedures, or administrative or adjudicatory decisions of a Party;

2. international legal obligations of a Party; or

3. obligations assumed by a Party, including those contained in an investment authorization or an investment agreement.

Article 17: Denial of Benefits

1. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:

(a) does not maintain diplomatic relations with the non-Party; or

(b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Treaty were accorded to the enterprise or to its investments.

2. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.

Article 18: Essential Security

Nothing in this Treaty shall be construed:

1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or

2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

Article 19: Disclosure of Information

1. Nothing in this Treaty shall be construed to require a Party to furnish or allow access to confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 20: Financial Services

1. Notwithstanding any other provision of this Treaty, a Party shall not be prevented from adopting or maintaining measures relating to financial services for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial services supplier, or to ensure the integrity and stability of the financial system.[129]

2. (a) Nothing in this Treaty applies to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a Party's obligations under Article 7 [Transfers] or Article 8 [Performance Requirements].[130]

(b) For purposes of this paragraph, "public entity" means a central bank or monetary authority of a Party.

3. Where a claimant submits a claim to arbitration under Section B [Investor-State Dispute Settlement], and the respondent invokes paragraph 1 or 2 as a defense, the following provisions shall apply:

(a) The respondent shall, within 120 days of the date the claim is submitted to arbitration under Section B, submit in writing to the competent financial authorities[131] of both Parties a

[129] It is understood that the term "prudential reasons" includes the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial institutions.

[130] For greater certainty, measures of general application taken in pursuit of monetary and related credit policies or exchange rate policies do not include measures that expressly nullify or amend contractual provisions that specify the currency of denomination or the rate of exchange of currencies.

[131] For purposes of this Article, "competent financial authorities" means, for the United States, the Department of the Treasury for banking and other financial services, and the Office of the United States

request for a joint determination on the issue of whether and to what extent paragraph 1 or 2 is a valid defense to the claim. The respondent shall promptly provide the tribunal, if constituted, a copy of such request. The arbitration may proceed with respect to the claim only as provided in subparagraph (d).

(b) The competent financial authorities of both Parties shall make themselves available for consultations with each other and shall attempt in good faith to make a determination as described in subparagraph (a). Any such determination shall be transmitted promptly to the disputing parties and, if constituted, to the tribunal. The determination shall be binding on the tribunal.

(c) If the competent financial authorities of both Parties, within 120 days of the date by which they have both received the respondent's written request for a joint determination under subparagraph (a), have not made a determination as described in that subparagraph, the tribunal shall decide the issue left unresolved by the competent financial authorities. The provisions of Section B shall apply, except as modified by this subparagraph.

(i) In the appointment of all arbitrators not yet appointed to the tribunal, each disputing party shall take appropriate steps to ensure that the tribunal has expertise or experience in financial services law or practice. The expertise of particular candidates with respect to financial services shall be taken into account in the appointment of the presiding arbitrator.

(ii) If, before the respondent submits the request for a joint determination in conformance with subparagraph (a), the presiding arbitrator has been appointed pursuant to Article 273), such arbitrator shall be replaced on the request of either disputing party and the tribunal shall

Trade Representative, in coordination with the Department of Commerce and other agencies, for insurance; and for [Country], [___].

be reconstituted consistent with subparagraph (c)(i). If, within 30 days of the date the arbitration proceedings are resumed under subparagraph (d), the disputing parties have not agreed on the appointment of a new presiding arbitrator, the Secretary-General, on the request of a disputing party, shall appoint the presiding arbitrator consistent with subparagraph (c)(i).

(iii) The non-disputing Party may make oral and written submissions to the tribunal regarding the issue of whether and to what extent paragraph 1 or 2 is a valid defense to the claim. Unless it makes such a submission, the non-disputing Party shall be presumed, for purposes of the arbitration, to take a position on paragraph 1 or 2 not inconsistent with that of the respondent.

(d) The arbitration referred to in subparagraph (a) may proceed with respect to the claim:

(i) 10 days after the date the competent financial authorities' joint determination has been received by both the disputing parties and, if constituted the tribunal; or

(ii) 10 days after the expiration of the 120-day period provided to the competent financial authorities in subparagraph (c).

4. Where a dispute arises under Section C and the competent financial authorities of one Party provide written notice to the competent financial authorities of the other Party that the dispute involves financial services, Section C shall apply except as modified by this paragraph and paragraph 5.

(a) The competent financial authorities of both Parties shall make themselves available for consultations with each other regarding the dispute, and shall have 180 days from the date such notice is receied to transmit a report on their

consultations to the Parties. A Party may submit the dispute to arbitration under Section C only after the expiration of that 180-day period.

(b) Either Party may make any such report available to a tribunal constituted under Section C to decide the dispute referred to in this paragraph or a similar dispute, or to a tribunal constituted under Section B to decide a claim arising out of the same events or circumstances that gave rise to the dispute under Section C.

5. Where a Party submits a dispute involving financial services to arbitration under Section C in conformance with paragraph 4, and on the request of either Party within 30 days of the date the dispute is submitted to arbitration, each Party shall, in the appointment of all arbitrators not yet appointed, take appropriate steps to ensure that the tribunal has expertise or experience in financial services law or practice. The expertise of particular candidates with respect to financial services shall be taken into account in the appointment of the presiding arbitrator.

6. Notwithstanding Article 11(2), [Transparency-Publication], each Party shall, to the extent practicable,

(a) publish in advance any regulations of general application relating to financial services that it proposes to adopt;

(b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed regulations.

7. The terms “financial service” or “financial services” shall have the same meaning as in subparagraph 5(a) of the Annex on Financial Services of the GATS.

Article 21: Taxation

1. Except as provided in this Article, nothing in Section A shall impose obligations with respect to taxation measures.

2. Article 6 [Expropriation] shall apply to all taxation measures, except that a claimant that asserts that a taxation measure involves an expropriation may submit a claim to arbitration under Section B only if:

(a) the claimant has first referred to the competent tax authorities[132] of both Parties in writing the issue of whether that taxation measure involves an expropriation; and

(b) within 180 days after the date of such referral, the competent tax authorities of both Parties fail to agree that the taxation measure is not an expropriation.

3. Subject to paragraph 4, Article 8 [Performance Requirements] (2) through (4) shall apply to all taxation measures.

4. Nothing in this Treaty shall affect the rights and obligations of either Party under any tax convention. In the event of any inconsistency between this Treaty and any such convention, that convention shall prevail to the extent of the inconsistency. In the case of a tax convention between the Parties, the competent authorities under that convention shall have sole responsibility for determining whether any inconsistency exists between this Treaty and that convention.

Article 22: Entry into Force, Duration and Termination

1. This Treaty shall enter into force thirty days after the date the Parties exchange instruments of ratification. It shall remain in force for a period of ten years and shall continue in force thereafter unless terminated in accordance with paragraph 2.

2. A Party may terminate this Treaty at the end of the initial ten-year period or at any time thereafter by giving one year's written notice to the other Party.

3. For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to

---

[132] For the purposes of this Article, the "competent tax authorities" means:

(a) For the United States, the Assistant Secretary of the Treasury (Tax Policy), Department of the Treasury; and

(b) for [Country', [___].

the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments.

SECTION B

Article 23: Consultation and Negotiation

In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures.

Article 24: Submission of a Claim to Arbitration

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Articles 3 through 10

(B) an investment authorization, or

(C) an investment agreement;

and

(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and

(b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Articles 3 through 10

(B) an investment authorization, or

(C) an investment agreement;

and

(ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach;

provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim or breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.

2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ("notice of intent"). The notice shall specify:

(a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;

(b) for each claim, the provision of this Treaty, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;

(c) the legal and factual basis for each claim; and

(d) the relief sought and the approximate amount of damages claimed.

3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

(a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the

respondent and the non-disputing Party are parties to the ICSID Convention;

(b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;

(c) under the UNCITRAL Arbitration Rules; or

(d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

5. A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of or request for arbitration ("notice of arbitration"):

(a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;

(b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;

(c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, are received by the respondent; or

(d) referred to under any arbitral institution or arbitral rules selected under paragraph 3(d) is received by the respondent.

A claim asserted by the claimant for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.

5. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Treaty.

6. The claimant shall provide with the notice of arbitration:

(a) the name of the arbitrator that the claimant appoints; or

(b) the claimant's written consent for the Secretary-General to appoint that arbitrator.

Article 25: Consent of Each Party to Arbitration

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Treaty.

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute; [and]

(b) Article II of the New York Convention for an "agreement in writing[."][;" and

(c) Article I of the Inter-American Convention for an "agreement."]

Article 26: Conditions and Limitations on Consent of Each Party

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 24(1) and knowledge that the claimant (for claims brought under Article 24(1a) or the enterprise (for claims brought under Article 24(1)(b)) has incurred loss or damage.

2. No claim may be submitted to arbitration under this Section unless:

(a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Treaty; and

(b) the notice of arbitration is accompanied,

(i) for claims submitted to arbitration under Article 24(1)(a), by the claimant's written waiver; and

(ii) for claims submitted to arbitration under Article 24(1(b), by the claimant's and the enterprise's written waivers

of any right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 24.

3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 24(1)(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's for the enterprise's rights and interests during the pendency of the arbitration.

Article 27: Selection of Arbitrators

1. Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.

2. The Secretary-General shall serve as appointing authority for an arbitration under this Section.

3. Subject to Article 20(3), if a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this section, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

4. For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without

prejudice to an objection to an arbitrator on a ground other than nationality:

(a) the respondent agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;

(b) a claimant referred to in Article 24(1)(a) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant agrees in writing to the appointment of each individual member of the tribunal; and

(c) a claimant referred to in Article 24(1)(b) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant and the enterprise agree in writing to the appointment of each individual member of the tribunal.

Article 28: Conduct of the Arbitration

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 24(3). If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

2. The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty.

3. The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.

4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, at tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter

of law, a claim submitted is not a claim for which an award in favour of the claimant may be made under Article 34.

(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).

(b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

(c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.

(d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefore, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award.

Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

6. When it decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

7. A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contact.

8. A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 24. For purposes of this paragraph, an order includes a recommendation.

9. (a) In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmits its proposed decision or award to the disputing parties and to the non-disputing Party. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than 45 days after the expiration of the 60-day comment period.

(b) Subparagraph (a) shall not apply in any arbitration conducted pursuant to this Section for which an appeal has been made available pursuant to paragraph 10 or Annex D.

10. If a separate, multilateral agreement enters into force between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered under Article 34 in arbitrations commenced after the multilateral agreement enters into force between the Parties.

Article 29: Transparency of Arbitral Proceedings

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing party and make them available to the public:

(a) the notice of intent;

(b) the notice of arbitration;

(c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28(2) [Non-Disputing party submissions] and (3) [*Amicus* Submissions] and Article 33 [Consolidation];

(d) minutes or transcripts of hearings of the tribunal, where available; and

(e) orders, awards, and decisions of the tribunal.

2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 18 [Essential Security Article] or Article 19 [Disclosure of Information Article].

4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

(a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);

(b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;

(c) A disputing party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Party and made public in accordance with paragraph 1; and

(d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c) In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information.

5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws.

Article 30: Governing Law

1. Subject to paragraph 3, when a claim is submitted under Article 24(1)(a)(i)(A) or Article 24(1)(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law.

2. Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 24(1)(a)(i)(B) or (C), or Article 2(1)(b)(i)(B) or (C), the tribunal shall apply:

(a) the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree; or

(b) the law of the respondent, including its rules on the conflict of laws;[133] and

(c) such rules of international law as may be applicable.

3. A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.

Article 31: Interpretation of Annexes

1. Where a respondent asserts as a defense that the measure alleged to be a breach is within the scope of an entry set out in Annex I, II or III, the tribunal shall, on request of the respondent, request the interpretation of the Parties on the issue. The Parties shall submit in writing any joint decision declaring their interpretation to the tribunal within 60 days of delivery of the request.

2. A joint decision issued under paragraph 1 by the Parties, each acting through its representative designated for purposes of this Article,

[133] The "laws of the respondent" means the law that a domestic court or tribunal of proper jurisdiction would apply in the same case.

shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with that joint decision. If the Parties fail to issue such a decision within 60 days, the tribunal shall decide the issue.

Article 32: Expert Reports

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

Article 33: Consolidation

1. Where two or more claims have been submitted separately to arbitration under Article 24(1) and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10.

2. A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary-General and to all the disputing parties sought to be covered by the order and shall specify in the request:

   (a) the names and addresses of all the disputing parties sought to be covered by the order;

   (b) the nature of the order sought; and

   (c) the grounds on which the order is sought.

3. Unless the Secretary-General finds within 30 days after receiving a request under paragraph 2 that the request is manifestly unfounded, a tribunal shall be established under this Article.

4. Unless all the disputing parties sought to be covered by the order otherwise agree, a tribunal established under this Article shall comprise three arbitrators:

(a) one arbitrator appointed by agreement of the claimants;

(b) one arbitrator appointed by the respondent; and

(c) the presiding arbitrator appointed by the Secretary-General, provided, however, that the presiding arbitrator shall not be a national of either Party.

5. If, within 60 days after the Secretary-General receives a request made under paragraph 2, the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 4, the Secretary-General, on the request of any disputing party sought to be covered by the order, shall appoint the arbitrator or arbitrators not yet appointed. If the respondent fails to appoint an arbitrator, the Secretary-General shall appoint a national of the disputing Party, and if the claimants fail to appoint an arbitrator, the Secretary-General shall appoint a national of the non-disputing Party.

6. Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 24(1) have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

(a) assume jurisdiction over, and hear and determine together, all or part of the claims;

(b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or

(c) instruct a tribunal previously established under Article 27 [Selection of Arbitrators] to assume jurisdiction over, and

hear and determine together, all or part of the claims, provided:

(i) that tribunal, at the request of any claimant not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 4(a) and 5; and

(ii) that tribunal shall decide whether any prior hearing shall be repeated.

7. Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article 24(1) and that has not been named in a request made under paragraph 2 may make a written request to the tribunal that it be included in any order made under paragraph 6, and shall specify in the request:

(a) the name and address of the claimant;
(b) the nature of the order sought; and
(c) the grounds on which the order is sought.

The claimant shall deliver a copy of its request to the Secretary-General.

8. A tribunal established under this Article shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by this Section.

9. A tribunal established under Article 27 [Selection of Arbitrators] shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this Article has assumed jurisdiction.

10. On application of a disputing party, a tribunal established under this Article, pending its decision under paragraph 6, may order that the proceedings of a tribunal established under Article 27 [Selection of Arbitrators] be stayed, unless the latter tribunal has already adjourned its proceedings.

Article 34: Awards

1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:

(a) monetary damages and any applicable interest; and

(b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs and attorney's fees in accordance with this Treaty and the applicable arbitration rules.

2. Subject to paragraph 1, where a claim is submitted to arbitration under Article 24(1)(b):

(a) an award of restitution of property shall provide that restitution be made to the enterprise;

(b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and

(c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

3. A tribunal may not award punitive damages.

4. An award made by a tribunal shall have no binding force exceptr between the disputing parties and in respect of the particular case.

5. Subject to paragraph 6 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

6. A disputing party may not seek enforcement of a final award until:

(a) in the case of a final award made under the ICSID Convention,

(i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or

(ii) revision or annulment proceedings have been completed; and

(b) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article 24(3)(d),

(i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside, or annul the award; or

(ii) a court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal.

7. Each Party shall provide for the enforcement of an award in its territory.

8. If the respondent fails to abide by or comply with a final award, on delivery of a request by the non-disputing Party, a tribunal shall be established under Article 37 [State-State Dispute Settlement]. Without prejudice to other remedies available under applicable rules of international law, the requesting Party may seek in such proceedings:

(a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Treaty; and

(b) a recommendation that the respondent abide by or comply with the final award.

9. A disputing party may seek enforcement of an arbitration award under the ICSID Convention or the New York Convention [or the Inter-

American Convention] regardless of whether proceedings have been taken under paragraph 8.

10. A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention [and Article I of the Inter-American Convention].

Article 35: Annexes and Footnotes

The Annexes and footnotes shall form an integral part of this Treaty.

Article 36: Service of Documents

Delivery of notice and other documents on a Party shall be made to the place named for that Party in Annex C.

SECTION C

Article 37: State-State Dispute Settlement

1. Subject to paragraph 5, any dispute between the Parties concerning the interpretation or application of this Treaty, that is not resolved through consultations or other diplomatic channels, shall be submitted on the request of either Party to arbitration for a binding decision or award by a tribunal in accordance with applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the UNCIRAL Arbitration Rules shall govern, except as modified by the Parties or this Treaty.

2. Unless the Parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each Party and the third, who shall be the presiding arbitrator, appointed by agreement of the Parties. If a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of either Party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

3. Expenses incurred by the arbitrators, and other costs of the proceedings, shall be paid for equally by the Parties. However, the tribunal may, in its discretion, direct that a higher proportion of the costs be paid by one of the Parties.

4. Articles 28(3) [*Amicus Curiae* Submissions], 29 [Investor-State Transparency], 30(1) and (3) [Governing Law], and 31 [Interpretation of Annexes] shall apply *mutatis mutandis* to arbitrations under this Article.

5. Paragraphs 1 through 4 shall not apply to a matter arising under Article 12 or Article 13.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty.

DONE in duplicate at [city] this [number] day of [month, year], in the English and [foreign] languages, each text being equally authentic.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:	FOR THE GOVERNMENT OF [Country]:

Annex A

Customary International Law

The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 5 [Minimum Standard of Treatment] and Annex B [Expropriation] results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5 [Minimum Standard of Treatment], the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

Annex B

Expropriation

The Parties confirm their shared understanding that:

1. Article 6 [Expropriation and Compensation](1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

3. Article 6 [Expropriation and Compensation](1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by Article 6 [Expropriation and Compensation](1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

Annex C

Service of Documents on a Party

United States

Notices and other documents shall be served on the United States by delivery to:

Executive Director (L/EX)
Office of the Legal Adviser
Department of State
Washington, D.C. 20520
United States of America

[Country]

Notices and other documents shall be served on [Country] by delivery to:

[insert place of delivery of notices and other documents for [Country]]

Annex D

Possibility of a Bilateral Appellate Mechanism

Within three years after the date of entry into force of this Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 34 in arbitrations commenced after they establish the appellate body or similar mechanism.

APPENDIX III

Free Trade Agreement

Between

The Government of New Zealand

And

The Government of the People's Republic of China

Preamble

The Government of New Zealand ("New Zealand") and the People's Republic of China ("China") hereinafter referred to collectively as "the Parties":

Inspired by their longstanding friendship and growing bilateral economic and trade relationship since the establishment of diplomatic relations in 1972;

Recalling the *Trade and Economic Cooperation Framework between New Zealand and the People's Republic of China* adopted on 28 May, 2004 with the objective of strengthening the comprehensive and stable economic and trade relationship between the Parties;

Recognising that the strengthening of their economic partnership through a Free Trade Agreement, which removes barriers on the trade of goods and services and investment flows, will produce mutual benefits for New Zealand and China;

Desiring to avoid distortions in their reciprocal trade and to create an expanded market for the goods and services in their territories through establishing clear rules governing their trade which will ensure a predictable commercial framework for business operations;

Mindful that fostering innovation and the promotion and protection of intellectual property rights will encourage further trade, investment and cooperation between the Parties;

Building on their rights, obligations and undertakings uner the *Marrakesh Agreement Establishing the World Trade Organization* and other multilateral, regional and bilateral agreements and arrangements;

Mindful of their commitment to the Asia-Pacific Economic Cooperation ("APEC") goals and principles, and in particular the efforts of all APEC economies to meet the APEC Bogor goals of free and open trade and the actions subscribed in the *Osaka Action Agenda;*

Upholding the rights of their governments to regulate in order to meet national policy objectives, and preserving their flexibility to safeguard the public welfare;

Mindful that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development and that closer economic partnership can play an important role in promoting sustainable development;

Desiring to strengthen their economic partnership to bring economic and social benefits, to create new opportunities for employment and to improve the living standards of their peoples;

Have agreed as follows:

CHAPTER 1

INITIAL PROVISIONS

Article 1: Establishment of the Free Trade Area

The Parties to this Agreement, consistent with Article XXIV of GATT 1994 and Article V of GATS, hereby establish a free trade area.

Article 2: Objectives

1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, are to:

(a) encourage expansion and diversification of trade between the Parties;

(b) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the Parties;

(c) promote conditions of fair competition in the free trade area;

(d) substantially increase investment opportunities between the Parties;

(e) provide for the protection and enforcement of intellectual property rights in each Party's territory in accordance with the provisions of the TRIPS Agreement and enhance and strengthen cooperation on intellectual property rights; and

(f) create an effective mechanism to prevent and resolve trade disputes.

2. The Parties seek to support the wider liberalization process in APEC consistent with its goals of free and open trade and investment.

Article 3: Relation to Other Agreements

1. Nothing in this Agreement shall derogate from the existing rights and obligations of a Party under the WTO Agreement or any other multilateral or bilateral agreement to which it is a party.

2. In the event of any inconsistency between this Agreement and any other agreement to which the Parties are party, the Parties shall immediately consult with each other with a view to finding a mutually satisfactory solution in accordance with customary rules of interpretation of public international law.

CHAPTER II

INVESTMENT

Section 1: Investment

Article 135: Definitions

For the purposes of this Chapter:

Enterprise means any entity constituted or otherwise organized under applicable law, whether or not for profit, and whether privately owned or governmentally owned or controlled, including any corporation, trust, partnership, sole proprietorship, joint venture, association or similar organization;

Enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a subsidiary located in the territory of a Party and engaged in substantive business operations there;

Investment means every kind of asset invested, directly or indirectly, by the investors of a Party in the territory of the other Party including, but not limited to, the following:

(a) movable and immovable property and other property rights such as mortgages and pledges;

(b) shares, debentures, stock and any other kind of participation in companies;

(c) claims to money or to any other contractual performance having an economic value associated with an investment;

(d) intellectual property rights, in particular, copyrights, patents and industrial designs, trade-marks, trade-names, technical processes, trade and business secrets, know-how and good-will;

(e) concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources;

(f) bonds, including government issued bonds, debentures, loans and other forms of debt[134], and rights derived therefrom;

(g) any right conferred by law or under contract and any licences and permits pursuant to law;

And change in the form in which assets are invested does not affect their character as investments;

Investments includes investments of legal persons of a third country which are owned or controlled by investors of one party and which have been made in the territory of the other Party. The relevant provisions of this Agreement shall apply to such investments only when such third counry has no right or abandons the right to claim compensation after the investments have been expropriated by the other Party;

Investor of a Party means a natural person or enterprise of a Party who seeks to make, is making, or has made an investment in the territory of the other Party;[135]

Natural person of a Party means a national or a permanent resident of a Party under its laws. Until such time as China enacts its domestic law on the treatment of permanent residents of foreign countries, this Chapter does not impose obligations on a Party with respect to the permanent residents of the other Party except for the obligations in Articles 42, 143, 144, 145 and 148.

Article 136: Objectives

The objectives of this Chapter are to:

[134]Loans and other forms of debt, which have been registered to the competent authority of a Party, do not mean trade debts where the debts would be non-interest earing if paid on time without penalty.
[135]For greater certainty, the elements of the definition of investor of a Party that relate to the establishment of investment are only applicable to Article 139 and article 142.

(a) encourage and promote the flow of investment between the Parties and cooperation between the Parties on investment-related matters on a mutually beneficial basis;

(b) establish a framework of rules conducive to increasing investment flows between the Parties and to ensure the protection and security of investments of the other Party within each Party's territory; and

(c) promote cooperation between a Party and investors of the other Party who have investments in the territory of the former Party, on a mutually beneficial basis.

Article 137: Scope

1. This Chapter applies to measures adopted or maintained by a Party relating to:

(a) investors of the other Party;
(b) investments of investors of the other Party.

2. This Chapter shall not apply to measures adopted or maintained by a Party affecting trade in services.

3. Notwithstanding paragraph 2, for the purpose of protection of investment with respect to the commercial presence mode of service supply, Article 142,[136] 143, 144, 145 and 148 shall apply to any measure affecting the supply of a service by a service supplier of a Party through commercial presence in the territory of the other Party. Section 2 shall apply to Articles 142, 143, 144, 145 and 148 with respect to the supply of a service through commercial presence.

4. For greater certainty, the provisions of this Chapter do not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.

5. This Chapter shall not apply to:

---

[136] The Parties understand that the reference to amounts necessary for establishing or expanding the investment under subparagraph (a) of Article 12.1 applies to the commercial presence mode of service supply only to the extent that there is a services market access commitment with regard to the sector.

(a) subsidies or grants provided by a Party; or

(b) laws, regulations, policies or procedures of general application governing the procurement by government agencies of goods and services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods or the supply of services for commercial sale.

6. This Chapter shall apply to all investments made by investors of a Party in the territory of the other Party, whether made before or after the entry into force of this Agreement, but Section 2 shall not apply to any dispute or any claim concerning an investment which was already under judicial or arbitral process before the entry into force of this Agreement.

Article 138: National Treatment

Each Party shall accord to investments and activities associated with such investments, with respect to management, conduct, operation, maintenance, use, enjoyment or disposal, by the investors of the other Party treatment no less favourable than that accorded, in like circumstances, to the investments and associated activities by its own investors.

Article 139: Most-favoured-nation Treatment

1. Each Party shall accord to investors, investments and activities associated with such investments by investors of the other Party treatment no less favourable than that accorded, in like circumstances, to the investments and associated activities by the investors of any third country with respect to admission, expansion, management, conduct, operation, maintenance, use, enjoyment and disposal.

2. For greater certainty, the obligation in this Article does not encompass a requirement to extend to investors of the other Party dispute resolution procedures other than those set out in this Chapter.

3. Notwithstanding paragraph 1, the Parties reserve the right to adopt or maintain any measure that accords differential treatment to third

countries under any free trade agreement or multilateral international agreement in force or signed prior to the date of entry into force of this Agreement.

4. For greater certainty, paragraph 3 includes, in respect of agreements on the liberalization of trade in goods or services or investment, any measures taken as part of a wider process of economic integration or trade liberalization between the parties to such agreements.

5. The Parties reserve the right to adopt or maintain any measure that accords differential treatment to third countries under any international agreement in force or signed after the date of entry into force of this Agreement involving:

(a) fisheries; and

(b) maritime matters.

Article 140: Performance Requirements

The Parties agree that the provisions of the WTO *Agreement on Trade-Related Investment Measures* are incorporated *mutatis mutandis* into this Agreement and shall apply with respect to all investments falling within the scope of this Chapter.

Article 141: Non-Conforming Measures

1. Article 138 does not apply to:

(a) any existing non-conforming measures maintained within its territory;

(b) the continuation of any non-conforming measure referred to in subparagraph (a);

(c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not increase the non-conformity of the measure, as it existed immediately before the amendment, with those obligations.

2. The Parties will endeavour to progressively remove the non-conforming measures.

3. Notwithstanding anything in paragraph 1, Article 138 shall not apply to any measure, which with respect to each Party, would not be within the scope of the national treatment obligations in any of that Party's existing bilateral investment treaties.

Article 142: Transfers

1. Except in the circumstances envisaged in Article 202, each Party shall grant to investors of the other Party the free transfer of all payments relating to an investment, including more particularly:

(a) amounts necessary for establishing, maintaining or expanding the investment;[137]

(b) returns from investments, including profits, dividends, interests and other income;

(c) royalty payments, management fees, technical assistance and other fees;

(d) proceeds obtained from the total or partial sale or liquidation of investments, or amounts obtained from the reduction in investment capital;

(e) payments made pursuant to a loan agreement in connection with investments;

(f) amounts necessary for payments under a contract, including amounts necessary for repayment of loans, royalties and other payments resulting from licences, franchises, concessions and other similar rights;

(g) earnings and other remuneration of personnel engaged from abroad in connection with that investment;

[137] The Parties understand that the reference to amounts necessary for establishing or expanding the investment only applies following the successful completion of the approval procedures for inward investment.

(h) payments made pursuant to Articles 14 and 145; and

(i) payments arising out of the settlement of a dispute.

2. The transfers referred to in paragraph 1 shall be made without delay in a freely convertible currency and at the prevailing market rate of exchange applicable within the Party accepting the investments on the date of transfer. In the event that the market rate of exchange does not exist, the rate of exchange shall correspond to the cross rate obtained from those rates which would be applied by the International Monetary Fund on the date of payment for conversions of the currencies concerned into Special Drawing Rights.

3. In the case of China, the obligations in paragraph 1 shall apply provided that the transfer shall comply with the relevant formalities stipulated by the present laws and regulations of China relating to exchange control provided that:

(a) these formalities shall not be used as a means of avoiding China's commitments or obligations under this Agreement;

(b) in this respect, China shall accord to investors of New Zealand treatment no less favourable than it accord to investors of any third country;

(c) the formalities shall be effected within such period as is normally required for the completion of transfer formalities. The said period shall commence on the day on which the relevant request has been submitted to the relevant foreign exchange administration with full and authentic documentation and information and may on no account exceed 60 days;

(d) transfer formalities relating to an investment shall in no case be made more restrictive than formalities required at the time when the original investment was made; and

(e) to the extent that these formalities are no longer required according to the relevant laws of China, Article 142 shall apply without restrictions.

4. Notwithstanding paragraphs 1 and 2, a Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:

(a) bankruptcy, insolvency, or the protection of the rights of creditors;

(b) issuing, trading or dealing in securities, futures or derivatives;

(c) criminal or penal offences;

(d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or

(e) ensuring compliance with orders or judgements in judicial or administrative proceedings.

5. Nothing in paragraph 3 shall affect the free transfer of compensation paid under Articles 144 and 145.

6. Neither Party may require its investors to transfer or penalize its investors that fail to transfer the income, earnings, profits or other amounts derived from or attributable to investments in the territory of the other Party.

7. In the case of China, the obligations in paragraph 6 apply only to the extent allowed by the relevant laws and regulations of China relating to exchange control, provided that paragraph 6 shall apply without restrictions to the extent that these laws and regulations no longer apply under China's law.

Article 143: Fair and Equitable Treatment

1. Investments of investors of each Party shall at all times be accorded fair and equitable treatment and shall enjoy the full protection and security in the territory of the other Party in accordance with commonly accepted rules of international law.

2. Fair and equitable treatment includes the obligation to ensure that, having regard to general principles of law, investors are not denied justice or treated unfairly or inequitably in any legal or administrative proceeding affecting the investments of the investor.

3. Full protection and security requires each Party to take such measures as may be reasonably necessary in the exercise of its authority to ensure the protection and security of the investment.

4. Neither Party shall take any unreasonable or discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Party.

5. A violation of any other article of this Chapter does not establish that there has been a violation of this Article.

Article 144: Compensation for Losses

Investors of a Party whose investments in the territory of the other Party suffer losses owing to war or other armed conflict, a state of national emergency, insurrection, riot or other similar events in the territory of the latter Party shall be accorded by the latter Party treatment, as regards restitution, indemnification, compensation or other settlements no less favourable than that accorded to the investors of its own or any third country, whichever is more favourable to the investors concerned.

Article 145: Expropriation

1. Neither Party shall expropriate, nationalize or take other equivalent measures (“expropriation”) against investments of investors of the other Party in its territory, unless the expropriation is:

(a) for a public purpose;

(b) in accordance with applicable domestic law;

(c) carried out in a non-discriminatory manner;

(d) not contrary to any undertaking which the Party may have given; and

(e) on payment of compensation in accordance with paragraphs 2, 3 and 4;

2. The compensation referred to above shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation measures were taken. The fair market value shall not reflect any change in value due to the expropriation becoming publicly known earlier. The compensation shall include interest at the prevailing commercial rate from the date the expropriation was done until the date of payment. It shall be paid without delay and shall be effectively realizable and freely transferable. It shall be paid in the currency of the country of the affected investor, or in any freely convertible currency accepted by the affected investor.

3. If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation paid, converted into the currency of payment at the market rate of exchange prevailing on the date of payment, shall be no less than:

(a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus

(b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5. This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement.

Article 146: Transparency

Each Party shall publish international agreements pertaining to investment to which it is a party.

Article 147: Contact Points

Each Party shall designate one or more contact points to facilitate communications between the Parties on any matter covered by this Chapter, and shall provide details of such contact points to the other Party. The Parties shall notify each other promptly of any amendments to the details of their contact points.

Article 148: Subrogation

1. If a Party or its designated agency makes a payment to an investor under an indemnity, a guarantee or a contract of insurance for a non-commercial risk granted or accorded in respect of an investment, the other Party shall recognize the assignment of any rights or claims by the investor to the Party or its designated agency and that Party's or its designated agency's entitlement by virtue of subrogation to exercise the obligations related to the investment to the same extent as the investor.

2. Where a Party (or any agency, institution, statutory body or corporation designated by it) has made a payment to an investor of that Party and has taken over rights and claims of the investor, that investor shall not, unless authorized to act on behalf of the Party or the agency of the Party making the payment, pursue those rights and claims against the other Party.

Article 149: Denial of Benefits

Subject to prior notification and consultation, a Party may deny the benefits of this Chapter to:

(a) investors of the other Party where the investment is being made by an enterprise that is owned or controlled by persons of a non-Party and the enterprise has no substantive business operations in the territory of the other Party; or

(b) investors of the other Party where the investment is being made by an enterprise that is owned or controlled by persons of the denying Party and the enterprise has no substantive business operations in the territory of the other Party.

Article 150: Committee on Investment

1. The Parties hereby establish a Committee on Investment that shall meet on the request of either Party or the FTA Joint Commission to consider any matter arising under this Chapter.

2. The Committee's functions shall include:

(a) reviewing the implementation of this Chapter;

(b) identification and recommendation of measures to promote and increase investment flows between the Parties; and

(c) consideration of the development of procedures that could contribute to greater transparency of measures described in Article 141.

Article 151: Promotion and Facilitation of Investment

The Parties affirm their desire to facilitate bilateral investment through, *inter alia:*

(a) cooperating and exchanging information aimed at improving the climate for two-way investment;

(b) building linkages between New Zealand and China's agencies with a view to promoting bilateral investment.

Section 2: Investor-State Dispute Settlement

Article 152: Consultation and Negotiation

Any legal dispute arising under this Chapter between an investor of one Party and the other Party, directly concerning an investment by that investor in the territory of that other Party, shall, as far as possible, be settled amicably through consultations and negotiations between the investor and that other Party, which may include the use of non-binding third-party procedures, where this is acceptable to both parties to the dispute. A request for consultations and negotiations shall be made in writing and shall state the nature of the dispute.

Article 153: Consent to Submission of a Claim

1. If the dispute cannot be settled as provided for in Article 152 within 6 months from the date of request for consultations and negotiations then, unless the parties to the dispute agree otherwise, it shall, by the choice of the investor, be submitted to:

   (a) conciliation or arbitration by the International Centre for the Settlement of Investment Disputes ("ICSID") under the *Convention on the Settlement of Disputes between States and Nationals or Other States,* done at Washington on March 18, 1965; or

   (b) arbitration under the rules of the United Nations Commission on International Trade Law ("UNCITRAL");

provided that the investor shall give the state party 3 months' notice prior to submitting the claim to arbitration under paragraph 1(a) or 1(b).

2. Upon the receipt of a notice referred to in paragraph 1, the state party may require the investor concerned to go through any applicable domestic administrative review procedures specified by the laws and regulations of the state party, which may not exceed 3 months, before the submission of the claim to arbitration under paragraph 1(a) or 1(b).

3. In case a dispute has been submitted to a competent domestic court, it may be submitted to international dispute settlement, on the condition

that the investor concerned has withdrawn its case from the domestic courts before a final judgement has been reached in the case.

4. The arbitration rules applicable under paragraph 1, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Section.

5. The arbitration award shall be final and binding upon both parties to the dispute. Each party shall commit itself to the enforcement of the award.

Article 154: Admissibility of Claims and Preliminary Objections

1. No claim may be submitted to arbitration under this Chapter if more than 3 years have elapsed between the time at which the disputing investor become aware, or should reasonably have become aware, of a breach of obligation under this Chapter causing loss or damage to the investor or its investments and the date of submission of the request for consultations and negotiations referred to in Article 152.

2. A state party may, no later than 30 days after the constitution of the tribunal, file an objection that a claim is manifestly without merit or is otherwise outside the jurisdiction or competence of the tribunal. The state party shall specify as precisely as possible the basis for the objection.

3. The tribunal shall address any such objection as a preliminary question apart from the merits of the claim. The parties shall be given a reasonable opportunity to present their views and observations to the tribunal. If the tribunal decides that the claim is manifestly without merit, or is otherwise not within the jurisdiction or competence of the tribunal, it shall render a decision to that effect.

4. The tribunal may, if warranted, award the prevailing party reasonable costs and fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claim or the objection was frivolous or manifestly without merit, and shall provide the parties a reasonable opportunity to comment.

Article 155: Interpretation of Agreement

1. The tribunal shall, on request of the state party, request a joint interpretation of the Parties of any provision of this Agreement that is in issue in a dispute. The Parties shall submit in writing any joint decision declaring their interpretation to the tribunal within 50 days of delivery of the request.

2. A joint decision issued under paragraph 1 by the Parties shall be binding on the tribunal, and any award must be consistent with that joint decision. If the Parties fail to issue such a decision within 60 days, the tribunal shall decide the issue on its own account.

Article 156: Consolidation of Claims

Where two or more investors notify an intention to submit claims to arbitration which have a question of law or fact in common and arise out of the same events or circumstances, the disputing parties shall consult with a view to harmonizing the procedures to apply, where all disputing parties agree to the consolidation of the claims, including with respect to the forum chosen to hear the dispute.

Article 157: Publication of Information and Documents Relating to Arbitral Proceedings

1. Subject to paragraph 2, the state party may, as it considers appropriate, ensure public availability of all tribunal documents.

2. Any information that is submitted to the tribunal and that is specifically designated as confidential information shall be protected from disclosure.

Article 158: Awards

1. Where a tribunal makes a final award against a state party, the tribunal may award, separately or in combination, only:

(a) monetary damages and any applicable interest;

(b) restitution of property, in which case the award shall provide that the state party may pay monetary damages and any applicable interest in lieu of restitution.

2. A tribunal may also award costs and fees in accordance with this Chapter and the applicable arbitration rules.

3. A tribunal may not award punitive damages.

4. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

5. A disputing party may not seek enforcement of a final award until all applicable review procedures have been completed.

6. Subject to paragraph 5, a disputing party shall abide by and comply with an award without delay.