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## Assessment of Transnational Investment Regulation and Alien Investors' Right in Nigeria

Ugwuozor Walter Chinonso and Umahi T.O.

Business Law Department, Faculty of Law, ESUT Agbani Enugu State Nigeria

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### ABSTRACT

This paper aims to explore the laws that govern Foreign Direct Investment (FDI) in Nigeria. There is a general perception that our municipal legislations and the attitude of Nigerian courts is a vulnerable areas which are seamlessly powerless when it comes to Foreign investors' rights and its protection in Nigeria. While this unpleasant situation is evident in Nigeria, this research argue that there cannot be effective control of Foreign Direct Investment (FDI) regulation in Nigeria without corresponding development of an effective minimum institutional and legal framework at the domestic level (including our constitution and other relevant statutory instrument). This paper uses a doctrinal approach in examining the relevant legal and institutional framework for the regulation and protection foreign investor's right with a view to underline the weakness in these law as well as prospects for enhancing them. Findings - This research demonstrates that for FDI to have positive impacts on the different sectors of the Nigerian economy, the various laws regulating the different sectors should be amended to reflect current realities. Originality/value - This paper provides a fresh insight or analysis to the legal barriers inhibiting FDI in Nigeria. It does this by highlighting the various laws affecting FDI in the Nigerian economy.

Keywords: Assessment, transnational, investment, regulation, alien, Nigeria

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### INTRODUCTION

The global economy has evolved at an impressive rate over the past three decades thereby increasing the level of international trade. This triggers the situation where foreign entities or persons under the enabling international legal and respective municipal legal regimes can validly enter into an agreement to invest directly in another country. The above situation prompted the need to have adequate investment regulations/regimes protecting investors' rights which is to be predicated on standardization and reconsideration of the essence of the extant regulations. Nigeria today is not all that investment destination for foreign direct investment (FDI) despite its huge population, arable land and stable weather condition. The country, Nigeria compares poorly with other countries within the G20 such as

India and Brazil not to mention almighty China. Singapore and Republic of South Africa are also way ahead of Nigeria in attracting FDI and this, it is said, is due to the unfavourable legal regime in Nigeria which is yearning for standardization and reform.

Standardization of legal framework, assures an alien investor of a strong commitment on the part of the host state to protect an investor's investment rights so that he can enjoy the benefits of his investment.

Interestingly it is not arguable for a state to have strict rules in relation to its foreign policy, promulgating laws which are either ineffective, wobbly and extremely unrealistic may in the final analysis be more dangerous than is necessary in deterring foreign investment as opposed to improving it. [1] Worthy of

note much of Nigeria's legislations [2] does not meet the modern day economic needs of the country. While some of the legislation appear to be too stringent, some of them on the other hand, have been so ineffective that they merely exist. Above all, none of the legislation has

specifically provided for property rights of foreign investors. Therefore the above situation calls for further research towards attaining the international best practice for protecting of investor's rights in Nigeria.

#### LITERATURE REVIEW

Decades ago, a prominent characteristic of global economic law has been the conclusion of international treaties for the protection of foreign investment. Presently, countries all over the world including Nigeria have concluded investment treaties. According to United Nations Conference on Trade and Investment (UNCTAD), it has recorded more than 3000 International Investment Regime (IIR) which include 2,857 Bilateral Trade Agreements (BITs). [3] The present international treaties are now focusing on the idea of protecting property and private enterprise of investors. As UNCTAD explicitly states, the figure above constitutes an international legal regime, sharing a number of essential similarities beyond the focus on foreign investment as the object of protection. A very important feature of most of these regimes is the incorporation of investment arbitration to resolve any dispute between foreign investors and host states. The existing literature on international investment law concurs that, despite a few differences between the texts, these treaties constitute a regime with common principle, norms, rules, and decision making procedures for the enforcement of investors right. [4] The characterization of these treaties added the important role of the Convention of the International Centre for the Settlement of Investment Disputes (ICSID). The simple idea behind the IIR is that foreign Investment requires protection against host states action, and that investment treaties provide protection on the investors. The World Bank in a publication dedicated to investment law reform advised:

if any country wants to attract significant levels of private investment and promote itself as a good place of business, it must protect investments and

investors in terms of the acquisition, management, conduct, operation and sale or other disposition of the investment in the host country which reviews the fundamental guarantees that investors seek.... [5]

Today most of the literature on investment law continues to approach the IIR from the perspective of foreign investment protection. Dolzer opined that promoting and protecting foreign investments behoves of institutions that reduces political risks and overweigh incentives for the host States to act opportunistically in order for private actors to unfold their investment activities. [6] Many commentators see the protection of foreign investment against host nation as constituting the object and purpose of investment treaties. [7], [8], [9] are affirmative that international investment law deals with expropriation, protection against which, in its various forms, is at the core of this topic. It has been argued that these protections offered is always in respect of public action with little or no concern on private action which is the missing gap in most of the literature. The question that has created some debate in the literature is whether the establishment of legal mechanism for foreign investment protection is an end in itself or whether there is a higher objective beyond the protection of foreign investment.

All these scholars, with the exception of Schnederman, have also categorized the IIR as a form of Global Administrative Law. The characterization is consistent with the idea that the IIR is a form of judicial review and the focus remained fixed on those actions of the host nations that can disturb foreign investment. [10] It has been suggested that investment treaties as an international law discipline

interferes in domestic regulatory and administrative sovereignty; that is their very purpose. The premise of this study is the available protection of foreign investors in Nigeria looking at our legal regimes. Of course, of note is that these international legal frameworks serve to enforce the protection of foreign investment when domestic institutions, in particular the judiciary and other relevant bodies has failed to enforce or guarantee the enforcement of such rights.

To buttress the above situation, Chapter two of the Federal Republic of Nigerian Constitution 1999 [11] (As Amended) provided for social, cultural and economic rights for the citizen of Nigeria and any other person (whether artificial or natural person) resident in Nigeria. Unfortunately section 6(6)(c) of the same constitution renders all the provisions of chapter two non-justiciable. The non-justiciability appears to be a neutraliser of an investors' confidence as to whether or not their investment could be adequately protected. Due to this absurdity in the Nigerian constitution, Nigerian courts at different times resorting to certain regional [12] and international conventions Nigeria signed up to in recognizing and enforcing of economic rights in Nigeria. Regrettably the reliance on this regional convention cannot be arrogated the supremacy of the constitution which is the grand norm in the land when both are in conflict. This absurdity prompts the call for the amendment of the constitution to accommodate and enforce these rights (including economic, socio-cultural rights) as contained in said chapter two of the Constitution in order to woo investors' confidence.

Thus the question is whether or not judicial protection through enforcement of arbitral awards is a necessary element for effective realisation of investor's socio- political and economic rights in states under assessment? If yes, how do they contribute to the efficacy of realisation of such rights? Are there any legitimate expectations on the adjudicatory powers of the Nigerian courts in this regard? If yes, do Nigeria have robust mechanism(s) for the

enforcement of foreign award in favour of investor's right in?.

The ugly incident of corporate corruption has destroyed the confidence investors has in Nigeria which as a result of robust corporate governance codes and/or regimes. The leading influence of corporate governance principles in corporate administration is beyond question. The persistent weight of corporate governance principles has been largely attributable to the adverse consequences of non-compliance and lack of enforcement with provisions of corporate governance codes; Nigeria is no exception in the implementation of corporate governance codes [13]. This is made manifest by the fact that there exists in Nigeria a multiplicity of corporate governance codes; some of which are industry specific [14] which reduces the confidence a prospective investor has in investing and having his investment protected in Nigeria.

A major shortcoming of the multiplicity of corporate governance codes regime presently the case in Nigeria relates to the resolution of conflicts in the provisions of any of the industry - specific corporate governance codes with the provisions of the 2011 Security and exchange commission Code. This situation is compounded by two elements. Firstly, all the industry- specific codes are compulsorily applicable to the companies operating in their respective sectors. Secondly the 2011 Security and Exchange Commission Codes is undecided on its superiority over the industry-specific corporate governance Codes.

Interestingly towards the end of the first half of 2011 the president signed into law the Financial Reporting Council of Nigeria Act of the year. This groundbreaking legislation established the Financial Reporting Council of Nigeria and vested it with enormous powers in respect of the regulation of companies operating in Nigeria. A remarkable provision of the Financial Reporting Council of Nigeria Act 2011 is that for the first time in Nigeria, there is an express statutory provision vesting responsibility in respect of corporate governance on a regulatory body. Companies on corporate

governance matters got their powers on corporate governance by inference. There authorized on corporate governance are implied. They are not expressly and clearly stated in the different statutes setting up such regulators including the SEC!

The challenge with these extensive Board and Director related provision of the FRC Code, is that they are starkly in contrast with the provisions of the Companies and Allied Matters Act ("CAMA"). Unfortunately and fundamentally, the provisions of a Regulation cannot be interpreted and or applied in law to amend or vary the provisions of an extent Act of the Nation Assembly.

For due context and clarity, we shall have a cursory look at the Financial Reporting Council Act of Nigeria, 2011 which sets up the FRC - it provided for the establishment of a Directorate of Corporate Governance under Section 50 which shall -a) develop principles and practices of Corporate Governance; b) promote the highest standards of Corporate Governance; c) promote public awareness about corporate governance principles and practices; d) on behalf of the Council, act as the national coordinating body responsible for all matters pertaining to corporate governance.

Noteworthy at this juncture, is fact that as far as the 1999 Constitution and other body of Nigeria legislation (both enacted and or adopted) are concerned, the FRC Act is the foremost Act of the National Assembly that incorporates 'Corporate Governance' into Nigerian Legislation. Worrying, the FRC Act did not provide the purview nor parameter of what constitutes Corporate Governance therein. Unavailingly, references in the FRC Code to foreign Codes such as the Combined Corporate, Governance Code of the United Kingdom or such as the international Codes on Corporate Governance, cannot be legally applied nor enforced as law in Nigeria unless specifically adopted by our National Assembly or through and express incorporation under the FRC Act. To this extent, the preconceived definition and ambit of Corporate Governance as imported from the UK and

other jurisdictions are neither binding nor enforceable in Nigeria - they are merely persuasive sources at the very best. Apparently, the FRC in pursuance of its above powers under Section 50 of its Act to develop and enforce Corporate Governance principles, has issued by regulation, a Code of Corporate Governance which has now become mandatory to all applicable Companies across Nigeria.

The immediate conflict and confusion that arises is that the FRC Corporate Governance Code directly contradicts or attempts to vary the provisions of CAMA in most material respect - we shall juxtapose the contradictions shortly. However, it must be submitted, as a preliminary point, that where is a conflict between an Act of the National Assembly and a regulation made by a body created pursuant to an Act of the National Assembly, the provisions of the Act shall prevail.

To this extent, FRC's attempt to explore and develop Corporate Governance principles under Section 50 of it enabling statute, by regulation, cannot be interpreted and or enforced to contradict, amend or vary the more superior and extant provisions of the Companies and Allied Matters Acts. And it begs the point that all provisions of the FRC Code which contradicts any provision of CAMA, shall to the extent of their inconsistency, be null and void.

For ease of reference, some of the areas of contradiction between CAMA and the FRC Code are highlighted as follows:

1. Classification of a Company - Under Section 24 of CAMA, "Any Company other than a private company shall be a public company and its memorandum, shall state that it is a public Company". The purported legal re-classification of Private Companies under Section 2.1 of the FRC Code as all private companies that are holding companies or subsidiaries of public companies; and the regulated private companies, does not align with the provisions of Section 24 of CAMA. A Company is either public or private and the fact of being a holding Company or being a subsidiary of a public Company or being regulated does not

make such private Companies to assume a different status under CAMA. Assuming the FRC had the powers to make the private Company classification, a more practical option to steer clear of CAMA, may be to require that the private companies it delineated be re-registered as public Companies.

2. Number of Directors - While Section 246(1) of CAMA provides that "Every Company registered on or after the commencement of this Act shall have at least two Directors..." Section 5.4 of the FRC Code provides that "Membership of the board shall not be less than eight (8)". The provision of CAMA shall prevail and Section 5.4 of the FRC Code shall be null and void;

Both at international and state levels, human rights (including investor's rights) are universal, indivisible, and interdependent and interrelated. This means that states should give equal consideration and treatment to all persons, both natural and artificial persons in the process of realization of same within their jurisdiction.

However it conceived that foreign investors are more concerned about not only the protection of private property rights but also the measure of control that these rights provide over resources. [15] Nigerian legislation and literature have paid limited attention to the kind of property rights that come to be specified in the context of International Investment Regimes (IIR). [16] The procedural questions raised by investment arbitration have attracted most of the attention, while the analysis of the arbitral interpretation has been limited to the review of host state authority. Little has been said against the scope of foreign

investor's rights in accordance with investment awards. It is therefore to suggest that there is a need to expand the existing approach to IIR, moving from an approach restricted to host state behaviour and responsibility, to a more comprehensive view capable of embracing foreign investor rights and standards of review. [17]

Conversely most writers are of the view that civil and political rights of persons are given the statute of constitutional recognition as fundamental rights, economic rights are merely provided as state policy programs and directives. Additionally, while the former are subject to judicial protection, the latter is not which was case under chapter two of the Constitution of the Federal Republic of Nigeria 2011 (As Amended)- exhaustively discussed above.

Based on the above situation, there exists a discrepancy between the municipal and international legal regimes for the protection of investor rights as well as lack best practises on corporate governance in Nigeria. In order to reconcile these discrepancies, certain questions are to be asked.

Thus the question is whether or not judicial protection is a necessary element for effective realisation of investor's socio- political and economic rights in Nigeria? If yes, how do they contribute to the efficacy of realisation of such rights? What is the scope of court's involvement in the process of implementing these rights? Are there any legitimate limitations on their adjudicatory powers in this regard? If yes, does the Nigerian State have robust mechanism(s) for the domestic realization and enforcement of foreign investor's right in Nigeria?

#### CONCLUSION

Despite the existence of numerous international and local legal regimes in Nigeria concerning the protection of investors' socio-economic and political rights, these rights have remained far from being actualized as a result of poor investment atmosphere. In other words, the object and purpose of the relevant legal regimes and the monitoring enforcement mechanism have been left with no practical effects in protecting

investors' rights. Therefore it is legitimate to address such issues through a qualitative legal research and propose possible solution in this regard so that Nigeria can be at par with her counterparts in protecting investors.

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