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LAW JOURNAL

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5. Footnotes (not end notes) are placed by insertion not manually.
6. British spellings and usages, as against their American versions, are used throughout the work. Cases and names of articles and books should be italicized while citations are left in normal letters. Book citation should be italicized this way; John Reading, *The Law and Practice of Evidence*, 2nd ed. Thorougood Press, Abakaliki, Nigeria, 2004 p. 203.

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THE PRINCIPLES OF FOREIGN INVESTMENT IN INTERNATIONAL LAW

HAFSAT IYABO SA'ADU, Ph.D.^{*}

Abstract

The concept of foreign investment is a phenomenon that came about as a result of ever-increasing interdependence and co-operations in the areas of economic development amongst independent nations. It is important to note that foreign investment is inevitable from the point of view of any state, be it developed or developing. The governments of developing countries have endeavoured to form laws, regulative, and adopt policies as would attract foreign investment and technology in the face of competition from even the developed countries. The concept of foreign investment therefore, depends, on the flexibility and methodology of its pursuit within a given economic policy. Chapter II Article 1 of the Charter of Economic Rights and Duties of State provides that every state has the right to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with national objectives and priorities. The Nigerian Investment Promotion Commission Act Cap. N117 Laws of the Federation of Nigeria 2004 which created the NIPC is the autonomous official government policy organization that regulates issues pertaining to foreign investment. There are several factors which shape the regulatory laws of a state, nationality, ethnicity, protection of local entrepreneurship, labour, energy, natural resources and political factors, environmental and social considerations that have to be considered in making of the choice by a state. These factors may invariably affect the regulatory laws as to the minimum standard of treatment of investors. Thus, this paper sets out to consider the general principles of law governing foreign investment under the international law.

Keywords: Principles, Foreign Investment, International Law.

Meaning and Concept of Foreign Investment

No matter what concept or definition that is given to foreign investment, the common feature in all definitions is that of the transfer of either tangible or intangible assets from one country to the other. According to the *Encyclopedia of Public International Law*,¹ foreign investment is: "the transfer of funds or materials from one country (called the capital exporting country) to another country (called the host country) in return for a direct or indirect participation in the earnings from its employment". Or it could be defined as a way of gainfully investing part of a country's capital in another country where it can bring in more desirable return rather than allowing it to stay idle at home or attract a low yield. From all the above definitions, we could define foreign investment as the act of investment

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(1993) London: Business Publishers Vol. 8 p. 146.

and provisions of capital from one foreign nation in shares or any other equity, securities of corporate entities which could be in form of direct foreign investment or indirect foreign investment to the host nation.

The concept of foreign investment on the other hand is a phenomenon that has been brought about as a result of ever-increasing interdependence and co-operations in the areas of economic development amongst independent nations. In the opinion of Professor A.O. Obidiye²,

Since international co-operation in the area of economic development is on the increase, between sovereign states and nationals of other sovereign states, changes in national policies and national economics often lead to outward search for investors and managers.

The Black's Law Dictionary defines investment as:

An expenditure to acquire property or otherwise assets in order to produce revenue, the assets so acquired. The placing of capital or laying out of money in a way intended to secure income or profit³.

The concept of foreign investment therefore, depends, on the flexibility and methodology of its pursuits within a given economic policy. The resultant effect of this is, either great economic advancement of such a nation State, or further economic dependence as the case has proved in some circumstances. In the opinion of Professor M.A. Ajomo⁴,

Foreign investment is inevitable from the point of view of any state, be it developed or developing. However, the odds are weighted more against the developing countries who lack the technological knowhow and capital for economic development. In consequence, the governments of developing countries have endeavoured to form laws, regulative, and adopt policies as would attract foreign investment and technology in the face of competition from even the developed countries.

The only way to raise the standard of living of the high proportion of the world population in under-developed countries is by rapid economic development and foreign involvement as a catalyst to the economic development of any nation state, while many of the under-developed and developing countries possess valuable natural wealth they lack the basic

¹ In a paper presented at the national workshop on law and practice of International Trade, organized by the Department of Jurisprudence and International Law, Faculty of Law, University of Lagos, 17th - 19th July 1990 at p. 16.

² Black H.C., Black's Law Dictionary, 6th ed., West Publishing Co.,

³ The Dimensions and Legal Framework of International Investment Agreements in Nigeria: The Joint Venture Model, in Ajomo M.A. (ed), (1989) *New Dimensions in Nigeria Law*, Lagos: N.I.A.L.S. p14

instrument for exploiting their resources for the economic benefit of their peoples—capital, skilled manpower and technological inventions.

Forms of Investment

There are different forms of foreign investment. They are direct investment and portfolio investment.

Direct foreign investment involves direct control and participation in the operation of the recipients' firms, while portfolio investment involves passive purchase of investments such as stocks or bonds. Direct foreign investment presents a lot of advantages to a host country over portfolio investment. These include bringing of hard currency to a host country and carries with it financial resources, managerial skills, technical knowledge and marketing connections. Direct foreign investment does not create debts unlike foreign loans or bonds. Direct foreign investment is generally long-term investment while portfolio investment is often short-term.²

However, it is to be noted that the type of regulatory regime for foreign investment that a host country decides to adopt depends upon whether the government wishes to encourage or discourage foreign investment in general, or to encourage particular types of investment or to discourage others.

The case for a foreign investment regime that encourages foreign investment is straight-forward and is no longer seriously controversial. Foreign investment transfers much needed capital, managerial skills, and technology to the host country. It also improves economic efficiency through gains resulting from increase in international trade, international competitiveness, improved access to foreign markets for domestic products, and increased training for the labour force.

The Nigerian Investment Promotion Commission Decree No. 15, 1995³ which created the NIPC is the autonomous official government policy organization that regulates issues pertaining to foreign investment. The formation of a legislative organ like the NIPC might have been informed by the government's desire that a level of control by the host country is desirable. Also, Chapter 11 Article 1 of the Charter of Economic Rights and Duties of States says that every state has the right to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with national objectives and priorities. Such regulations are equally meant and intended to regulate, and supervise the activities of Transnational Corporations (TNCs) in the national jurisdiction.

There are several factors which shape the regulatory laws of a state. These are nationalism, ethnicity, protection of local entrepreneurship, labour, energy, natural resources

² Foreign Investment Contract and General Legislation. See: <http://www.Badellman.com/legislation.html> accessed on 25 May 2014. Note further that the Nigerian Investment Promotion Commission (NIPC) Decree repealed the Industrial Development Coordination Committee (IDCC) Decree No. 36 of 1988 and the Nigerian Enterprises Promotion Decree (NEPD) of 1972 as amended in 1977 and 1989 which forbade ownership by Nigerians the ownership of certain businesses.

³ 1995: Act Cap. 311:7 Laws of the Federation of Nigeria 1999: 2004.

and political factors, environmental and social considerations that have to be considered in making of the choice by a state. These factors may invariably affect the regulatory laws as to the minimum standard of treatment of investors.

The days of prohibiting and discouraging foreign investment have passed. Countries like Russia and China who were the major critics of foreign investment have opened both their economies and their doors to foreign investors.

Therefore, the regulations governing foreign investments are commonly set out in "investment laws" and "investment codes". In socialist countries (such as the People's Republic of China and Vietnam) that allow investments only in the form of joint ventures, the regulations are usually called "joint venture laws". The purpose of these laws is the creation of a legal framework that will attract and put to work foreign capital.

Instead of having general laws, a few states have special investment acts that apply to particular sectors of the economy such as agriculture, technology, tourism and so on. And some, such as Brazil, have a complex network of laws that control investment incentives, subsidized financing, tariffs, taxes, foreign exchange prices, technology transfers and other matters, such as the combination of functions as an investment code.

The provisions commonly found in these codes and general laws are sometimes incorporated in Bilateral Investment Treaties (BITs).⁴

Therefore, in discussing the principles of law governing foreign investment, it is assumed that the main purpose of these principles of law is to encourage direct foreign investment and incidentally portfolio foreign investment.⁵

The General Principles of Law Governing Foreign Investors are:-

1. Principle of Admission of Foreign Investment.

The host government should facilitate and encourage the entry of foreign investment, avoid any cumbersome or delay causing admission procedures. Foreign investors should be allowed to enter freely and perform any lawful activities in the host country, subject to limitations. Such limitation, to be drawn to restrict only those foreign investments which will not interfere with national security of the host country.⁶

A number of countries, including Angola, have various forms of screening and approval procedures that restrict direct foreign investment. In developing countries, registration and approval procedures almost invariably cause an inordinate amount of delay, for example, in Egypt, seven years was required to secure approval for a joint venture between GM and ISUZU, and Michelin.⁷

The most common rationale for screening requirements is that governments need to

⁷ "Guidelines on the Treatment of Foreign Direct Investment" issued by the World Bank Group on September 25, 1992 and Published in 31 International Legal Materials 1563 (1992).

⁸ Ibid.

⁹ Ibid.

¹⁰ Foreign Investment Contract and General Legislation. See: <http://www.Badellman.com/legislation.html> accessed on 25 May 2014.

determine whether a particular foreign investment is desirable. But there are no good economic criteria for determining whether a particular investment is desirable¹². Also, the proposed investments may be unlawful because they are in the area that is reserved to the government or to nationals, or because they violate existing legislation, such as environmental protection laws. Many countries desire to preclude foreign investment from certain sensitive areas, such as ownership of land near border areas, manufacture of armaments, ownership of news media, production of and dealing in narcotics drugs and psychotropic substances, production of military and paramilitary wears and accoutrement, including those of the police, customs, immigration and prison services¹³. These are legitimate concerns.

Another legitimate concern is preventing foreign investments from dominating the host country's economic and political life, but this can be achieved through better measures than screening foreign investment.

The real case for a screening procedure is that it enables the host country to negotiate a higher return or bargaining chip or to negotiate a better deal from foreign investment for the host country¹⁴.

Meanwhile, the security of the host country is of paramount importance. Even the United States who is in the forefront of the proponent of the liberal theory of openness to foreign investment, does not permit entry into its market at will. There is the Exon-Florio Amendment to the Omnibus Trade Act. Under this legislation the president may prevent the entry of foreign investment, which he considers to be a threat to national security from entering the U.S. There is a regulatory structure within the U.S for reviewing incoming investment¹⁵.

2. Principle of Fair Notice of the Rule of the Game.

The foreign investors need to know what are the rules of the game that is the law guiding the foreign investment both before and after making commitments to invest. A host country normally publishes pamphlets or handbooks containing up-to-date collections of relevant legislations governing foreign investment. Such a handbook should include relevant constitutional provisions, treaties in force, the Foreign Investment Law and its Regulations in widely used languages such as English, French, Spanish and German Language¹⁶.

These guide books and pamphlets should be available from the Foreign Investment Institute, Consulate, Embassy, Law Libraries and Chamber of Commerce in capital exporting countries.

3. Principle of Fair and Equitable Treatment

¹² *Ibid.*

¹³ Sections 17 and 31 Nigerian Investment Promotion Commission (NIPC) Act, Cap. NI17 Laws of the Federation of Nigeria (LFN) 2004.

¹⁴ Foreign Investment Contract and General Legislation. See: <http://www.Baile/Bpm.com/legislative.html> accessed on 25 May 2014.

¹⁵ See C. S. Elan Kang, U.S. Politics and Greater Regulation of Inward Foreign Direct Investment, (1997) by International Organization 301 at 304.

¹⁶ *Handbook of Investment Treaties, International Legal Materials*, (1991) Vol. 30 p. 273.

Treatment of the foreign investor under international laws involves the host country to extend fair and equitable treatment to all foreign investment established in its territory and to all foreign personnel. This treatment extends to granting work visas, permits, import and export licenses, and maximum protection and security of the foreign investors and their personnel. It includes foreign investors full protection of his property or ownership rights and even intellectual property rights¹⁷.

This law provides for the host country to take adequate measures to prevent corruption and to promote accountability and transparency in dealing with foreign investors. The only exception to this general rule is in area where investment is restricted to nationals for purposes of investing or operating a business. This law further provides that national legislation and regulations will not discriminate against foreign investors or among foreign investors on grounds of nationality¹⁸.

This principle of law establishes firmly the general standard of fair and equitable treatment of foreign investors under the International Law. This is in both multi-lateral and bilateral investment treaties. It guarantees high protection and security for both personnel and property. The principle of non-discrimination of foreign investors because of their alien status is an important aspect of this law. They will be treated equally to allow them to operate their business freely in the host state¹⁹.

It is to be noted that in some areas foreigners are not similarly situated with nationals and need not be treated equally. The International Law recognizes that a host state may legitimately reserve certain areas to national investors. The principle of non-discrimination should not intervene in this. For instance, a host country should not afford to foreigners the same subsidized loans it bestows upon its nationals. This principle allows the host state to require foreign investors to recruit the bulk of their labor force locally. The fact is that it is more expensive to recruit and employ foreign personnel because of economic considerations and constraints of law²⁰.

This will lead us to consider General Agreement on Tariff and Trade (GATT) which represents an area of intrusion of the World Trade Organization into the realm of foreign investment. GATT permits regulation of service sectors on the basis of technical competence and qualifications but forbids discrimination against foreigners. It aims to progressively eliminate existing discrimination while purporting not to interfere with government policy objectives. It ensure that the foreign investment enters subject to the policies and laws of the host state and preserving this as a condition for protection. The host state therefore needs to assure itself that no sovereign control over foreign investment is surrendered as a result of investment treaty²¹.

To some extent, GATT is the first multi-lateral instrument containing a standard of

¹⁷ Foreign Investment Contract and General Legislation. See: <http://www.Baile/Bpm.com/legislative.html> accessed on 25 May 2014.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ GATT General Agreement on Tariffs and Trade. See: <http://www.econhistory.chf/gatt.html> accessed on 25 August 2014.

admission and treatment of foreign investors, though the instrument is limited to foreign investors who provide services within the territory of the state²².

Another important aspect of this principle of law is its requirement of the host government to take adequate measures to prevent corruption and to promote accountability and transparency in dealing with foreign investors. Recently, the 34²³ members of the Organization for Economic Cooperation and Development (OECD) countries, are reluctant to invest if laws and regulations are administered in a fashion that bribery of government officials is another cost of doing business. The new OECD anti-bribery convention obligates member nations to enact legislation similar to the U.S. Foreign Corrupt Practices Act, which makes it a criminal offense for U.S. persons to bribe foreign officials to secure any business²⁴.

4. Principle of Concessions or Permits to Operate Public Utilities or to Exploit Natural Resources.

This should be done only after a competitive bidding. The terms and conditions contained in the invitation to bid shall be incorporated into the concession contracts or permits.

The invitation to bid should contain clear descriptions of the public service, public work, mineral area to be exploited, the terms of the bidding, the pre-qualifications to bid, the availability of feasibility studies or prospecting reports and criteria for evaluation of bids²⁵.

This principle contemplates open bidding system in order to avert corruption and to ensure fairness, and equal treatment to all prospective bidders. The prospective bidders, should know precisely what they are bidding for, the criteria by which their bidding will be evaluated and the technical and financial resources needed to qualify as a bidder. In this respect, bidders can compete in relation to how much they are willing to offer to the host government for the concession, the quality of the public service, the rate structure or other factors²⁶.

5. Principle of Transferability of Funds.

This principle of law requires minimization in controlling the free transfer of funds out of the host state. There is the need for the foreign firms to remit after tax profits to their shareholders, service their loans, pay for technology and pay for needed imports²⁷.

The law also allows expatriate personnel to send home at least part of their wages or salaries each month and even to transfer immediately all their savings from such wages upon

²² *Ibid.*

²³ As of 2013, 34 States have ratified the convention and thereby joined the OECD. See Convention on the Organization for Economic Co-operation and Development <<http://en.wikipedia.org/wiki/organisation>> accessed on 26 August 2014.

²⁴ Organization for Economic Cooperation and Development, 'Through International Direct Investment', See: <<http://www.oecd.org/dataoecd/11/40/48146811.pdf>> accessed on 26 August 2014.

²⁵ *Source of Investment Location, International Legal Materials*, (1991) Vol. 30 p. 282.

²⁶ *Ibid.*

²⁷ *Ibid.*

termination of their employment. This to be done in the usable currency acceptable to the investors²⁸.

The Nigerian Investment Promotion Commission Decree No.16 of 1995 (hereinafter referred to as the NIPC Decree)²⁹ and the Foreign Exchange (Monitoring and Miscellaneous Provisions) Decree No. 17 of 1995 (hereinafter referred to as the FEMM Decree)³⁰ was aimed at facilitating foreign investment.

The NIPC Act gives some incentives³¹ for foreign investment. These are:-

- a guarantee of unconditional transferability of funds, in freely convertible currency, of dividends or profits (net of taxes) attributable to the investment;
- transferability of payments in respect of loan servicing where a foreign loan has been obtained; and
- the remittance of proceeds (net of all taxes), and other obligations in the event of a sale or liquidation of the enterprises or any interest attributable to the investment³².

This provision of law gives the foreign investor the option to freely remit or reinvest the proceeds from sale, liquidation, or expropriation of an investment.

This principle permits deferment for up to five years in a situation where the accounts involved from sale or disposal of an investment may be large and when a country is undergoing a balance of payments problem at the time of such request to repatriate a large amount. This principle of law provides further that interest at normal market rates in local currency must be paid on the sum deposited for transfer during the time such transfer is blocked.

Nothing in principle 5 should be understood to prevent a host government from preventing a transfer through nondiscriminatory, equitable and good faith application of its legislation dealing with (a) bankruptcy or insolvency, (b) alimony or support obligations, (c) criminal offences, or (d) ensuring satisfaction of judgements in ordinary civil litigation³³.

6. Principle of Expropriation.

This general principle provides that a host government may not directly or indirectly expropriate or nationalize a foreign investment within its territory or take a measure tantamount to expropriation or nationalization.

This particular principle is drafted broadly to include both creeping expropriation and formal expropriation or nationalization. Creeping expropriation involves regulatory measure which deprive the foreign investor of some ownership. These include forcing the foreign investor to flee the country, denying the investor access to its funds and profits, coercing the

²⁸ *Ibid.*

²⁹ Now NIPC Act Chapter N117 Law of the Federation of Nigeria (LFN) 2004.

³⁰ Now Foreign Exchange (Monitoring and Miscellaneous Provisions) Act CAP F34, Laws of Federation of Nigeria (LFN) 2004.

³¹ Section 22 empowers the Commission to provide such packages.

³² Section 24 of Nigerian Investment Promotion Commission (NIPC) Act/Cap. N117 Laws of the Federation of Nigeria 2004.

³³ Foreign Investment Contract and General Legislation. See: <<http://www.fishbase.org/legislation>> accessed on 25 May 2014.

investor to sell or transfer at an unfairly low price, interfering with access to needed facilities and supplies, or appointing an Intervenor or Administrator to manage the foreign investment. Formal expropriation or nationalization involves measure that deprive the foreign investor of some ownership for a public purpose, in accordance with applicable legal procedures and without discrimination on the basis of nationality.²⁴

The expropriation should be upon payment of appropriate compensation to the investor. This law states further that compensation will be deemed "appropriate" if it is adequate, prompt and effective. Compensation is regarded as "prompt" if paid without delay. Compensation is considered effective if paid in currency that can be freely converted or is deemed freely usable by the International Monetary Fund²⁵. It is also effective if paid in any currency acceptable to the foreign investor. Therefore, compensation paid in bonds or some other deferred method of payment is regarded as neither prompt nor effective. The Angola's Foreign Investment Law adopts the compensation standard of prompt, adequate and effective, which conforms to the standard prescribed by Expropriation law²⁶. Also, Section 25 of the NIPC Act provides guarantees against expropriation and nationalization. Where acquisition of a foreign firm has to take place in the national interest under the law providing for payment of fair and adequate compensation, such compensation shall be paid without undue delay. It also provides that the repatriation of such compensation be made in convertible currency.

In the case of India, since it attained independence, it always provided fair and equitable treatment to foreign enterprises including granting them freedom for remittance of profit and repatriation of capital as well as compensation wherever any foreign enterprise was acquired in public interest. The recent agreement concluded by India which discarding the so called Hull formula i.e. "prompt, adequate and effective compensation" provides necessary assurance that expropriation in principle, would be subject to legal guarantees that:

- (i) It would be only for a public purpose and non-discriminatory;
- (ii) fair and equitable compensation is payable;
- (iii) funds and assets due or compensation could be repatriated in convertible currency subject to national laws concerning foreign exchange regulations;
- (iv) the measure of expropriation is open to judicial review to establish that it is reasonable and proper²⁷.

However, the problem in any expropriation is the appropriate value of the foreign investment. The bulk of expropriation disputes are about what is the appropriate value for compensation. This can be determined by the fair market value of the investment at the time of taking over. Fair market value is measure by the sum that a willing buyer would pay for the investment. If a willing buyer is not available and expropriated firm is operating at a

²⁴ Section 25 of Nigerian Investment Promotion Commission (NIPC) Act Cap. N117 Laws of the Federation of Nigeria 2004.

²⁵ *Ibid*.

²⁶ *Ibid*.

²⁷ See P. K. Jha and A. Kumar (2008), *Law and Foreign Investment: Host Country's Perspective to the Investment of Foreign Firms in India*, *Journal of International Law*, 4, 65.

profit, then the International Tribunals and Arbitrators often resorted to "going concern value". This is determined by discounting the future earnings of the investment. For investments not profitable, then liquidation value is often utilized.

7. Principle of Dispute Settlement.

This principle of law states: "Disputes between the host country and foreign investors will normally be settled by negotiations. If these are unsuccessful, disputes shall be settled by the national courts or by other agreed upon alternative dispute resolution mechanisms, such as arbitration, conciliation or mediation"²⁸.

Disputes arising from investment are usually resolved by negotiations. If it fails, the normal route is to resort to litigation in the courts of the host country. But sometimes the aggrieved parties may agree to some other alternative dispute resolution like arbitration, conciliation or mediation. The provisions of law for international arbitration are common. The said provisions enable the parties to choose the arbitrators, the applicable law and the place of arbitration²⁹.

The dispute settlement procedures under the NIPC Decree says that in the case of disputes between a foreign investor and any government in Nigeria, where there exist a bilateral or multilateral agreement on investment protection between the Federal Government and the home government of the foreign investor, such disputes shall be settled within the framework of such an agreement³⁰ or in accordance with any other national or international machinery for the settlement of such disputes which the parties may agree upon³¹.

The Nigerian government has long declared its readiness to submit to international arbitration or other ADR mechanisms for the resolution of investment disputes through its national legislation, the Arbitration and Conciliation Act Cap 19, Laws of the Federation of Nigeria, 1990 as amended 2004. The Act which is modeled, after the UNCITRAL (United Nations Commission on International Trade Law). This law provides for the recognition and enforcement of an arbitral award irrespective of the country in which it is made³². It further provides that parties to an international commercial agreement may resolve their dispute in accordance with the Arbitration Rules set out in schedule one of the Act or the UNCITRAL Arbitration Rules or any other international arbitration rules acceptable to the parties³³.

²⁸ Foreign Investment Contract and General Legislation. See: <<http://www.Badriferno.com/legislation.htm>> accessed on 25 May 2014

²⁹ *Ibid*.

³⁰ Section 26(2) of Nigerian Investment Promotion Commission (NIPC) Act Cap. N117 Laws of the Federation of Nigeria 2004.

³¹ Section 26(2) and 26(3) for referring disagreements as to the dispute to be adopted to the International Centre for Settlement of Investment Disputes (ICSID) Rules.

³² Section 31(1) Arbitration and Conciliation Act Cap 19 Laws of the Federation of Nigeria (LFN) 1990 as amended 2004. See further Section 26 of the Nigerian Investment Promotion Commission (NIPC) Act Cap. N117 Laws of the Federation of Nigeria (LFN) 2004.

³³ Section 25 Arbitration and Conciliation Act Cap 19 Laws of the Federation of Nigeria (LFN) 1990 as amended 2004. See further Section 36 of the Nigerian Investment Promotion Commission (NIPC) Act Cap. N117 Laws of the Federation of Nigeria (LFN) 2004.