Golden Gate University School of Law
GGU Law Digital Commons

Theses and Dissertations | Student Scholarship

Spring 2011

Mismanagement of Emerging Stock Markets: Analysis of the Role Played by "Legislative Infidelity" - a Norm of Int'l Economic Jurisprudence - in the N8.1tn ($60bn) Crash of Nigeria Stock Market

Collins U.C. Ikebudu
Golden Gate University School of Law

Follow this and additional works at: http://digitalcommons.law.ggu.edu/theses

Part of the International Law Commons, and the Securities Law Commons

Recommended Citation
Ikebudu, Collins U.C., "Mismanagement of Emerging Stock Markets: Analysis of the Role Played by "Legislative Infidelity" - a Norm of Int'l Economic Jurisprudence - in the N8.1tn ($60bn) Crash of Nigeria Stock Market" (2011). *Theses and Dissertations.* Paper 27.

This Dissertation is brought to you for free and open access by the Student Scholarship at GGU Law Digital Commons. It has been accepted for inclusion in Theses and Dissertations by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

GOLDEN GATE UNIVERSITY SCHOOL OF LAW

MISMANAGEMENT OF EMERGING STOCK MARKETS: Analysis of the Role played by 'Legislative Infidelity' – A Norm of Int'l Economic Jurisprudence — In the N8.1tn ($60bn) Crash of Nigeria Stock Market.

SUBMITTED TO THE GOLDEN GATE UNIVERSITY SCHOOL OF LAW, DEPARTMENT OF INTERNATIONAL LEGAL STUDIES, IN FULFILLMENT OF THE REQUIREMENT FOR THE CONFEREMENT OF THE DEGREE OF SCIENTIAE JURIDICAE DOCTOR (SJD).

MEMBERS OF THE DISSERTATION COMMITTEE

PROFESSOR DR. CHRISTIAN N. OKEKE, LL.M (KIEV) DOCTOR IN DE RECHTS GELEERDHEID (AMSTERDAM); PROFESSOR OF INTERNATIONAL AND COMPARATIVE LAW; DIRECTOR, THE CENTER FOR ADVANCED INTERNATIONAL LEGAL STUDIES, GOLDEN GATE UNIVERSITY SCHOOL OF LAW.

PROFESSOR DR. SOPHIE CLAVIER, SAN FRANCISCO STATE UNIVERSITY GRADUATE SCHOOL: MA, SAN FRANCISCO STATE UNIVERSITY LAW SCHOOL: DIPLOME D'ETUDES SUPEREURES (JD PLUS LL.M EQUIVALENT); DIPLOME D'ETUDES APPROFONDIES (LL.M); DOCTEUR EN DROIT (SJD), UNIVERSITY OF PARIS, PANTHEON SORBONNE.

PROFESSOR TIMOTHY A. SIMON, BACHELOR'S DEGREE IN ECONOMICS, UNIVERSITY OF SAN FRANCISCO; JURIS DOCTOR, HASTINGS COLLEGE OF LAW, UNIVERSITY OF CALIFORNIA; ADJUNCT PROFESSOR OF SECURITIES REGULATIONS, GOLDEN GATE SCHOOL OF LAW, SAN FRANCISCO; ADVISOR ON INTERNATIONAL SECURITIES IN GOLDEN GATE'S U.S. LEGAL STUDIES PROGRAM.

BY

Collins U.C. Ikebudu, Esq., LL.B (HONORS), LL.M

SAN FRANCISCO, CALIFORNIA

APRIL 29th, 2011.

MISMANAGEMENT OF EMERGING STOCK MARKETS: Analysis of the Role Played by *'Legislative Infidelity'* – A Norm of Int'l Economic Jurisprudence — In the N8.1tn ($60bn) Crash of Nigeria Stock Market.

Summary of Contents

Summary of Contents i
Table of Contents ii
Table of Cases vii
Table of Statutes viii
Abbreviations x
Acknowledgement xiii
Abstract xiv

Chapter 1: Issue, Purpose and Scope 1

Chapter 2: TRIPS as an Exemplification of *'Legislative Infidelity'* in International Law; A Brief Analysis 50

Chapter 3: Legislative Infidelity and N8.1tn ($60bn) Crash of Nigeria Stock Market; Analysis of a Premeditated Securities Fraud. ~Part 1~ 95

Chapter 4: Legislative Infidelity and the N8.1tn ($60bn) Crash of Nigeria Stock Market: Analysis of a Premeditated Securities Fraud. ~Part 2~ Complicity of Nigeria's Investments and Securities Tribunal in the Securities Fraud that Crashed Nigeria Stock Market. 144

Chapter 5: Legislative Infidelity and the N8.1tn ($60bn) Crash of Nigeria Stock Market: Analysis of a Premeditated Securities Fraud. ~Part 3~More Evidence of Contrived Dysfunction: Other Plots that Abet Fraud in Nigeria Capital Market. 193

Table of Contents

CHAPTER 1: Issue, Purpose, and Scope 1

1.1 Introduction 1

1.1.1 The Apocalyptic Crash 2

1.1.2 The Cover-Up 5

1.1.3 Cover-Up by Market Operators, Regulators, and Government 5

1.1.4 Cover-Up by the Central Bank of Nigeria 7

1.1.5 Other Markets Debunked Global Crisis Excuse 10

1.1.6 Plots of the Crash Hidden in Framework of Nigeria Market 12

1.2 Why This Topic Is Important 13

1.2.1 The Crash Beckons for Inquiry 14

1.2.2 My Dissertation is a Fortuitous Opportunity 14

1.3 Benefits of My Research 15
1.3.1 Research Offers Opportunity for Redress 15
1.3.2 Research Proves that Global Poverty is Mostly Induced 15
1.3.3 Dissertation Spotlights '*Legislative Infidelity*' 16

1.4 Central Thesis of My Dissertation 17

1.5 Legislative Infidelity; Definition, Encounter, and Examples 19
1.5.1 Definition of Legislative Infidelity 19
1.5.2 Encounter with Legislative Infidelity 20
1.5.3 Examples of Legislative Infidelity in Int'l 'Legislation' 22
1.5.3.a Sources of International Law 22
1.5.3.b Insurgent Sources of International Law 23

1.6 IMF and World Bank; Exemplars of Legislative Infidelity in the Jurisprudence of Int'l Economic Order 24
1.6.1 Origin and Brief History of the IMF, and its Metamorphosis to Infidelity 24
1.6.2 Original Mandate of IMF 26
1.6.3 Termination of IMF Job 27
1.6.4 IMF's Metamorphosis 28
1.6.5 IMF Articles of Agreement; Legislative Infidelity Epitomized 31
1.6.5.a IMF's Immunity with Impunity 32
1.6.6 Criticisms of IMF and Its Operations in Developing Countries 33

1.6.6.a IMF's Reports Described as '*Garbage*' 35

1.7 Four Deadly Steps IMF (and World Bank) use to Kill Developing Nations Economies 36
1.7.1 Step One is privatization 36
1.7.2 Step Two is capital market liberalization 37
1.7.3 Step Three: Market-based pricing – a fancy term for raising prices on food, water and cooking gas. "*Step-Three-and-a-Half*: 'the IMF riot'" 38

1.7.4 Step Four is free trade – likened to the Opium Wars 39

1.7.5 Doctrinaire Ideology of '*free-market Fundamentalism*' still Shapes Policy 40

1.8 World Bank; A Model of Legislative Infidelity 41

1.8.1 History of the World Bank 41

1.8.2 World Bank's Transformation 42

1.8.3 Opening Remark on World Bank's Guidelines for the Treatment of Foreign Direct Investment 43

1.8.4 Legislative Infidelity and World Bank 'Guidelines for the Treatment of Foreign Direct Investments'; A Brief Analysis. 44

CHAPTER 2: TRIPS as an Exemplification of '*Legislative Infidelity*' in International Law; A Brief Analysis. 50

2.1 Introduction 50

2.2 Trip into TRIPS; A Summary of TRIPS' Major Controversies 51

2.3 TRIPS and Legislative Infidelity; Analytical Overview 53

2.4 TRIPS Cross-Referencing Technique; A Genre of Legislative Infidelity 62

2.5 Post-Adoption Controversies That Trail TRIPS; Stirring the Hornet's Nest 68

2.6 Scholarly Angle to TRIPS Controversies 72

2.7TRIPS Neglect of the Property Rights of Indigenous Peoples and Local Communities; Another Face of Legislative Infidelity 79

2.7.1 The Bellagio Declaration 80

2.7.2 Scholarly Writings on the Neglect of Property Rights of Indigenous Peoples and Local Communities 83

2.8 UNCHR Sub-Commission on Prevention of Discrimination and Protection of Minorities; An Effort that was Aborted. 89

2.9 U.N. General Assembly Resolution 61/295; Real Solution that Fell Short. 92

2.10 Conclusion 93

CHAPTER 3: Legislative Infidelity and N8.1tn ($60bn) Crash of Nigeria Stock Market; Analysis of a Premeditated Securities Fraud. ~Part 1~ 95

3.1 Introduction 95

3.2 What Caused Nigeria's N8.1tn ($60bn) Stock Market Crash; Fortuitous Tragedy or an Organized '*Hot Money Cycle*' Scam Scheme? 100

3.3 Events Associated with the Crash 102

3.4 SEC Board's Trips to U.S. 106

3.5 '*Legislative Infidelity*' Designed into Nigerian Securities Acts and Subsidiary Legislations 107

3.6 Nigerian Securities and Exchange Commission; Capital Market Regulator Officially Sabotaged in the Securities Act 109

3.6.1 Part-Time, None-Executive SEC Chairman 112

3.6.2 Sabotage of SEC on Appointment 114

3.6.3 Tenure and Devotion 116

3.6.4 Sabotage of SEC on Salary 118

3.7 India Stands as a Reproach to Nigeria 122

3.7.1 Nigeria Arrangement is unlike no Other 125

3.7.2 Nigeria Arrangement is not Like the British System 125

3.8 Nature of Securities and the Implication to Securities Regulation 129

3.8.1 Distinguishing Feature of Securities 130

3.8.1.a). Securities are Created, not Produced 132

3.8.1.b). Securities are not used or Consumed 133

3.8.1.b.i) Efficient Market Hypothesis 134

3.8.1.c) Intangible and Complex Nature of Securities 137

3.8.1.d) Higher Regulatory Standard 138

3.9 Nigerian Investments and Securities Tribunal (IST); a Strategic Impediment to Nigeria's SEC 139

3.10 Conclusion 143

CHAPTER 4: Legislative Infidelity and the N8.1tn ($60bn) Crash of Nigeria Stock Market: Analysis of a Premeditated Securities Fraud.

~Part 2~ Complicity of Nigeria's Investments and Securities Tribunal (IST) in the Securities Fraud that Crashed Nigeria Stock Market.

4.1 Introduction 144

4.2 Power of Nigeria's SEC (through APC) to Investigate and Punish Securities Malpractices, Under ISA 2007 146

4.3 Nigerian IST through the Cases: IST's Judicial Hostility towards SEC; Happenstance or Evidence of Complicity in Securities Fraud? 148

4.3.1 Examples of the Tribunal's Judgments that Freed Securities Fraudsters 150

4.3.1.i) *Union Bank of Nigeria (UBN) PLC v. SEC* 150

4.3.1.ii) *Molten Trust Ltd & Another v. SEC* 152

4.3.1.iii).*Nova Finance & Securities Ltd and Mr. Eugene Anenih v. SEC* 156

4.3.1.iv) *Olisaemeka v. SEC* 169

4.3.1.v) *Akintola Williams Deloitte v. SEC and 20 others* 170

4.4 Award of Costs to SEC; Nigerian Tribunal's Rivalry with APC and SEC 181

4.4.1). *Central Securities Clearing System (CSCS) v. SEC* 181

4.4.2). *Lighthouse Assets Management Company Ltd v. SEC* 181

4.4.3). *FIS Securities Ltd v. SEC* 182

Central Securities Clearing Ltd and Anor v. Bonkolans Investment Ltd and 5 Ors 185

4.5 IST Power to Accept Monetary Gifts and Donations: Affront to Justice 186

4.5.1 Gift Power not Based on Economic Need 189

4.6 Rule 2(2),(c), IST (Procedure) Rules 2003; Money Boost in the Tribunal 191

4.7 Conclusion 192

CHAPTER 5: **Legislative Infidelity and the N8.1tn ($60bn) Crash of Nigeria Stock Market; Analysis of a Premeditated Securities Scheme.**

~Part 3~ More Evidence of Contrived Dysfunction: Other Plots that Abet Fraud in Nigeria Capital Market.

5.1 Introduction 193

5.2 Size of the Investments and Securities Tribunal; Means of Obstructing Access to Justice 195

5.3 Constraining Lawyers and Clients; Further Obstruction of Access to Justice 198

5.4 Stifling Robust Shareholders Activism; Repressing 'Citizen Police' 203

5.4.1 Code of Conduct for Shareholders Associations in Nigeria 207

5.4.2 *S.40* 1999 Nigerian Constitution 207

5.4.3 Analysis of the Code of Conduct for Shareholders 208

5.5 Damndest Conflict of Interest Situations: When the Regulator Doubles as the Regulated. 212

5.6 Power of Nigeria's SEC to Accept Monetary Gifts and Donations 217

5.7 Absence of *Private Rights of Action*; A Grave Loophole in Nigerian Law 218

5.8 *Treble Damages* Principle; Deterrent Rule against Securities Fraud 224

5.8.1 Treble Damages under Old English Law 225

5.8.2 Treble Damages under U.S. Law 226

5.8.3 Treble Damages in India 226

5.8.4 Treble Damages under Nigerian Law 226

5.9 *Margin Loan*: The Achilles Heel that threatens many Nigerian Investors and Banks 230

5.10 *Insider-Trading*; Broker-Dealers and Inside Information 233

5.11 IMF and World Bank's Roles in Nigeria Market Crash 234

5.12 Conclusion 237

5.13 Recommendations 240

Table of Cases

AKINTOLA Williams Deloitte v. SEC and 20 others, (***Unreported***) Appeal No. IST/LA/APP/01/08, judgment delivered on Tuesday, 10th February, 2009..170, 173, 178

ARRINGTON v. Merrill Lynch, Pierce, Fenner and Smith, (1981), 651(9th Cir)..................................231

ANGELASTRO v. Prudential Bache Securities Corp,(1984), 764 F.2d 939 (3d Cir.)......................231

BATEMAN Eichler, Hill Richards, Inc. v. Berner, (1985), 472 U.S. 299.............................220, 233

CADBURY Nigeria Plc vs. SEC & Another, (2008), (*Unreported*) (2008), *Appeal* No.IST/APP/01/08 *delivered* on 12th November, 2008. 163

CENTRAL Securities Clearing Ltd and Anor v. Bonkolans Investment Ltd and 5 Ors, (2007) 2 NISLR 95, at page 135...185

CENTRAL Securities Clearing System (CSCS) v. SEC, (2004) 1 NISLR 41...............................181

DERRY v. Peek, (1889), 11 App. Cas. 337...219

FIS Securities Ltd v. SEC; (2004), (2004) 1 NISLR 165. 182

H.J. Inc. v. Northwestern Bell Telephone Co, (1989),492 U.S. 299..222

J.I. Case Co v. Borak, (1964),377 U.S. 426. 220

LIGHTHOUSE Assets Management Company Ltd v. SEC, (2004) 1 NISLR 81, at 110............181, 183

LPDC v. Fawehinmi, (1985), 2 NWLR (Pt.7) 300...180

MERRILL Lynch, Pierce, Fenner and Smith, Inc. v. Curran, (1982),456 U.S. 353........................220

MOLTEN Trust Ltd & Another v. SEC, (2007)2 NISLR 137 at 170-171, paras F-A...........152, 161, 164

NOVA Finance & Securities Ltd and Mr. Eugene Anenih v. SEC, ***(Unreported)*** (2009), Case No. IST/APP/02/09. Judgment delivered on Wednesday, 9th September, 2009...........................156, 223

OLISAEMEKA v. SEC, (2007) NISLR 175..169

SAMUEL Osigwe v. Bureau of Public Enterprises..191

SEC v. Prof. A.B. Kasunmu, SAN (Practicing under the name and style of Prof. A.B. Kasunmu's Chambers) and Attorney-General of the Federation). (***Unreported***), Appeal No. CA/L/451/2004, Court of Appeal Lagos Division, judgment delivered on Thursday, 6th of November, 2008.........................202

UNION Bank of Nigeria (UBN) Plc v. SEC, (2004), 1 NISLR 115...................................150, 212

Table of Statutes

Berne Convention (1971)

Bubble Act, 1720

Charter of the United Nations, 1945

Company Act, 1844, United Kingdom

Companies Act, 1867, United Kingdom

Constitution of the Federal Republic of Nigeria (Promulgation) Decree, (1999)

Directors Liability Act, 1890, United Kingdom

Federal Mail Fraud Act of 1872, 18 U.S.C. s.1341, (Supp.2003), U.S.

Foreign Corrupt Practices Act (1998), U.S.

Financial Services and Market Act 2000, England

Glass-Steagall Act (or the Banking Act) of 1933, U.S.

ICJ Statute, 1945

Insider Trading Sanctions Act of 1984, U.S.

Int'l Center for Settlement of Investment Disputes (1966) *Convention on the Settlement of Investment Disputes between States and Nationals of Other States.*

Investment Advisers Act of 1940, U.S.

Investment Company Act of 1940, U.S.

Investments and Securities Act, 1999 (repealed), Nigeria

Investments and Securities Act, 2007, Nigeria

Investments and Securities Tribunal (Procedure) Rules, 2003 , Nigeria

Legal Practitioners' Act, 1962, Nigeria

National Securities Markets Improvement Act of 1966, U.S.

Paris Convention (1967)

Private Litigation Reform Act, 1995, U.S.

Pub. L. No. 104-67 s.102, adding s.27A to the Securities Act and s.21E to the Securities Exchange Act

Racketeer Influenced and Corrupt Organizations Act, 1970, U.S.

Rome Convention

Rules of Procedure of SEC Administrative Proceedings Committee contained in Schedule VII of the Rules and Regulations of SEC, Nigeria

Sarbanese-Oxley Act of 2002, U.S.

Securities Act, 1933, U.S.

Securities Exchange Act, 1934, U.S.

Security and Exchange Board of India Act, 1992, India

Securities Investor Protection Act of 1970, U.S.

Securities Litigation Uniform Standards Act of 1998, U.S.

SEC Rules and Regulations Pursuant to Investments and Securities Act 1999, Nigeria

The Joint Stock Companies Registration Act, 1844, United Kingdom

Treaty on Intellectual Property in Respect of Integrated Circuits

Trust Indenture Act of 1939, U.S.

United Nations Convention Against Corruption, (2004), GA Res. 58/4 (Annex

UN 'Declaration on the Rights of Indigenous People'; Adopted by General Assembly Resolution 61/295 of 13 September 2007

UN General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources

UN General Assembly Resolution 3171

U.N. General Assembly Resolution 61/29 (2007), Declaration on the Rights of Indigenous People

UN Resolutions 3201 (Declaration on the Establishment of a New International Economic Order)

UN Resolution 3202 (Program of Action on the Establishment of a New International Economic Order)

UN Resolution 3281 (Charter of Economic Rights and Duties),

United States Code Title 15, Commerce and Trade Chapter 2b-Securities Exchange

Vienna Convention on the Law of Treaties, 1988

Williams Act of 1968, U.S.

Wire Fraud Statute of 1952, 18 U.S.C., s.1343 (Supp. 2003), U.S.

World Bank Guideline on the Treatment of Foreign Direct Investment, 1992

Abbreviations.

AGM	Annual General Meeting
AIPLA Q.J.	American Intellectual Property Law Association Quarterly Journal
APC	Administrative Proceedings Committee
Ariz. L. Rev.	Arizona Law Review
ASI	All Share Index
BPE	Bureau of Public Enterprises
CAC	Corporate Affairs Commission
Can. T.S.	Canadian Treaty Series
CBN	Central Bank of Nigeria
CEO	Chief Executive Officer
CSCS	Central Securities and Clearing Systems
D-G	Director General
EGM	Extraordinary General Meeting
FSA	Financial Services Authority
FSMA 2000	Financial Services and Market Act 2000
GATT	General Agreements on Tariff and Trade
IBRD	International Bank for Rehabilitations and Development
ICJ	International Court of Justice
ICSID	International Center for Settlement of Investment Disputes
IFC	International Finance Corporation
I.L.M.	*International Legal Materials*
IMF	International Monetary Fund
IPO	Initial Public Offering
ISA	Investments and Securities Act
IST	Investments and Securities Tribunal

ISX	Iraqi Stock Exchange
JSC	Justice of the Supreme Court
Mich. J. Int'l L.	Michigan Journal of International Law
NAICOM	National Insurance Commission
NISLR	Nigeria Investments and Securities Law Report
NSE	Nigeria Stock Exchange
NWLR	Nigeria Weekly Law Report
NYSE	New York Stock Exchange
SAF	Structural Adjustment Facility
SAN	Senior Advocate of Nigeria
SAT	Securities Appeal Tribunal
S.A.T.S	South African Treaty Series
SEBI	Securities and Exchange Board of India
SEBI Act	Security and Exchange Board of India Act, 1992
SEC	Securities and Exchange Commission
SROs	Self Regulatory Organizations
TRIPS	General Agreement on Trade-Related Aspects of Intellectual Property Rights
U. Ark. LITTLE ROCK L. Rev.	University of Arkansas Little Rock Law Review
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UN GAOR	United Nations General Assembly Official Records
U.N.J.Y.B.	United Nations Juridical Yearbook
U.N.T.S.	United Nations Treaty Series
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

WWII	Second World War
Y.B.U.N.	Year Book of the United Nations

Acknowledgement

I want to thank my son who had to endure nearly four years of my absence while I pursued accelerated Masters and Doctorate degree programs in law. He is the reason why I embarked on this extraordinary journey. I want also to thank my late father and my late step-mother both of whom made big sacrifices that helped nurture my deep passion for education since early in my life.

I thank Golden Gate University for awarding me a merit-based scholarship that emboldened me to plunge into a doctorate degree program. I thank the erudite, distinguished, and hard working members of my Dissertation Committee who groomed me through the process of writing this dissertation. I reserve my special gratitude to a Professor who taught me my very first class in International Law, long time ago during my Bachelor's degree program, in another school, in another country, in another continent, in Africa. And, who many years later, again, taught me my first class in International Law during my Masters Degree program. He also taught me the first course in my Doctorate program, in Golden Gate University, San Francisco, California, U.S.A. The same man happens to be the Chairman of my Doctoral Dissertation Committee. This sequence of events is rare, cannot be designed, and is more than a coincidence. To me, it is divine providence. Professor Dr. Christian N. Okeke is my *'Lord and Master'* in International Law, put in my path by the author of my life, to help align my academic dreams to my stars. Thank you, Professor, for being there to finish your heavenly assignment on me.

I thank all the Professors in Golden Gate University who directly and indirectly helped me during the course of my academic journey. I also thank the staff of this great University including the indefatigable Jonathan Chu who has moved on to other assignments, hardworking John Pluebell, office staffs, the Library staff, the Financial Aid staff, the Registry staff, etc, all of whom attend to students' problems like they are personal to them. The work ethics in this University is phenomenal. I enjoyed my stay in this wonderful school, and would not have had it any other way.

Finally, I thank my friends and relations whose words of encouragement helped me. Thank you all.

Excerpt

The crash of Nigeria stock market which occurred between 2008 and 2009 was unusual. Events that preceded the crash, misconducts of market operators and regulators before, during, and after the crash, the reckless hypes and spins that generated lots of frenzied trading leading to the astronomical rise of Nigeria stock market to number one position in the world, and the synchronization and magnitude of the crash that followed – all exhibit signs of organized scheme.

Thanks to the *English Bubble Act* of 1720 with which South Sea Corporation precipitated a one hundred and five years securities fraud in Britain, the infamous John Law's Mississippi South Pacific Corporations scams that contemporaneously crashed the French market, the 2001Enron '*loophole*', and the 2008 severe stock market crash in U.S., 1990 Indian Stock Market crash, and 2008 Kenyan Stock Market crisis, it is now common knowledge that severe stock market crashes are mostly induced by organized securities rackets. In almost all the cases, law is used as a vehicle to achieve the swindles.

In recent time, IMF, World Bank, and IFC, in conjunction with local officials, have been accused by insiders, of instigating '*hot money cycle*' devious schemes that destroy financial markets and economies of weaker and poorer nations. Instrumentality of the law is implicated as the means by which the fraudulent schemes are executed.

The simultaneity in the meteoric rise and precipitous crash of Nigeria stock market had all the marks of an organized securities scheme. The elaborate distortion of the legal and structural foundations of Nigeria capital market, statutory sabotage of Nigeria's SEC, unusual positioning and empowerment of Nigeria's Investments and Securities Tribunal and the tribunal's complicit roles, brazen misconducts of market operators and regulators before, during, and after the crash, atypical reticence of Nigerian government, — all point to the crash being a organized event. Against the overwhelming weight of evidence, Nigerian authorities wrongly blamed global financial crisis for the crash of the stock market.

To understand the proximate causes of Nigeria stock market's N8.1 trillion ($60bn) crash, therefore, analysis of Nigerian securities laws should be undertaken. This paper examines the fidelity of the critical strategic policy-thrust as well as the legal and structural frameworks put in place for Nigeria capital market by the Nigerian principal securities laws, and concludes that the chronic dysfunctions crafted into Nigerian Investments and Securities Acts (repealed 1999 and the extant) 2007, served as veritable means used to execute the organized securities scheme that crashed Nigeria stock market between 2008 and 2009.

Unfortunately, the same irrational legal and structural frameworks with which the crash of Nigeria stock market was precipitated are still used to run Nigeria capital market. A cursory investigation also reveals that the same situation exists in Nigerian banking and other principal financial and economic sectors. Sadly too, Nigeria's national economy and the fate of Nigeria's 150 million citizens hinge on the unremitting financial market racketeering schemes.

CHAPTER 1

Issue, Purpose, and Scope

1.1 Introduction

Nigerian stock market[1] was ranked world's best performing market in the last quarter of 2007.[2] The outstanding ranking resulted from the market's unusual prolonged *bullish run* that began in 2005, and peaked at N21.4tn ($150bn) total market capitalization in March 2008.[3] Market operators and investors cheered the rare feat. However, that performance foreshadowed a tragedy that Nigeria ignored.

The long *bullish run* that generated the spectacle was neither supported by sound market *fundamentals* nor by any positive economic *foundation*. The bullish run was abnormal, *irrational*, and strange. That performance was without reason, which in itself would have served as notice to market regulators and investors. Also, Nigerian capital market's regulatory framework and structural arrangement display array of defects that would have alerted the investing public that factors other than normal *market forces* produced that surprising performance.

1.Note;'*Capital Market*' and '*Stock Market*' are sometimes used interchangeably to refer to the stock market.
2.See Official website at http//www.bloomberg.com/apps/news?pid=newsarchive&sid=aSechJpKP2yo (visited 08/10)
3.See Footnote 6 infra.

Imprudent investors habitually jump impulsively into the market whenever they see market rallies. Market operators commonly take advantage of investors' predictable *exuberance*, and often simulate *bullish movements* to lure *unwary* investors into the stock market. The conduct is known as *crooked stock pool.* A prudent securities investor who did requisite *due-diligence* prior to investing in Nigeria stock market would have discovered many red flags, recognized that the impetuous *bullish runs* had no rational basis, and so were contrived.

From the numerous inadequacies in the elemental framework of Nigeria's stock market, it is evident that Nigerian market's spectacular performance was not real. If the protracted bullishness in Nigeria stock market was artificially generated, as was apparent, it would be true to tradition to expect the hands that created the false *surge* to eventually reap their reward. Indeed, this familiar '*predator* and *prey*' trend in the stock market led Professor Harold Bloomenthal to aptly surmise that

"*... the problems at which modern securities regulation is directed are as old as the cupidity of sellers and the gullibility of buyers.*" [4]

4.See Bloomenthal, H. (2008), Securities Law Handbook (2008-2009 ed.), Vol. 1,7. 2007

1.1.1 **The Apocalyptic Crash**: It was reasonably foreseeable that Nigeria stock market's irrational surge would eventually capitulate under the pressure of accumulated *bubbles.* Expectedly, the market did capitulate, with astonishing vehemence. The accumulated bubbles suddenly busted with vengeance, triggering an avalanche of crash. Stock prices tumbled down with *bearish* alacrity, brutal in force, escalated in intensity and magnitude, inverse in proportion to the forces with which the market accellerated skyward. The result was a cataclysmic implosion of Nigeria stock market. The crash triggered monumental disaster that inflicted enormous financial losses to investors. Just between March and May 2008, the Nigerian stock market suffered abysmal 75% net losses in its All Share Index (ASI) and total market capitalization.[5] In hard cash, Nigeria stock market lost a total sum of over N8 trillion (eight trillion Naira) ($60 billion), investors funds,[6] in just three months. (Tab of the initial crash was variously quoted as N7.8 trillion, N8.1trillion, and N9 trillion). There is no formal investigation or official report yet on the crash.[7] Nigeria's mostly smalltime investors were ravaged by the apocalyptic crash. Majority of investors suffered crushing financial losses.[8] Most of the victims lost everything; family

5. **Note**; ***All Share Index*** refers to the *aggregate quantity of shares* traded in a stock market in a given period. ***Total market capitalization*** means the *total value of traded equities* in a given periodic session.
6.**See**; Bloomberg's report ***republished*** in Nigeria's *Punch Newspaper* of 02/02/2009 titled 'Nigeria stock market losses, highest in the world'. - Nigeria's market capitalization peaked at **N12.4tn** in March 2008, but fell to **N4.5tn** by end of March 2009.
7.**Note**; Absence of official inquiry into the crash of Nigeria stock market means that greater reliance is placed on unofficial sources such as news reports, as resource materials, for facts of the crash.
8.**For Example**;See newsreport that former Ogun State Governor, Chief Shola Osoba, lost N500million($3.35million) in the crash; @ http://odili.net/news/service/2009/feb/14/505.html (12/09)

nest-eggs, personal savings, business capitals, retirement benefits and gratuities, borrowed funds, anomalous *margin loans* commercial banks gave their customers to purchase the banks' own stocks , etc.[9] Many investors sold landed properties and other earthly possessions, and invested the proceeds in the over-hyped stock market. They lost it all in the crash. It was a severe and painful national calamity. Yet, Nigerian government did not react.

While victims of the crash mourned their losses, story broke out that bank executives celebrated their windfalls.[10] It became a real life tale of the proverbial *other peoples' money.*

World's mainstream financial news media reported the story of another world record broken by Nigerian stock market.[11]This time, the record was unflattering. International news media rated the crash as the worst of its kind in the annals of financial market history.[12] Nigeria capital market was downgraded in its rating, and declared the worst performing market in the world.[13]

9.See news report that His Royal Highness, The Oba of Lagos, lost N850million ($5.66million) personal money in the crash; http://odili.net/news/source/2009/apr/13/424.html (12/09)
10.See News report, soon after the crash, titled- "Nigerian Bank executives intensify status contest with Private Jets"; http://odili.net/news/source/2009/feb/20/405.html (12/09)
11.Note; Story of the crash was widely reported in Bloomberg, CNN Money, MSNBC Financial, Wall Street Journal, and many international and local newspapers.
12.See Bloomberg Report @ http//www.bloomberg.com/apps/news?pid=newsarchive&sid=aSechJpKP2yo (12/2009)
13. Bloomberg, ibid.

1.1.2 **The Cover-Up:** However disconcerting the tragic crash was for Nigerian victims, things got even worse. Usually when serious stock market disaster occurs in any nation, relevant authorities and government promptly rise up to the occasion, tackle the crisis headlong with the aim to protecting investors, unraveling the problems, and finding solutions. World-over, examples abound of radical financial market reforms that arose out of different governments prompt responses to severe stock market crisis.[14] Instances where drastic market crashes provoked dramatic responses from authorities and governments include –Britain 1844[15], U.S. 1933, 1934, 2002, and 2010[16], India 1992[17], Kenya 2007[18], to name just a few. In Nigeria, the world's worst securities crisis remained ignored, while most of those under whose watch the crisis occurred still hold sway.

1.1.3 **Cover-Up by Market Operators, Regulators, and Government**: After the Nigerian market crash, top financial market operators and regulators, who ought to be first responders to the crash, as the anointed defenders of investors in Nigeria capital market immediately went to work, a different kind of work.

14.Examples include Britain, U.S.A., India, and Kenya.
15.Note; After South Sea Corporation's scams, then British Parliament enacted the world's first comprehensive Financial Regulation Act, i.e., the English Joint Companies Registration Act or Company Act of 1844.
16.Note; After the Great Depression and 'Enron Scam' U.S. Congress enacted the revolutionary 1933/34 and 2002 Securities Acts. Also, President Obama's extensive financial market reform of 2010 was enacted after the recent global financial crisis.
17.Note;India responded to its stock market crash of 1990 by enacting the SEBI Act of 1992 which totally transformed India's Stock Market.
18.Note;Kenyan Govt shot down its stock market and hired PricewaterhouseCoopers to audit and investigate the cause of Kenya's 2008 $77 million stock market crash. Afterwards, changes were enacted in the nation's financial market regulation.

Apparently, fearing public reprisals, Nigerian top financial market operators swung into intense self-absolving media campaigns and assorted propaganda.[19]Everything and everybody else was blamed for the crash. The blame game successfully diverted attention from the real cause of the financial tragedy. Excuses were invented and blamed for the stock market havoc.

Implausible explanations were given to a bewildered nation and its agonizing citizens for the sudden collapse of Nigeria stock market. Head of Nigeria's Stock Exchange first attributed the crash to global food crisis.[20] Given that the skeptical Nigerian audience failed to believe that story, excuses for the crash swiftly shifted to the mundane.

"*Profit-taking*" by investors and "*self correction*" by the market were tried out as excuses. Those excuses did not fly either. *Divestments* and *decoupling* from Nigeria by undisclosed international investors whose unidentified home economies were allegedly hit hard by the then escalating global financial crisis, had earlier

19.Example – news report that Dr. Akingbola, CEO Intercontinental Bank blame market crash on careless statements@ http://allafrica.com/stories/200902180188.html (06/2010)
20.See Nigerian Vanguard Newspaper of January 13, 2009; Also reported at http;//odili.net/news/source/2009/jan/13/305.html (04/2009)

been canvassed as the reason for the market crash, but promptly abandoned.[21] Later on, the seemingly plausible global financial meltdown itself became the excuse for the crash.[22] The global financial crisis explanation ostensibly resonated well with the exasperated Nigerian public, and, especially, with the Nigerian government, then mortified by the magnitude of the crash. Then President Musa Yar'adua (now deceased) accepted the global financial crisis explanation. Mr. President publicly proclaimed the global crisis excuse in every public speech he made.[23] He sold the red-herring to the skeptical Nigerian public, probably innocently.

1.1.4 **Cover-Up by the Central Bank of Nigeria**: Interestingly too, just before the market crash, then Governor of Central Bank of Nigeria (CBN), a Harvard trained economist and World Bank protégé, publicly announced to the alarmed nation, in several press interviews and public seminars, that he had devised and put in place sure measures that would totally insulate Nigeria's economy from impacts of the then burgeoning global financial crisis.[24] Nigeria's apex bank chief assured government and people of Nigeria that, under his watch, the global financial crisis

21. Note; Initial claim was that global crisis in their respective home economies forced foreign investors to divest from Nigeria, which indirectly led to Nigeria market crash. This claim was dropped and replaced with global crisis itself as a plausible excuse.
22.See footnote 21 supra.
23.See 'Yar'Adua admits impact of financial meltdown on Nigeria' http://odili.net/news/source/2009/jan/15/413.html(12/09)
24. See news report 'Global Financial Meltdown: 11 Countries seek Nigeria's safety model, Says Soludo. In ***ThisDay*** Newspaper of Sunday, October 12, 2008.

would never impact Nigeria's economy. To buttress his claims, the Central Bank Governor declared that eleven nations had approached him asking to be taught the iron-clad, global financial crisis-proof measures he invented.[25]

The CBN Governor did not name any of the nations that approached him. But his claims succeeded in momentarily breaking the free fall of the rapidly sinking market, and dissuaded many investors from *exiting* their losing stakes. He, thus, foiled timely exodus of numerous investors, and the aim was to sustain *liquidity* in the market. His actions constitute serious securities violations that occasioned immense financial losses to many investors who would otherwise have exited the market early.

When Nigeria stock market eventually crashed and the media campaigners ran out of excuses, and had to revert to the global financial crisis explanation, the Central Bank Governor made an about-turn. He denied ever promising the nation any insulation from the global meltdown.[26] He contended that he was *misunderstood* (not that he was *misquoted*). He was neither misunderstood nor misquoted. He was being economical with truth the entire time.

25.See footnote 24 supra at page 7.
26.Note; CBN Governor made the surprising denial while explaining the $13.9bn capital flight from Nigeria. He also attributed the crisis to foreign investors divestments. ***See*** news report in http://odili.net/news/source/2008/dec/5/306.html (12/2009)

Sadly, the intensive media campaigns that ensued drowned out vestiges of the crash victims' loud reservations. Mr. President's formal address to the nation blaming global financial crisis for Nigerian market crash finally settled the matter. Neither an official investigation nor public inquiry was instituted to seek the causes of the precipitous crash that inflicted N8trillion ($60bn) losses to investors.[27]

Any discerning observer who paid close attention to the irrational behaviors of Nigeria capital market would have noticed abnormalities from the markets rapid ascension to world number one, and to its eventual descent to opprobrium. Between 2005 and early 2008 when the market rocketed furiously skywards, it was clear that the bullishness was without the requisite fundamental support. The spectacular performance was strange, an indication that a big crash was inevitable.

Explanations given by Nigerian authorities for the market crash were evidently wrong and unconvincing. Contrary to the declared exonerations, global financial

27.Note; Because Nigerian government failed to institute inquiry into the Nigerian stock market crash, no formal report or record exists on the matter. Hence, information on the crash is only gathered from unofficial and secondary sources mainly newspaper reports of unofficial accounts.

crisis had nothing to do with the crash of Nigeria stock market.[28]There was *no nexus* between Nigeria stock market and the epicenter of the global financial crisis for Nigeria market to be so brutally impacted by global financial crisis. This is because there is no Nigerian company that was listed in the U.S. or any other major world capital markets at the time of the global crisis, and vice versa.[29]

1.1.5 **Other Markets Debunked the Global Crisis Excuse**: At the time Nigeria stock market crashed precipitously, and global financial crisis was wrongly blamed for it, many similarly situated emerging stock markets performed spectacularly well.[30] The *contrarian* performance was squarely attributed to absence of *linkages* between the emerging markets and capital markets of U.S. and other major economies which were the origins and ground-zeros of the global financial crisis.[31]

28.Note; Global financial crisis began in U.S. Capital market and spread to other western financial markets that have links with the U.S. market. Most developing markets without such linkages escaped direct hit from the global meltdown. For example see performance of Iraqi stock market (ISX) during the global financial crisis at pages 10 and 11.

29.See news report; 'Why Foreign Investors Shun Nigeria', By Nigerian SEC @ http://odili.net/news/source/2009/apr/12/200.html[11/2009]

30. Iraqi stock market (ISX) became world's most famous contrarian performer amongst markets not linked to U.S. and other major economies.

31.See for example AP News of 10/12/2008 *"I don't think that the current financial crisis will hurt our economy and especially this market **because we are not connected to any of the global markets and we have very few foreign investors,"*** by Omar Mouwaffak – ISX Market Operator. Syndicated in World Business on MSNBC.Com (12/2010)

War-torn, *rag-tag,* Iraqi stock market (ISX) became the celebrated poster-child of defiance to the global financial crisis.[32] Iraqi stock market lacked modern computer and electronic gadgets for enhanced securities trading, and failed to attract investors from developed economies, which turned out to be its saving grace. ISX performed spectacularly well at the peak of the global financial meltdown in 2008. ISX outstanding performance at the time was credited to insulation occasioned by absence of couplings with western markets. Nigerian market, lacking direct linkage with western markets, was similarly insulated from the global crisis.

Stock market strengthens ... in Iraq

Source; Hadi Mizban / AP. updated 10/12/2008 3:34:44 PM ET BAGHDAD - An Iraqi stock trader reacts in front of Iraq's stock exchange board, in Baghdad on Sunday. The ISX index has soared 20 percent since September 2008.[32]

32. Report and pictorial illustration of ISX .
33.See Associated Press report of 10/12/2008 that while the rest of the world faced financial meltdown, Iraq Stock Exchange boomed. That the ISX index soared nearly 40 percent during September. The ISX is only **open two hours a day, three days a week** and **brokers track trading activity on the floor with colored markers and white bulletin boards instead of computers.**

My study shows convincing evidence that Nigeria stock market crash resulted from meticulously planned and assiduously executed, organized securities scheme, and not from global financial crisis as alleged. Top Nigerian financial market operatives, including securities market operators, top bankers, and financial market regulators ought to answer questions for securities fraud.[34]

1.1.6 **Plots of the Crash Hidden in Framework of Nigeria Market**: Evidence of culpability is splashed allover in the precision distortions of the legal, structural, and infrastructural framework of the Nigerian capital market. As part of the scheme, critical safety-nets and vital anti-fraud mechanisms of the capital market were methodically incapacitated, in advance. Regulatory infrastructures were disarranged and damaging loopholes skillfully designed into the laws. Lacunas were artfully created and exploited in the coordinated scheme. Scope of the design extended also to comparable manipulations of Nigeria's other financial and economic institutions' frameworks. Nigerian banking laws are not spared. I will show details of each leg of the securities scheme later on in chapters 3 and 4.

34.See news report dated 10/8/2010; *"CEO of Oceanic Bank convicted of bank and securities frauds -- Dr. Cecilia Ibru to forfeit N150bn ($1bn), and go to prison for 18 months"* - @ http://www.saharareporters.com/news-page/former-md-oceanic-bank-cecilia-ibru-convicted-bank-fraud. (10/2010).

Nigeria's financial-sector leaders comprising mostly of powerful Ivy League graduates[35] brought home to Nigeria the decadent jurisprudential norm of the international economic order. Like in history's biggest financial crimes, Nigeria's securities and banking designs utilized the old but hitherto nameless phenomena - ***legislative infidelity*** and ***the use of law for instrumentality of undue economic advantage, fraud, and exploitation*** – entrenched norms of the jurisprudence of international economic order.

Similar scheme is currently going on in Nigeria's bond market, without let. The same scheme is being replicated in Nigeria's other financial sectors, and staggering amount of money is being funneled offshore under questionable circumstances, and nobody is asking questions.[36]

1.2 **Why This Topic Is Important.**

Circumstances of the Nigerian stock market crash, the dishonest securities framework foisted upon Nigeria in plain sight, magnitude of the resulted losses to mostly smalltime securities and bank investors, boldness of the cover up, and, ultimately, the ease with which Nigerian government accepted the excuses, all

35.Note; Central Bank Governor, Director-General of Nigeria Stock Exchange, and President of the Securities Tribunal are all Harvard PhDs.
36.CBN Governor funneled nearly $30billion overseas, after the crash, and claimed the money belonged to foreigners divesting from Nigeria.

suggest the existence of deep-rooted systemic rot in Nigeria's financial sector. If pervasive systemic rot of that magnitude happens to exist in Nigeria's financial sector, the implication will be inescapably dire, and could precipitate worse things. The situation deserves a thorough investigation.

1.2.1 **The Crash Beckons for Inquiry**: It became necessary that somebody has to investigate Nigeria's worst financial apocalypse, if only to identify the proximate cause, call attention to it, and possibly prevent re-occurrence. The need for this study became even more compelling after my preliminary research uncovered alarming pattern of illusory statutory provisions, dubious legislations, and bad structural arrangements in Nigeria's principal financial laws. Also, I discovered a woven mass of complex securities designs carefully buried deep inside the bellies of porous, overly prolix, deceptive, and vague enabling statutes. The intricate plots were further augmented with flawed institutional arrangements that left Nigeria's capital market abysmally susceptible, and the investors, vulnerable to easy exploitation. The same designs exist in the Nigerian banking system.

1.2.2 **My Dissertation is a Fortuitous Opportunity**: This dissertation presents me with the fortuitous opportunity to fully study the many inexcusable failings, research, pin-point, and document the immediate causes of Nigeria capital market

crash. The dissertation also offers me a propitious chance to examine the domestication in Nigeria, of the unjust legislative tactics that abound in the laws of international economic order.[37]

1.3. **Benefits of My Research.**

Benefits of my research are many and varied.

1.3.1 **Research Offers Opportunity for Redress**: First, the crash of Nigeria's capital market and its collateral impact on Nigeria's national economy is grave. The crash wrecked the lives of a sizeable number of Nigeria's 150 million citizens. The incident toppled Nigeria's already ailing economy and unleashed economic woes on most citizens and businesses. Effort expended in identifying the proximate causes of that grave tragedy will be good investment that would present an opportunity to Nigeria to improve the country's flawed securities and financial laws, and also offers an additional promise of saving Nigeria from terrible consequences of recurrence of the crash.

1.3.2 **Research Proves that Global Poverty is Mostly Induced**: Second, the interminable cycle of severe poverty that ravages most developing countries appear to be induced rather than resulting from the false assumption that people mired in global poverty are predisposed to ineptness and laziness. The kind of cruel

37.**Note**; Striking similarities exist between malevolent legislative style in int'l law and legislative infidelity under Nigerian laws

exploitation that the Nigerian incident represents appears to exacerbate poverty in many developing nations. Scholarly investigation that identifies causative factors of global poverty will be a worthy undertaking. If my research uncovers any arrangements in domestic laws, or in the jurisprudence of international economic order, that contributes to abuses and mass poverty, end product of the research will be of benefit to the billions of victims of global poverty, and to the many that fight poverty.

1.3.3 **Dissertation Spotlights '*Legislative Infidelity*'**: Finally, this research aims to bring to public focus the unspoken subjects of '*legislative infidelity*' and '*the use of law for instrumentality of furthering undue economic advantage and exploitation*', both of which are covert species of corruption that wreck havoc on the domestic and global stages, without attracting due attention and needed redress. This variety of corruption disproportionately affects developing nations saddled with poor legislations, and majority of the world's population who forever bear the burden of global exploitation with all its tragic ramifications. Investigation devoted to uncovering such law-based, poverty-inducing, and furtive predatory stratagems will be of interest to many countries. In my opinion this endeavor is worth the while, the matters are evidently important, and the available evidence sufficiently compelling to warrant the investigation. These are some of the reasons why I chose this topic for my dissertation.

1.4 **Central Thesis of My Dissertation.**

The major thesis of my dissertation is to establish that the crash of Nigeria stock market and the resulted N8 trillion ($60bn.) losses was caused by organized securities scheme. To prove Nigeria's securities scheme, I intend to show that a pattern of nefarious arrangements was carefully weaved into the enabling statutes, as well as in the rigged frameworks of the Nigerian capital market. I propose to show that in the most critical areas, as is common with organized securities schemes, Nigerian market arrangement carefully deviated drastically from the ideal,[38] in ways that clearly suggest existence of prior intention to commit fraud. I will also show past cases where similar pattern of manipulating basic laws were used to commit financial frauds in some other jurisdictions. My aim is to persuade Nigerian government to come clear on Nigeria stock market crash, and to enact the appropriate capital market and financial regulations in the country.

I will begin my discussion by first establishing that the system of using law to achieve undue advantage and to advance ulterior agenda began in the annals of the jurisprudence of international law. I will analyze some international rules and regulations and show examples of the skillful misuse of law in that regard. I will show that the same methods were used in precipitating the Nigerian market crash.

38. Note; Nigerian stock market arrangement is principally modeled after the United States securities market system.

To show Nigeria's version of using law as instrument of advancing fraud, I will critically review the regulatory, enforcement, and structural provisions of Nigeria's extant Investments and Securities Act, 2007 (ISA 2007). I will also analyze the Act's adjudicatory structure, balance of regulatory and enforcement powers, and review a few decisions of the Nigerian Investments and Securities Tribunal, with a view to establishing a pattern of coordinated complicity that involved the tribunal. In the end I will quickly review pertinent provisions of Nigeria's extant banking laws, if time and space permit. For the Securities Act, the purpose of my scrutiny will be to verify the fidelity and adequacy, or otherwise, of the relevant provisions of the pertinent statute, in establishing for Nigeria a ***transparent, orderly, and safe capital market, where fair and equitable principles of trade*** reign[39]. For the banking sector, the object will be to scrutinize some crucial provisions of the principal regulatory framework with the aim to determining their suitability for instituting ***safety and soundness***[40] in the Nigerian banking sector.

My ultimate aim is to establish a causal nexus between Nigeria's financial sector law-loopholes and the N8 trillion ($60 billion) capital market crash. And also, to link existence of many loopholes in Nigerian laws, and the consequential collapse

39. Note; This is the appropriate universal threshold of integrity required of every standard Capital Market.
40. Note; ***Safety and Soundness*** are the minimum universal standard every banking institution is required to observe.

of Nigeria stock market, to domestication of legislative infidelity in Nigeria. The end purpose is to persuade respective Nigerian authorities to enact necessary changes. But, as a prelude, I will first define and explain *'legislative infidelity' and 'use of law for instrumentality of undue advantage, fraud, and exploitation'*. I will thereafter begin the analysis of select international rules to show that legislative infidelity originated in the jurisprudence of the world order. I will devote the rest of this chapter to reviewing some pertinent rules enacted by World Bank and IMF.

1.5 Legislative Infidelity; Definition, Encounter, and Examples.

1.5.1 **Definition of Legislative Infidelity:** For my purpose, I define "*Legislative Infidelity and the Use of Law for Instrumentality of Undue Economic Advantage, Fraud, and Exploitation*" as a law-making tradition that originated in the jurisprudence of international economic order. The practice consists of malevolent law-making tactic that *intentionally creates loopholes, distortions, ambiguities, vagueness, and unwarranted complications in texts of laws and legislations,* with the ulterior objective of taking pragmatic advantage of the confusion to advance unfair selfish goals.[41]

41. **Note;** Taking undue advantage of other people (political or economic) is always the underlying motive behind legislative infidelity.

1.5.2 **Encounter with Legislative Infidelity:** My awareness of legislative infidelity ripened in Professor Dr. Christian Okeke's International Investment Law class at Golden Gate University. I encountered legislative infidelity while studying the different rules and guidelines that govern foreign direct investment relationships, particularly the rules enacted by the international financial institutions and organizations.

Existing regulations, rules, and texts of laws that regulate conducts in international economic, finance, and foreign direct investment activities are inundated with provisions that could easily pass as random blunders.[42] The supposed blunders consistently resulted in uncommon specie of artful legislations that usually begin with preambles dressed up in overly optimistic promises, but end in substantive prescriptions filled with converse texts that substantially derogate from the expressed preambular ideals.

Initially, I misunderstood the blunders as chance mistakes, and dismissed them as mere coincidences. Later on, I identified striking consistency in the pattern of

42. See World Bank's Guideline for Foreign Direct Investment, TRIPS Agreement, IMF and World Bank's Articles of Agreements, etc.

the strange mistakes. They occur in customized frequency in ways that could not justifiably be explained away as coincidences.

Study of the guidelines and rules made for foreign direct investment by the World Bank, and other enactments made by IMF and their sister international agencies and organizations, revealed a consistent pattern of disruptive liaisons with domestic economies and internal affairs of many developing countries. Study also shows that slant and bias represent deliberate normative choices in international economic laws, rather than some random occurrences. And, that the intended purpose for favoring the unjust legislative style is to create binding international rules that serve to advance ulterior agenda. There is no coincidence about it.

Regrettably, legislative infidelity has also drifted surreptitiously into, and polluted domestic jurisprudences of many developing countries, triggering economic and socio-political woes. Nigeria is a classic example of nations parading panoply of tainted domestic legislations in her banking, finance, capital market, insurance, petroleum, oil and gas, custom and excise, electoral, and labor, amongst many other critical sectors of her economy and polity. Legislative infidelity caused the crash of Nigeria stock market.

1.5.3 **Examples of Legislative Infidelity in Int'l 'Legislation':** There is no better way to explicate legislative infidelity under international law than to review few principal rules and regulations that exist in international economic order. It is common knowledge that the world order has no *central legislature* to enact laws, like the legislative arms of national governments. And that, international legal framework is garnered from diverse sources.

1.5.3.a **Sources of International Law**: Sources of international law include laws allowed to be cited in, and applied by, the International Court of Justice (ICJ).[43] According to provisions of ICJ Statute, principal sources of international law include international Conventions, international customs as evidence of a general practice accepted as law (*Opinion Juris*), the general principles of law recognized by civilized nations, judicial decisions and the teachings of the most highly qualified publicists of the various nations (this last source is subject to the provisions of Article 59 of the ICJ statute).

The United Nations Charter stands out as an important international enactment. Another prominent source of international law that merits special mention is

43. Article 38(1) (a), (b), (c), and (d) of the Statute of ICJ, concluded in San Francisco, 26 June 1945, entered into force, 24 October 1945. ***See*** 1978 Y.B.U.N. 1052; 1945 Can. T.S. 7; 1945 S.A.T.S. 6; ***reprinted in*** 1 Weston & Carlson I.H.2.

Vienna Convention on the Law of Treaties[44] known also as the Constitution of International Law. It is a compilation of ***Orga-omnis***. Sources of the law of nations also include binding multilateral treaties,[45] and Security Council resolutions.[46]

1.5.3.b **Insurgent Sources of International Law**: *Insurgent* rules of international law emerged onto the scene after WWII, in the areas of global economics and finance, commandeering international recognition, support and patronage. The *rebel* sources of international law include World Bank's Guidelines for Foreign Direct Investments,[47] IBRD's ICSID Convention, World Bank and IMF's[48] respective Articles of Agreements, as well as TRIPS Agreement,[49] to name just a few. I will examine salient provisions of some of these insurgent enactments to show legislative infidelity in international economic laws. The rest of this chapter will focus on IMF and the World Bank. Next chapter will be devoted entirely to TRIPS Agreement and its laundry-list of legislative infidelities.

44. See Vienna Convention on the Law of Treaties; ***concluded*** at Vienna, 23 May 1969, ***entered into force***, 27 January 1988. 1155 U.N.T.S. 331; 1969 U.N.J.Y.B. 140; ***reprinted in*** 8 I.L.M. 679 (1969) and 1 Weston & Carlson I.E.1
45. See ***Pacta Sunt Servanda***, Article 29, Vienna Convention on Law of Treaties.
46. See Articles 24 & 25 of the Charter of United Nations (as amended). Concluded, 26 June, 1945. 1 U.N.T.S. XVI, 1976 Y.B.UN 1043.
47. See review of World Bank Guidelines on Foreign Direct Investment infra from page 43.
48. See discussion on IMF's Articles of Agreement infra beginning from pages 31.
49. See detailed analysis of TRIPS Agreement in chapter 2

1.6 IMF and World Bank; Exemplars of Legislative Infidelity in the Jurisprudence of Int'l Economic Order.

International Monetary Fund (IMF) and World Bank's respective Articles of Agreements, World Bank's Guidelines for Settlement of Investment Disputes, and International Convention for the Settlement of Investment Disputes (ICSID Convention), exemplify post WWII *insurgent* additions to the jurisprudence of international economic order. Due to the significant but very controversial roles IMF and World Bank play in matters of global economics and finance, coupled with the lack of fidelity in the content and latitude of their respective enabling documents, the two institutions invite brief but careful examinations to identify cases of legislative infidelity.

1.6.1 Origin and Brief History of the IMF, and its Metamorphosis to Infidelity:

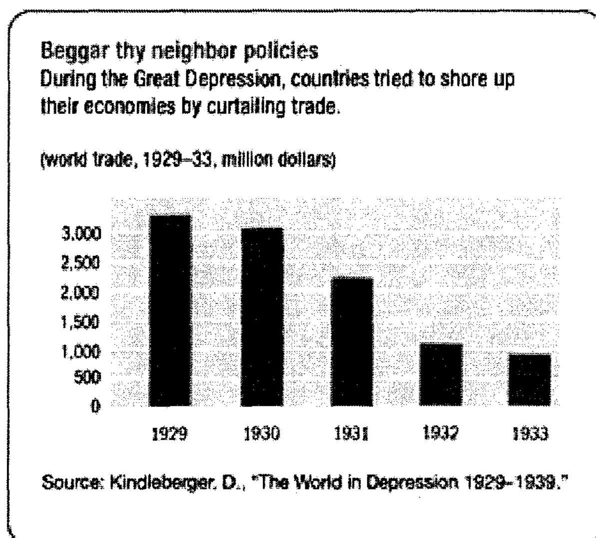
IMF[50] and World Bank[51] are the primary international financial institutions. Both institutions share common history - both were conceived during WW II, created at the forty-five nations' international economic conference held July, 1944 in Bretton Woods, New Hampshire, U.S.A., and each was assigned specific duties.

50. **See** official website of the IMF http://www.imf.org/external/about/histcoop.htm (12/2010)
51. **See** official website of the World Bank at http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTARCHIVES/0,,contentMDK:20053333~menuPK:63762~pagePK:36726~piPK:36092~theSitePK:29506,00.html. (12/2010)

According to official record, **IMF** was created following the experiences of the

1930's Great Depression, during which different western

"...countries attempted to shore up their failing economies by sharply raising barriers to foreign trade, devaluing their currencies to compete against each other for export markets, and curtailing their citizens' freedom to hold foreign exchange. These attempts proved to be self-defeating. World trade declined sharply (see chart below), and employment and living standards plummeted in many countries. This breakdown in international monetary cooperation ***led the IMF's founders to*** *plan* ***an institution charged with overseeing the international monetary system—the system of exchange rates and international payments that enables countries and their citizens to buy goods and services from each other****. The new global entity would* ***ensure exchange rate stability and encourage its member countries to eliminate exchange restrictions that hindered trade****."*[52]



Source; official website of IMF at http://www.imf.org/external/about/histcoop.htm

52. See IMF official site at; http://www.imf.org/external/about/histcoop.htm (01/2011)

1.6.2 **Original Mandate of IMF**: From the above passage, IMF's mandate was limited to overseeing a system of exchange rates and international payments. And, to ensure exchange rate stability by encouraging its members to eliminate exchange restrictions that hindered trade. Scope of IMF's duties were defined and delimited from inception. IMF came into formal existence in December 1945, when its first 29 member countries signed its Articles of Agreement.[53] IMF began operations on March 1, 1947[54] and now has 187 members worldwide.[55]

In the beginning, from 1947, IMF evidently dedicated faithfully to the duties prescribed in its founding mandate, until 1971 when turn of events cut short IMF's job. In IMF's own account of the event that terminated its assignment,

"[t]he countries that joined the IMF between 1945 and 1971 agreed to keep their exchange rates (the value of their currencies in terms of the U.S. dollar and, in the case of the United States, the value of the dollar in terms of gold) pegged at rates that could be adjusted only to correct a "fundamental disequilibrium" in the balance of payments, and only with the IMF's agreement. This ***par value system****—also known as the* ***Bretton Woods system****—prevailed* ***until 1971, when the U.S. government suspended the convertibility of the dollar (and dollar reserves held by other governments) into gold.****"*[56]

53. See Articles of Agreement of the International Monetary Fund (As Amended). Concluded At Washington, 22 July 1945, Entered into force, 27 December 1945, 2 U.N.T.S. 39; 1946 S.A.T.S. 3; ***reprinted in*** 4 Weston and Carlson IV.A.3
54.See IMF official website supra at page 25.
55.IMF official website ibid.
56.See IMF official website ibid.

1.6.3 **Termination of IMF Job**: Convertibility of the dollar and dollar reserves into gold is at the core of the international monetary system IMF was created to oversee. Implicit in IMF's slim mandate is that when the specific purpose the agency was created to perform ended, IMF would close shop. Except if IMF secures a fresh legitimate mandate authorizing it to transform itself, or to go into another business. Without clear new mandate, it is doubtful whether IMF can legitimately recreate itself as it purportedly did. IMF explains how the ***Breton Wood system***, i.e., ***the par value system*** it was created to supervise ended between 1968 and 1973, thus;

"[b]y the early 1960s, the U.S. dollar's fixed value against gold, under the Bretton Woods system of fixed exchange rates, was seen as overvalued. A sizable increase in domestic spending on President Lyndon Johnson's Great Society programs and a rise in military spending caused by the Vietnam War gradually worsened the overvaluation of the dollar.

The system dissolved between 1968 and 1973*. In August 1971, U.S. President Richard Nixon announced the "temporary" suspension of the dollar's convertibility into gold. While the dollar had struggled throughout most of the 1960s within the parity established at Bretton Woods, this crisis marked the breakdown of the system. An attempt to revive the fixed exchange rates failed, and by March 1973 the major currencies began to float against each other.*

Since the collapse of the Bretton Woods system, IMF members have been free to choose any form of exchange arrangement they wish *(except pegging their currency to gold): allowing the currency to float freely, pegging it to another currency or a basket of currencies, adopting the currency of another country, participating in a currency bloc, or forming part of a monetary union."*[57]

57. See IMF official website at http://www.imf.org/external/about/histend.htm (12/2010)

Upon the demise of Brenton Wood system, ***countries freely chose any form of exchange arrangement they wished***, except pegging their currency to gold. And, subsequent attempt to revive the fixed exchange rate system also failed. That was when IMF's founding mandate ended, and IMF ought to have winded up.

1.6.4 **IMF's Metamorphosis**: Rather than wound up when its job ended, IMF, it appears, recreated itself, under unclear circumstances. IMF *suo-motu* increased the purposes prescribed in its Articles of Agreement. Two of IMF's new purposes raise concerns in that they both give IMF unusual mandates that initiated IMF's invasion of the economic and political sovereignties of weaker member nations. IMF's intrusive new mandates are respectively contained in Article 1, purposes (ii), and (v), of IMF Articles of Agreement. Purpose (ii) empowers IMF

"[t]o facilitate the expansion and balance growth of international trade, ***and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objective of economic policy.*** *"*[58]

The above provision that empowers IMF to engross itself in *the development of the productive resources of* its *members* is an example of legislative infidelity. An open-ended enactment that authorizes IMF to involve itself in *'promoting and*

58. See Article 1, paragraph (ii) of IMF Articles of Agreement supra at page 26.

maintaining employment', *'real income'*, and *'development of the* ***domestic resources'*** of its member nations, *'as primary objective of economic policy'* presaged IMF's invasion of sovereignties of weaker nations. That mandate bears a resemblance to naked imperialism and a grosser form of legislative infidelity.

Concomitantly, purpose (v) of IMF's expanded Articles of Agreement introduced the business of ***lending money to poor nations.*** Again, as mentioned above, IMF's original mandate did not include lending money to poor nations. Apparently, to placate the ominous implications of IMF's new money-lending business, fancy language was used in ***Article 1(v)*** of IMF Articles of Agreement. Article 1, paragraph (v) declares one of IMF's purposes to be;

"[t]o ***give confidence to members*** *by making the general resources of the Fund temporarily available to them* ***under adequate safeguards****, thus* ***providing them with opportunity to correct maladjustments in their balance of payments*** *without resorting to* ***measures destructive of national*** *or international* ***prosperity****."*[59]

IMF began its two new functions without any discernible mandate. IMF Articles of Agreement did not empower it to alter itself or its functions. IMF's new ventures did not arise until IMF ran into existential threat in the 1970s, and needed to find a way to sustain its ebbing relevance. In IMF's own record subtitled "***Helping***

59. See Article 1, paragraph (v) of IMF Articles of Agreement supra at page 26.

Poor Countries", under a main title "***The End of Bretton Woods System (1972 to 1987),*** IMF explained its metamorphosis this casually;

"*[f]**rom the mid-1970s**, the IMF sought to respond to the balance of payments difficulties confronting many of the **world's poorest countries** by **providing concessional financing through what was known as the Trust Fund.** In March 1986, the **IMF created a new concessional loan program called the Structural Adjustment Facility.** The **SAF was succeeded by the Enhanced Structural Adjustment Facility** in December 1987.*"[60]

Since its creation in 1944 up till the mid-1970s, IMF did not concern itself with the plight of world's poorest countries. IMF's self-transmutation to serve the poorest countries coincided conveniently with the period the United States government terminated IMF's job in 1971. Subsequent events proved that IMF's later-day transformation was in bad faith, and driven by motives other than its declared altruism. With the two mandates, IMF began its controversial liaisons with the economies of world's poorest nations, most of whom today bear deep scars of excruciating poverty, worsened social and political disruptions, and increased corruption to show for trusting in IMF and the World Bank. IMF Articles of Agreement contain numerous species of legislative infidelity that time and space would not allow a full discussion of within the limits of my dissertation. However, IMF's strange immunity contained in the ***Agreement*** deserves special attention.

60.See IMF official website, footnote 59 at page 27 supra.

Ostensibly, in anticipation of spate of disputes its activities would generate, IMF hatched provisions in its Articles of Agreement that completely insulated IMF from accountability, in ways that point to legislative infidelity and misuse of law. In form, content, and intent, IMF's Articles of Agreement epitomizes legislative infidelity. A short review of the ***immunity clause*** contained in IMF's Articles of Agreement will hereby follow.

1.6.5 **IMF Articles of Agreement; Legislative Infidelity Epitomized**

IMF crafted a near absolute, simple but, creatively written ***immunity clause*** in its Articles of Agreement to potentially hedge itself from answerability and litigations. ***Section 3, Article 9*** of IMF's Articles of Agreement provides that;

"[t]he Fund, its property and its assets, wherever located and by whomsoever held, ***shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity*** *for the purpose of any proceedings or by the terms of any contract."*[61]

IMF vests itself with immunity from judicial processes, as well as from terms of contracts it lawfully entered into, unless it waives the immunity. IMF then ordered that any waiver must be express. It remains an open question whether a law court can strip IMF of its unusual immunity. Sections 4, 5, 6, 7, 8, and 10 of Article 9 of IMF Articles of Agreement reinforce the inviolability of IMF's immunity.

61. See ***Section 3, Article 9*** of IMF Articles of Agreement.

1.6.5.a **IMF's Immunity with Impunity**: It is conceded that civil and criminal immunities for designated international entities are common, but such privileges are usually rooted in diplomatic immunity. IMF's case is totally different. IMF reserves for itself the powers to engage in ordinary commercial businesses which traditionally vitiate diplomatic privileges and immunities where they exist. In any case, IMF makes no claim to diplomatic immunity. IMF's immunity is delineated in section 3, article 9. A combined reading of sections 2 and 3, Article 9 of IMF's Articles of Agreement shows that IMF preserves to itself the power to dabble into purely commercial businesses, enter into any type of contracts, acquire and dispose movable and immovable properties. Disputes usually arise from normal business engagements. IMF retains the capacity to sue anybody, nation, or entity, in the event of any disputes. But, IMF shields itself against suits in any court of law, except ***with its consent***. This is unjust. Nothing can be more absurd, and constitute an affront, than a plaintiff's access to justice that is hinged entirely on the benevolence and acquiescence of the defendant. A defendant placed in such an unusual powerful position will not easily yield to an adversary. IMF's immunity exemplifies travesty of justice. Totality of IMF immunity illustrates legislative infidelity and use of law for instrumentality of advancing undue economic advantage, fraud, and exploitation. That, unfortunately, also casts blur on the integrity threshold with which IMF operates.

Much has been said and written about IMF, and the consensus of opinion is a resounding condemnation of IMF and its activities. Tyranny of time and space would not permit a full discussion of IMF's many wrongs and criticisms. However, a brief glimpse into IMF's evaluation by IMF's most prominent critic would shed light on IMF's poor performance and disrepute.

1.6.6 **Criticisms of IMF and Its Operations in Developing Countries:** IMF has many prized critics, but IMF's most profound reproof comes from a distinguished authority and an insider, Professor Joseph Stiglitz. In one of his books, *Globalization and its Discontents,*[62] Professor Stiglitz assails IMF, arguing that;

"[a] half century after its founding, it is clear that the IMF has failed in its mission. It has not done what it was supposed to do – provide funds for countries facing an economic downturn, to enable the country to restore itself to close to full employment. In spite of the fact that our understanding of economic process has increased enormously during the last fifty years, and in spite of IMF's efforts during the past quarter century, crisis around the world have been more frequent and (with the exception of the Great Depression) deeper. By some reckonings, close to a hundred countries have faced crisis. Worse, many of the policies that the IMF pushed, in particular, ***premature capital market liberalization,*** *have contributed to global instability. And once a country was in crisis, IMF funds and programs not only failed to stabilize the situation but in many cases actually made*

62. See Stiglitz, J., (2002), Globalization and its Discontents, (W.W. Norton and Company, Inc., Publishers).

matters worse, especially for the poor. The IMF failed in its original mission of promoting global stability; it has also been no more successful in the new missions that it has undertaken..."[63]

Continuing, Professor Stiglitz describes the consequences of IMF failings, thus;

"[t]he result for many people has been poverty and for many countries social and political chaos. The IMF has made mistakes in all the areas it has been involved in: development, crisis management, and in countries making the transition from communism to capitalism. Structural adjustment programs did not bring sustained growth even to those, like Bolivia, that adhered to its strictures; in many countries, excessive austerity stifled growth; successful economic programs require extreme care in sequencing – and pacing. If, for instance, markets are opened up for competition too rapidly, before strong financial institutions are established, then jobs will be destroyed faster than new jobs are created. In many countries, mistakes in sequencing and pacing led to rising unemployment and increased poverty."[64]

The eminent Professor of Economics then blamed the problems on leadership thus;

"[u]nderlying the problems of the IMF and the other international economic institutions is the problem of governance: who decides what they do. The institutions are dominated not just by the wealthiest industrial countries but by commercial and financial interests in those countries, and the policies of the institutions naturally reflect this. The choice of heads for these institutions symbolizes the institutions' problem, and too often has contributed to their dysfunction. While almost all of the activities of the IMF and the World Bank today are in the developing world (certainly, all of their lending), they are led by representatives from the industrialized nations. (By custom or tacit agreement the head of the IMF is always a European, that of the World Bank an American.) They are chosen behind closed doors, and it has never even been viewed as a prerequisite that the head should have any experience in the developing world. The institutions are not representative of the nations they serve."[65]

63. See Stiglitz, J., Globalization and its Discontents, ibid at page 15.
64. See Stiglitz, J., Globalization and its Discontents ibid at page 18
65. See Stiglitz, J., Globalization and its Discontents ibid at pages 18 and 19

1.6.6.a **IMF's Reports Described as '*Garbage*':** Writing a feature story on Professor Stiglitz, ***Nation*** magazine surmised that;

"Stiglitz, 58, is hardly the first person to accuse the IMF of operating undemocratically and exacerbating Third World poverty. But he is by far the most prominent, and his emergence as a critic marks an important shift in the intellectual landscape..."[66]

According to the ***Nation*** magazine, Mr. Stiglitz was once asked what developing countries should do with the annual reports IMF prepares on member nations. Stiglitz recommended *"...**picking it up, saying 'thank you very much' and dropping it straight in the garbage can.**"* The magazine then concluded that *"Stiglitz has done more to damage the IMF's reputation than any other living economist."*[67]

Professor Stiglitz parades an impressive profile. He is an eminent professor of Economics in Columbia University, the distinguished Chairman of ex-President Clinton's celebrated Council of Economic Advisers, past Chief Economist and later erstwhile Senior Vice President of the World Bank. Additionally, he is a two-time winner of the Nobel Prize in Economics. Joseph Stiglitz's criticisms of IMF and World Bank bear undeniable testament to misconducts of the two institutions.

66. See official website of Global Issues at www.globalissues.org/TradeRelated/FreeTrade/Criticisms.asp, at p.10.(12/2010)

67. Official website of Global Issues ibid.

1.7 **Four Deadly Steps for Killing Economies of Developing Nations:** Writing on Professor Stiglitz's ***most damning revelation*** yet, London ***Observer*** reported that the eminent Economist gave an ***insider scoop about a 'four-step deadly method IMF and World Bank use to destroy economies of 'third-world' nations'***.[68] The newspaper recounted that Stiglitz granted exclusive interview to it and ***Newsnight***, about ***the inside workings of the IMF, the World Bank, and the bank's 51% owner, the US Treasury***. And that, from independent sources (not Stiglitz), the newspaper obtained a cache of documents marked, *'confidential'* and *'restricted'*. Also, that they showed one of the documents to the Economist, and requested him to translate. According to the newspaper;

"Stiglitz helped translate one, a 'country assistance strategy'. There's an assistance strategy for every poorer nation, designed, says the World Bank, after careful in-country investigation. But according to insider Stiglitz, the Bank's 'investigation' involves little more than close inspection of five-star hotels. It concludes with a meeting with a begging finance minister, who is handed a 'restructuring agreement' pre-drafted for 'voluntary' signature. Each nation's economy is analysed, says Stiglitz, then the Bank hands every minister the same four-step programme.

1.7.1 ***Step One is privatisation***. *Stiglitz said that rather than objecting to the sell-offs of state industries, some politicians - using the World Bank's demands to silence local critics - happily flogged their electricity and water companies. 'You could see their eyes widen' at the possibility of commissions for shaving a few billion off the sale price.*

And the US government knew it, charges Stiglitz, at least in the case of the biggest privatisation of all, the 1995 Russian sell-off..." [69]

68.See ***The Observer***, Sunday 29 April 2001, at http://www.guardian.co.uk./business/2001/apr/29/business.mbas (01/2011)
69. See ***The Observer*** newspaper report ibid.

The Observer newspaper contended that Stiglitz cannot simply be dismissed as a "*conspiracy nutter*". And, that the man was "*inside the game - a member of Bill Clinton's cabinet, chairman of the President's council of economic advisers.*"

The newspaper noted that most sick-making for Stiglitz is that the US-backed oligarchs stripped Russia's industrial assets, with the effect that national output was cut nearly in half. Neither the IMF, nor the World Bank denied Professor Stiglitz's allegations. IMF collusion with World Bank to *'silence'* local critics, make prescriptions that involve *fire sale of state industries and infrastructures* to *conniving foreign investors* at *discounted prices*, and *bribing public officials with corrupt commissions* when they agree to shave billions off the value of their key industries and infrastructures, bother on dishonesty and amount to cheating, and also violate several anti-corruption laws.[70]

The Observer newspaper wrote that Professor Stiglitz also described ***step two*** of the four-step destruction of emerging nations as ***capital market liberalization***;

1.7.2 "*...After privatisation,* ***Step Two is capital market liberalisation.*** *In theory this allows investment capital to flow in and out. Unfortunately, as in Indonesia and Brazil, the money often simply flows out. Stiglitz calls this the 'hot money' cycle. Cash comes in for speculation in real estate and currency, then flees at the first whiff of trouble. A nation's reserves can drain in days.*

70. See *Article 23*, United Nations Convention Against Corruption, (2004), GA Res. 58/4 (Annex); ***reprinted in*** 43 I.L.M. 37 and 4 Weston & Carlson IV.D.26. ***See also*** U. S Foreign Corrupt Practices Act (1998); United States Code Title 15. Commerce and Trade Chapter 2b-Securities Exchange.

And when that happens, to seduce speculators into returning a nation's own capital funds, the IMF demands these nations raise interest rates to 30%, 50% and 80%.

'The result was predictable,' said Stiglitz. Higher interest rates demolish property values, savage industrial production and drain national treasuries..."[71]

IMF that prides itself as the champion of economic growth for poor and weak nations is exposed by Professor Stiglitz to be engaged exactly in the opposite. Professor Stiglitz's startling revelations confirm numerous accusations that IMF is misleading the poor and weak nations of the world, and not a sincere economic partner to the developing nations.

Continuing, Professor Stiglitz also shed light on the ***third step*** of IMF's four-step destruction agenda; ***market-based pricing***. The ***Observer*** reported that;

1.7.3 *"...At this point, according to Stiglitz, the IMF drags the gasping nation to* ***Step Three: market-based pricing*** *- a fancy term for raising prices on food, water and cooking gas. This leads, predictably, to* ***Step-Three-and-a-Half:*** *what Stiglitz calls* ***'the IMF riot'****.*

The IMF riot is painfully predictable. When a nation is, 'down and out, (the IMF) squeezes the last drop of blood out of them. They turn up the heat until, finally, the whole cauldron blows up,' - as when the IMF eliminated food and fuel subsidies for the poor in Indonesia in 1998. Indonesia exploded into riots.

There are other examples - the Bolivian riots over water prices last year and, this February, the riots in Ecuador over the rise in cooking gas prices imposed by the World Bank. You'd almost believe the riot was expected.

71. See ***The Observer*** at p.36 supra.

And it is. What Stiglitz did not know is that Newsnight obtained several documents from inside the World Bank. In one, last year's Interim Country Assistance Strategy for Ecuador, the Bank several times suggests - with cold accuracy - that the plans could be expected to spark 'social unrest'.

That's not surprising. The secret report notes that the plan to make the US dollar Ecuador's currency has pushed 51% of the population below the poverty line.

The IMF riots (and by riots I mean peaceful demonstrations dispersed by bullets, tanks and tear gas) cause new flights of capital and government bankruptcies. This economic arson has its bright side - for foreigners, who can then pick off remaining assets at fire sale prices.

A pattern emerges. There are lots of losers but the clear winners seem to be the western banks and US Treasury..."[72]

Finally, according to the ***Observer***, Professor Stiglitz described ***the last*** of IMF's four-step third-world nations' destruction methodologies as ***free trade***.

1.7.4 *"...Now we arrive at **Step Four: free trade.** This is free trade by the rules of the World Trade Organisation and the World Bank, which Stiglitz likens to the Opium Wars. 'That too was about "opening markets",' he said. As in the nineteenth century, Europeans and Americans today are kicking down barriers to sales in Asia, Latin American and Africa while barricading our own markets against the Third World's agriculture.*

In the Opium Wars, the West used military blockades. Today, the World Bank can order a financial blockade, which is just as effective and sometimes just as deadly.

*Stiglitz has two concerns about the IMF/World Bank plans. First, he says, because the plans are devised in secrecy and driven by an absolutist ideology, never open for discourse or dissent, **they 'undermine democracy'**. Second, they don't work. Under the guiding hand of IMF structural 'assistance', Africa's income dropped by 23%.*

72.*The Observer* newspaper ibid.

Did any nation avoid this fate? Yes, said Stiglitz, ***Botswana****. Their trick? 'They told the IMF to go packing.'*

Stiglitz proposes radical land reform: an attack on the 50% crop rents charged by the propertied oligarchies worldwide. Why didn't the World Bank and IMF follow his advice?

'If you challenge (land ownership), that would be a change in the power of the elites. That's not high on their agenda.'

Ultimately, what drove him to put his job on the line was the failure of the banks and US Treasury to change course when confronted with the crises, failures, and suffering perpetrated by their four-step monetarist mambo... 'It's a little like the Middle Ages,' says the economist, 'When the patient died they would say well, we stopped the bloodletting too soon, he still had a little blood in him.'"[73]

1.7.5 **Doctrinaire Ideology of '*free-market fundamentalism*' still Shapes Policy**:

Nation magazine further reported that to some degree, the mounting criticism from Stiglitz and other quarters has had an impact. That, IMF officials recently acknowledged the potential risks of capital market liberalization, and that both the IMF and World Bank have begun speaking more openly about debt relief and poverty reduction. However, the magazine noted that while rhetoric has changed, Mr. Stiglitz maintains that a doctrinaire ideology of "*free-market fundamentalism*" continues to shape policy. According to Nation magazine, Mr. Stiglitz argues that

"[t]he IMF and World Bank are pushing developing countries to privatize their pension systems, for example, which is highly controversial in the First World. The IMF demanded fiscal austerity in Argentina, where unemployment had reached 20

73. ***The Observer*** newspaper ibid.

percent and, in December, sparked riots that led to the government's collapse. It preaches the gospel of free trade to developing countries – even though most Western countries built their economies by protecting certain industries and continue to subsidize domestic producers. The blind push to privatize and deregulate has not only failed to fuel development, Stiglitz contends, but reflects an idealized vision of how markets function that neither economic theory nor concrete experience supports."[74]

Professor Stiglitz displayed rare combination of courage and integrity to shine magnificent light on IMF and World Bank misdeeds. Considering the secrecy with which IMF and the World Bank operate, and the hermetic cocoon in which both institutions ensconced themselves, Stiglitz's revelation is epic. I will next briefly analyze the World Bank and its own variety of legislative infidelity.

1.8 **World Bank; A Model of Legislative Infidelity**

My review of the World Bank will be very brief, and limited only to the Bank's self-transformation, a concise analysis of the guidelines for treatment of foreign direct investments and (if time permits) ICSID Convention and Tribunal.

1.8.1 **History of the World Bank**: Like IMF, World Bank was *born* in 1944, in Bretton Woods, New Hampshire, U.S.A. World Bank was assigned a single duty of helping rebuild war-torn Europe, after the Second World War.[75]

74. See Official website of Global Issues ibid, footnote 69 at page 35 supra.

75. See World Bank's official website at http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTARCHIVES/0,,contentMDK:20053333~menuPK:63762~pagePK:36726~piPK:36092~theSitePK:29506,00.html (01/2011)

1.8.2 **World Bank's Transformation:** When Europe's post-war rebuild-program ended, World Bank's assignment finished. However, like IMF, World Bank gave itself another job. Like IMF too, the new job had to be veiled in a cloak of empathy for poor nations. World Bank easily owned up that it was originally formed to help reconstruct Europe after WW II, but explained its change flimsily;

"Reconstruction has remained an important focus of the Bank's work, given the ***natural disasters, humanitarian emergencies, and post-conflict rehabilitation needs that affect developing and transition economies. Today's (World) Bank, however, has sharpened its focus on poverty reduction as the overarching goal of all its work****. It once had a homogeneous staff of engineers and financial analysts, based solely in Washington, D.C. Today, it has a multidisciplinary and diverse staff including economists, public policy experts, sectoral experts, and social scientists. 40 percent of staff are now based in country offices."*[76]

World Bank did not explain how, and by what authority it transformed from specific Eurocentric rebuilding assignment, to become IMF's *twin 'guardian angel'* for the 'conflict-prone', 'natural disaster-infested', and 'poverty stricken', developing and transitioning economies. It appears that World Bank simultaneously appointed itself to IMF's same new duties, apparently with ulterior motives, just like the IMF.

Also like IMF, controversies trail World Bank's activities in developing countries. Time and space constraints would not allow a full discussion of World Bank's

76.See World Bank official website at p.43 supra.

many negative reflections. I will therefore limit my analysis of World Bank to only a quick review of few pertinent provisions of the bank's enacted rules for treatment of foreign direct investments.

1.8.3 **Opening Remark on World Bank's Guidelines for the Treatment of Foreign Direct Investment.**

Long before World Bank enacted its guidelines for the treatment of foreign direct investment, UN General Assembly had, thirty years prior, in the Assembly's seventeenth session held on 14th December, 1962, passed the General Assembly's boldest and most laudable resolution, i.e., ***General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources.***[77] Resolution 1803 was latter ***reaffirmed*** by UN General Assembly ***Resolution 3171*** during its 28th Session held 17 December 1973.[78]

Resolution 1803's balance and profundity in defining national sovereignty, and tying every nation's right over her natural resources to permanent sovereignty, remain distinctly monumental. The ideals enunciated in Resolutions 1803 and

77.***Source***; United Nations (1963), "General Assembly Resolution 1803 (XVII); Permanent sovereignty over natural resources", *Official Records of the General Assembly; Seventeenth Session,* Supplement No. 17, (A/5217) (New York; United Nations), pp. 15-16; ***reprinted in*** 2 I.L.M. 223 (1963) and 4 Weston and Carlson IV.F.1 ***See also*** Professor Dr. Christian Okeke, (2008),The Law of International Investments, Course Syllabus, Spring 2008, p. 40.

78.UN General Assembly ***Resolution 3171*** passed during the Assembly's 28th Session held 17 December 1973, ***See*** GA Res. 3171, UN GAOR, 28th Sess., Supp. No. 30, at 52, UN Doc. A/9030 (1973); ***reprinted in*** 13 I.L.M. 238 (1974) and 4 Weston and Carlson IV.F.2.

3171, as well as the bold principles carefully articulated in subsequent UN ***Resolutions 3201*** *(Declaration on the Establishment of a New International Economic Order)* and ***3202*** *(Program of Action on the Establishment of a New International Economic Order),*[79] and Resolution ***3281*** *(Charter of Economic Rights and Duties),*[80]are so comprehensive and exhaustive that jointly, they ***cover*** almost the entire ***field*** of international economic engagements. The reasonable expectation would be that World Bank's later effort to make rules in the related subject area of treatment of foreign direct investments ought to have, in the least, acknowledged the already existing rules. Unfortunately, that was not the case. A short analysis of World Bank's enacted Guidelines will now follow;

1.8.4 **Legislative Infidelity and World Bank *'Guidelines for the Treatment of Foreign Direct Investments'*; A Brief Analysis.**

World Bank Guidelines for the Treatment of Foreign Direct Investment[81] ('World Bank Guidelines' or 'the guideline') is World Bank's second exercise of doubtful legislative authority to enact laws and prescribe rules in the field of foreign direct investments. ICSID[82] was the first. Both enactments appear to be made ***ultra vires***

79.*Source;* United Nations (1974), General Assembly Resolutions 3201 and 3202, *Official Records of the General Assembly; Sixth Special Session,* Supplement No. 1 (A/9559)(New York; United Nations), pp. 3-12. ***See also*** Prof. Dr. Okeke supra at p.43.
80.Source; United Nations (1975), General Assembly Resolution 3281, *Official Records of the General Assembly; Twenty-Ninth Session,* Supplement No. 31 (A/9631)(New York; United Nations), pp.50-55. **See also** Prof Okeke, 18, supra at page 43
81. See World Bank Group (1992). ''Guidelines on the Treatment of Foreign Direct Investment'', *Legal Framework for the Treatment of Foreign Investment; Volume II; Guidelines* (Washington, D.C.; The International Bank for Reconstruction and Development/THE WORLD BANK), PP. 35-44.
82.Source, Document ICSID/2 (Washington D.C.; Int'l Center for Settlement of Investment Disputes). (1966) *Convention on the Settlement of Investment Disputes between States and Nationals of Other States,*

as World Bank possesses no legislative authority. Neither World Bank's Articles of Agreement nor any other legal instrument conferred World Bank with powers to enact laws. Nevertheless, World Bank enacted guidelines that purport to set binding rules to regulate relationships between transnational corporations and host states in foreign direct investments field. Enacted in 1992, World Bank's guideline, in a nutshell, consists of ***five chapters*** and a total of ***thirty-three paragraphs***. Preamble to the guideline characteristically begins with a typical rosy claim

"*... that a flow of foreign direct investment* ***brings substantial benefits to*** *bear on the world economy and* ***on the economies of developing countries in particular****, in terms of* ***improving the long term efficiency of the host country*** *through* ***greater competition****,* ***transfer of capital****,* ***technology*** *and* ***managerial skills*** *and enhancement of market access and in terms of the expansion of international trade;...*"[83]

The preamble also proclaims that;

"*...respective General Counsel has,* ***after reviewing existing legal instruments and literature****, as well as* ***best available practice identified by these institutions****, prepared a set of guidelines representing a desirable overall framework which embodies essential principles meant to promote foreign direct investment* ***in the common interest of all members...***"[84]

Paragraph 1 of ***Chapter I*** of the guideline enjoins members of the World Bank Group institutions to apply the guidelines to private foreign investment in their

83. See World Bank Group (1992), supra, footnote 81 at p.44
84. See World Bank Group (1992), ibid.

respective territories.[85] Chapter 1, paragraph 1, by implication, delivers a definite command to World Bank Group institutions to apply only World Bank guidelines to the exclusion of every other rules dealing with the same subject. Having clearly made the desired point that the World Bank Guideline should be the only rule to be applied to all private foreign direct investments by World Bank Group institutions, the rest provisions of paragraph one become skillfully jumbled. ***Paragraph 2*** of Chapter 1 defines the scope of paragraph 1 thereof by providing in its first part that "*[t]he application of these Guidelines extends to existing and new investments…*"[86] The effect is that World Bank guidelines apply ***retroactively*** to *preexisting* concession contracts, contrary to the norm. Rest provision of paragraph 2 is conveniently designed in incomprehensible and ambiguous language.

Chapter II of the guideline lays down detailed directives for host states ***admission*** of foreign investors. The prolix and condescending details of Chapter II demonstrate World Bank's general overbearing disposition towards host states – mostly developing host nations.[87]

85. See Paragraph 1, Chapter 1 of the World Bank Guidelines; World Bank Group (1992) supra at p.44.

86. See Paragraph 2, Chapter 1 of the World Bank Guidelines, ibid.

87. See paragraphs 2 (a) and (b), 3, 4, 5, and 6 of World Bank Guidelines, ibid.

Chapter III titled ***Treatment*** also exhibits similar domineering and condescending posture towards host states, dictating to them, in undignified details, how their natural resources should be managed, as if the host states are colonial outposts.

However, nothing in the guidelines compares to the draconian stipulations buried in ***Chapter IV** titled **'Expropriation and Unilateral Alterations or Termination of Contracts'***. Chapter IV, made up of eleven paragraphs and several sub-paragraphs, is so verbose with details that it runs into three whole pages. ***Paragraph 1*** of Chapter IV enjoins states not to expropriate directly or by implication, in whole or in part, a foreign direct investment. Pointedly, the entire Chapter IV is devoted to rigorous, complex, and *fuzzy-math* computations of what constitutes ***"appropriate compensation"*** payable to foreign investors in the event of expropriation by host states. No aspect of foreign investors' real or imagined entitlement is left to chance. Every conceivable entitlement to the foreign investor is distinctly spelt out and decreed. Yet, no accommodation is spared in this lengthy and overly detailed chapter to extend any modicum of protection to the host states, or to strike any form of balance. All the blemishes noted in the opening chapters and paragraphs of the World Bank Guidelines seem to explode with intensity in Chapter IV. The outcome is a brazenly one sided, and overly lavish protections accorded foreign investors in ways that hijacked the economic and national sovereignties of host

states. World Bank guidelines simply tied the hands of host states, and totally ignored their interests, and paid no heed whatsoever to the host citizens' rights. No attempt was made in the Guidelines to address known misconducts of foreign investors. The resulted bias is very palpable.

Probably, to give even more teeth to Chapter IV, ***Chapter V*** of the guideline designated ***'Settlement of Disputes'***, in its ***paragraph 3***, resolutely channeled all foreign direct investments disputes *exclusively* to the arbitration panels of ICSID. In effect, paragraph 3 simply wipes out the jurisdictions of host states domestic courts over all investment disputes. Implication of the above is that World Bank which is a ***for-profit*** business interest, makes the rules, superintends foreign direct investments, and seats in judgment over all the disputes. It must be noted that ICSID tribunal is a creation of the International Bank for Rehabilitation and development (IBRD), [88] aka, the World Bank. Yet, World Bank's Articles of Agreement totally excludes World Bank from law suits and from accountability.[89]

88.See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. ***Source***; International Center for Settlement of Investment Disputes. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, document ICSID/2 (Washington D.C.; International Center for Settlement of Investment Disputes). **Note**; The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States was submitted to Governments by the Executive Directors of the International Bank for Reconstruction and Development on 18th March 1965 and entered into force on 14 October 1966. ***See also*** Professor Dr Christian Nwachukwu Okeke,(2008), page 43, supra at p. 44.

89. While Section 3 of Article VII of IBRD Articles of Agreement empowers World Bank to enter into all types of contracts, and to institute legal proceedings, Sections 3,4,5,6,7,8, and 9 thereof bestows the bank with ridiculously extensive immunities.

In form and substance, and for all its many failings, World Bank Guidelines seem to be a partisan appendage to transnational corporations, and to the west, rather than a principle-driven policy instrument. In sum, World Bank's Guidelines represent all the overt and covert trappings of regulatory infidelity and the use of law as instrumentality to further undue economic advantage. Factoring in all the controversies that trail World Bank activities,[90] it appears also that the ICSID Convention and the Tribunals created there-under are vessels strategically positioned to advance the pursuit of ulterior agenda.

To conclude the substantiation of my thesis that legislative infidelity is a phenomenon of the global economic order, I will in Chapter 2 briefly review the General Agreement on Trade Related Intellectual Properties (TRIPS Agreement). The review in the next chapter will illustrate more profound forms of legislative infidelity under the international economic order.

90. See Professor Stiglitz's Observer newspaper interview on World Bank and IMF, *inter alia,* at pp 36 to 40 supra.

CHAPTER 2

TRIPS as an Exemplification of '*Legislative Infidelity*' in International Law; A Brief Analysis.

2.1 **Introduction:** General Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[91] is a classic example of international '*enactments*' that is tainted with legislative infidelity. TRIPS was conceived to enhance the protection of private economic and proprietary rights over intellectual properties, in the international arena. International intellectual property protection generates controversy between developed nations and developing nations. Accusations, counter-accusations, acrimonies and animosities generated by TRIPS continued in the international intellectual properties sector, even after TRIPS was adopted.

Issues with TRIPS transcend the Agreement's unwieldy nature. Besides its facial awkwardness, TRIPS is inundated with accusations of trickery that allegedly occurred in the choice of forum for its negotiations, during the many rounds of its negotiations, and in the method of its adoption.[92] Critics also charge TRIPS with foisting self-serving western peculiar idea of property rights on the rest of the world, even in places such ideas do not fit, and as an imperialistic vehicle.[93]

91. See; General Agreement on Trade-Relate Aspects of Intellectual Property Rights. ***Concluded*** at Marrakesh, 15 April 1994. ***Entered into force***, 1 January 1995; ***reprinted in*** (1994) 33 I.L.M. 1197 ***and*** 4 Weston and Carlson IV.C.2D.
92. See; Long, Doris E. (1994);*Copyright and the Uruguay Round Agreements; A New Era of Protection or an Illusory Promise*? AIPLA Q.J. 531 ***reproduced in*** Long and D'Amato, (2000), a Coursebook in International Intellectual Property, 357, 358.
93. See; footnote 119, ***infra*** at page 74

Brief ***summation*** of the controversies that marked the Rounds of Ministerial negotiations of TRIPS will help the understanding of some of the basic contentions over TRIPS.

2.2 Trip into TRIPS; A Summary of TRIPS' Major Controversies.

Rounds of Ministerial trade negotiations over TRIPS began in Tokyo, spilled over to Uruguay, and ended in Marrakesh where the Agreement was adopted.[94] Doris E. Long described the several rounds of Ministerial trade negotiations that pitted developed nations against developing nations, over the *appropriate forum* to negotiate TRIPS.[95] According to her, controversy first arose from developed countries attempt to use a favorable GATT forum to address global problems posed by international trafficking of counterfeit products. Western proposers of TRIPS, led by the United States, attributed their preference for GATT forum over the more appropriate WIPO venue to the perceived inability of existing international conventions to address counterfeit trafficking problems.[96] And, to alleged WIPO's susceptibility to developing countries politicking and their continued use of WIPO to lessen the level of intellectual property protections established under the Berne Convention.[97]

94. *See* Long, Doris E.(1994) supra at page 50
95. Long, Doris E.(1994) ibid
96. Long, Doris E.(1994) ibid
97. Long, Doris E. (1994)ibid

Developing countries led by Brazil and India vehemently opposed using GATT forum and, instead, preferred WIPO as the proper forum to address intellectual property protections.[98] The opposers predicated their GATT resistance to GATT being an inappropriate avenue for intellectual property matters, and to accusations that GATT was also a forum mainly for the rich nations, and decried any attempt to include the protection of intangible intellectual property rights under GATT.[99] The contention marred Tokyo round of negotiations, and spilled over to the subsequent Uruguay round. The forum-shopping argument was in the end resolved in favor of the West.

"*Much of the debate regarding GATT versus WIPO jurisdiction was largely resolved by 1987, when WIPO was granted observer status in GATT negotiations on TRIPS. Debates regarding the balance to be struck between Berne Convention and non-Berne Convention issues of copyright protection, however, continued to be infected by this underlying jurisdictional debate.*"[100]

However, more controversies still followed TRIPS after its adoption. Some of TRIPS' new rifts center on the scope and intendment of the Agreement. TRIPS later squabbles will be spotlighted later. Meanwhile, a brief review of fidelity deficiencies of TRIPS substantive provisions will immediately follow hereunder.

98. Long, Doris E.(1994), supra at page 51
99. Long, Doris E. (1994)ibid
100. Long, Doris E. (2000), 361, supra at p.50

2.3 TRIPS and Legislative Infidelity; Analytical Overview.

Legislative infidelity issues provoked most of TRIPS controversies. Analysis of TRIPS provisions will begin with four of the preamble's pledges. ***First stanza*** of TRIPS preamble affirms members desire "…***to reduce distortions*** *and impediments to international trade…and … the need to promote effective and adequate protection of intellectual property rights…*"[101] The **second stanza** recognizes "…*the need for new rules and disciplines concerning …(c) [t]he provision of effective and appropriate means for the enforcement of trade-related intellectual property rights,* ***taking into account differences in national legal systems;…***"[102] TRIPS ***fifth stanza*** alludes to "… *underlying* ***public policy objectives of national systems for the protection of intellectual property,*** *including developmental and technological objectives…*"[103] Finally, and most remarkably, the ***sixth stanza*** recognizes "… ***the special needs of the least-developed country Members*** *in respect of* ***maximum flexibility*** *in the* ***domestic implementation of laws and regulations*** *in order to enable them to* ***create a sound and viable technological base…***"[104]

101. See; ***First Stanza*** to TRIPS
102. See; ***Second Stanza***, ibid
103. See; ***Fifth Stanza,*** ibid
104. See; ***Sixth Stanza*** ibid

TRIPS opening provisions reflect some of the Agreement's objectives, as declared in the preamble. However, a brief review of TRIPS substantive provisions will confirm that TRIPS rosy preambular promises are abandoned. In general, all of TRIPS substantive provisions consist of ***seven parts*** divided into ***71 Articles***, many paragraphs and numerous subparagraphs.

Article 1 titled *'Nature and Scope of Obligation'* enjoins TRIPS members, in mandatory language, to give effect to the Agreement. In a seeming demonstration of freewill, Article 1 also authorizes TRIPS signatory members to give more extensive protection to international intellectual property rights than prescribed in the Agreement, ***if they so wished***. Remarkably, Article 1 additionally gives members the ***freedom to choose, within their own domestic legal systems and practices, the appropriate method of implementing*** TRIPS. The portion of Article 1 that granted members the freedom of choice states expressly that "***[m]embers shall be free*** *to* ***determine the appropriate method*** *of implementing the provisions of this Agreement* ***within their own legal system and practice.***"[105] The language of Article 1 is plain, clear, and unequivocal in granting members the freedom to choose the appropriate domestic legal system for implementing TRIPS.

105. See; Article 1.

Article 1 freedom of choice provision expressly makes it the prerogative of each signatory member nation to decide her own legal system for implementing TRIPS. The corollary notion is that TRIPS will provide *only* the general framework for its implementation. Implicit in the freedom of choice provision, also, is that a signatory Member's *bona fide* choice of method of implementing TRIPS, which does not contradict the Agreement's principal framework, would be final on the matter. In view of Article 1, the reasonable expectation is that TRIPS will maintain consistency in all its provisions. And not embark on self-contradiction by later on dictating in particularized details specific provisions that members must enact into their domestic laws. As will be seen below, TRIPS turned around and made prescriptions of what members must spell out in their domestic laws. These conflicted provisions resulted to internal contradictions with provisions of Article 1 which already deferred such authority to individual TRIPS signatory members. Pointless internal contradiction is one attribute of legislative infidelity.

Paragraph 5 of Article 41, under **Part III** (enforcement), supports Article 1, as well as the conclusion that TRIPS opted expressly to not dictate judicial systems to its members. According to Paragraph 5, Article 41 "*[i]t is* ***understood*** *that* ***this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement***

of law in general**, nor does it affect the capacity of Members to enforce their law in general. **Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general. "[106]

Paragraph 5 of Article 41, read jointly with the relevant portion of Article 1, clearly relieves Members from obligation to alter their existing *legal systems* in any particular way, for the purposes of complying with requirements of TRIPS. As long as members enforcement obligations of the Agreement is otherwise met.

However, in typical legislative infidelity mode, TRIPS made an about-turn. After unequivocally deferring to signatory members the freedom to decide appropriate methods of implementing TRIPS in their *domestic legal systems*, the Agreement recanted. In stark contrast with the express provisions of Articles 1 and 41, TRIPS veered round and stipulated copious details of procedural and substantive legal matters that Members *must* incorporate into their domestic legal systems, in order to be in conformity with TRIPS.[107]

106. See; Article 41, Paragraph 5 of TRIPS.
107. See; Mandatory requirements of Articles 8(1), 9, 10, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 39, 40, and 41 of TRIPS.

Again, ***section 2 of Part III*** titled *'Civil and Administrative Procedures and Remedies'* which covers Articles 42 to 50, also, lays out extensive details of entire gamut of mandatory stipulations of substantive and procedural matters which Members must incorporate into their domestic laws. Examples include matters of *Fair and Equitable Procedures*– Article 42, *Evidence*– Article 43, *Injunction* – Article 44, *Damages* – Article 45, and *Other Remedies* – Article 46. Other TRIPS mandated requirements include *Right of Information* – Article 47, *Indemnity* – Article 48, *Administrative Procedures* – Article 49, *Provisional Measures* – Article 50, and a patchwork of other similar provisions. These TRIPS provisions, in effect, take away from members the power of choice which Article 1 clearly gave to them.

Members whose existing laws and procedures are dissimilar and those who do not already have TRIPS prescribed new laws in their legal system must alter their laws in order to be in conformity with TRIPS requirements. Some of TRIPS demands are obvious in requiring Members to alter their domestic laws.[108]However, a host of other TRIPS provisions impose changes that members must make, but skillfully avoided using clear and specific language that explicitly denote compulsion.

108. See; *Example*, Article 8. ***See also*** TRIPS Article 33 stipulation that 20 years shall be the life of patent protection.

Many of TRIPS imposed requirements are so sweeping that they radically supplanted sacred principles of procedural and substantive laws. One such drastic provision is ***Article 34*** that ousted the settled ***burden of proof*** rule of justice. Article 34 titled *'Process Patent; Burden of Proof'*, provides in ***paragraph*** **1** that

"[f]or the purpose of civil proceedings in respect of the infringement of the rights of the owner ... if the subject matter of a patent is a process for obtaining a product, the judicial authorities shall have the authority to ***order the defendant to prove that the process to obtain an identical product is different*** *from the patented process. Therefore,* ***Members shall provide*** *... that any identical product when produced without the consent of the patent owner shall,* ***in the absence of proof to the contrary, be deemed to have been obtained by the patented process;*** *(a) if the product ... is new; (b) if ...the* ***owner of the patent*** *has* ***been unable*** *through reasonable efforts* ***to determine the process actually used.****"[109]

Shun of verbosity, the literal meaning of Article 34 is that in all ***process patent*** infringement litigations, the ***burden of proof shall be on the defendant,*** *and not on the plaintiff.* TRIPS, by Article 34, paragraph 1, compels signatory Members to alter their respective domestic laws on process patent infringement law suits, so that ***when a plaintiff attempts but fails to prove, or plaintiff is otherwise unable to prove his/her/its case, the burden of proof shall automatically shift to the defendant to disprove plaintiff's unsubstantiated (and probably frivolous) case.***

109. See; Article 34

Article 34 offends good conscience, and forcefully tramples upon sacred rule of procedural law which mandates that a ***person who alleges must prove***. It is a settled principle of law that plaintiff who makes allegation against a defendant, in a law suit, must first put forward sufficient facts to prove the allegation. Thereafter, the defendant will then be called upon to defend. TRIPS flagrantly transgressed against this golden rule, and instead prescribed a draconian requirement that means in effect that *a defendant upon whom an allegation is made by a plaintiff, albeit frivolously, shall bear the burden of disproving plaintiff's allegation*. The plaintiff is thus relieved from offering any proof to win a process patent infringement law suit. Obviously, none of the TRIPS sponsors would allow similar provisions in their domestic laws. Article 34 is extremely harsh, impudent, clearly self-serving, evidently predatory, and constitutes an impermissible intrusion into the national sovereignties of those TRIPS member nations who are not technologically advanced. Article 34 is one of TRIPS many glaring cases of legislative infidelity.

Similarly, ***Paragraph 2*** of ***Article 34*** reiterates the vexing provisions of paragraph 1 thereof. Those and similar self-interest provisions designed into TRIPS safeguard only the interests of potential patent process litigation *plaintiffs*. Plaintiffs in international intellectual property infringement law suits are most likely, and usually are, the technologically savvy nations and entities. In all, Article 34 is one

typical example of TRIPS many instances of legislative infidelity and use of law for instrumentality of advancing undue economic advantage, exploitation, and fraud.

It must be noted here that despite the use of seemingly permissive language in paragraphs 1 and 2 of Article 34, compliance with the provisions of those two paragraphs is not discretionary. Provisions of the two paragraphs of Article 34 operate subject to Article 1 paragraph 1, and Article 8 paragraphs 1 and 2, both of which make compliance to ***all*** TRIPS requirements mandatory. Article 1 paragraph 1 stipulates in part that any steps Members shall take for the protection of intellectual property rights ***must not contravene*** the provisions of ***the Agreement.*** Paragraphs 1 and 2, Article 8 enjoins TRIPS Members to formulate or amend their domestic laws, and to take appropriate measures, that suit their domestic needs, provided also that any steps so taken must be "*...consistent with the provisions of this Agreement.*"[110] Article 1 paragraph 1 read together with Article 8 paragraphs 1 and 2 denote compulsion, not discretion, the liberal writing style notwithstanding.

110.See; Paragraphs 1 and 2, Article 8.

The provisions of TRIPS which paragraphs 1 and 2 of Article 8 command *formulations* or *amendments* of members' domestic laws to conform to include provisions of paragraphs 1 and 2 of Article 34. In other words, in view of Articles 1 and 8, *the demand* of Article 34 that members alter their domestic laws so that burden of proof shall be on the defendant in process patent litigations, is *mandatory* and *not permissive.* The seemingly permissive tone of Article 34 tending to suggest that Members have discretion on the matter is misleading.

For harboring such far-reaching demand on crucial matters of justice, TRIPS ironically sabotages the mission it set out to accomplish. Legal instruments characteristically strive to advance justice, not to propagate injustice. TRIPS is inherently unjust, self-seeking, opportunistic, and imperialist. Member nations coerced into enacting TRIPS unjust requirements into their domestic laws would predictably become reluctant to enforce such bad laws at home, in effect defeating TRIPS main purpose of protecting intellectual property rights on the international arena. The Agreement exemplifies legislative infidelity and use of law for instrumentality of furthering undue economic advantage – a hallmark of the jurisprudence of international economic order. I will next briefly discuss TRIPS other genre of legislative infidelity which involves *complicated cross-referencing style* used in writing TRIPS.

2.4 **TRIPS Cross-Referencing Technique; A Genre of Legislative Infidelity.**

Besides TRIPS legislative infidelity shortcomings already discussed, another worrisome legislative infidelity issue with the Agreement is its overly complicated cross-referencing style. This refers to a style in which articles of TRIPS excessively cross-reference different independent Conventions, Treaties, and other autonomous instruments, in intricate ways that appear to be calculated to confuse. The problem associated with this legislative draftsmanship style does not lie alone in the quantity of the cross-references. The tortuous designs of most of the cross-referencing provisions also exacerbate the Agreement's comprehension ordeal, and invariably, leads to compliance difficulties.

In addition to several internal cross-references to itself, TRIPS *copiously* cross-references many other different international instruments. TRIPS provisions despoiled by excessive cross-referencing tactics include the following Articles, amongst others; Article 1 paragraph 3, Article 2 paragraphs 1 and 2, Article 3 paragraph 1, Article 4 paragraphs (b) and (d), and Article 9 paragraph 1. TRIPS other knotty cross-references include Article 10 paragraph 1, Article 27 subparagraph (b) of paragraph 3, Article 35, Article 39 paragraph 1, Article 63 paragraph 2, paragraphs 1, 2, and 3 of Article 64, Article 65 paragraph 1, Article 68, Article 70 paragraphs 2, 4, 8(a), and 9, and Article 71 paragraph 2. Though the

cross-references are many and cumbersome in themselves, the additional contortions in the phrasing of some of the cross-referencing articles magnified the document's reading and comprehension problems in ways that suggest prior existence of dishonest motive.

Independent instruments generously cross-referenced in TRIPS include the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits, WTO Agreement, WIPO, and GATT 1994. These separate legal instruments are profusely cross-referenced in several articles in aberrant ways that make TRIPS exceedingly dependent on other instruments, tenuous to read, and impede comprehension. For example, paragraph 1, Article 2 of TRIPS provides that "*[i]n respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967).*"[111]

Paragraph 2 of Article 2 provides further that "*[n]othing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to*

111. See Article 2 paragraph 1.

each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits"[112]

Comprehension of the above two paragraphs of Article 2 becomes somewhat beclouded and challenging. Paragraph 1 Article 2 above looks facially normal, but on closer examination, suffers from heavy clarity issues. Paragraph 1 seems to require, in effect, that to comply with Parts II, III, and IV of TRIPS, Members have to comply with Articles 1 to 12, and Article 19 of Paris Convention (1967). It must be noted that Parts II, III, and IV referred to in paragraph 1 of Article 2 comprise of fifty-four Articles, numerous paragraphs and subparagraphs. And that these fifty-four articles contain the core substance of TRIPS. Most of the articles stipulate many other compliance requirements of their own. Paragraph 1 of Article 2, thus, requires that to comply with these fifty-four articles of TRIPS, plus their many paragraphs and subparagraphs, each Member has to skim each of the fifty-four articles that make up Parts II, III, and IV, respectively, to understand and comply with their equally vague provisions. The Member shall thereafter go over to the Paris Convention of 1967 and comply with each provision of Articles 1 through 12, and Article 19, respectively, i.e. comply with the thirteen mentioned articles of Paris Convention (1967). The draftsmanship style is totally awkward, tortuous,

112. See Article 2 Paragraph 2.

convoluted, confusing, and unwarranted. The writing style sacrifices clarity, and neither aids comprehension, assists faithful compliance, nor adds any value to TRIPS, or to TRIPS understanding and faithful compliance. TRIPS arduous cross-referencing style defeats a principal necessity that every law must be clear and unambiguous, for easy understanding and even compliance.

Again, focused on *Integrated Circuit* alone, Paragraph 2, Article 2 of TRIPS cross-referenced four different independent international instruments, and provides that Members' existing obligations under each of the referenced instruments shall not be derogated by anything that is contained in Parts I to IV of the TRIPS Article. This is another complicated invocation of several international documents in ways that unduly create avoidable clarity problems, arduously tasks a reader, and unnecessarily hampers comprehension. When this conundrum is combined with the cross-referencing problems identified in TRIPS paragraph 1 of Article 2 above, Article 2 paragraph 2's dilemma swells.

Furthermore, paragraph 1, Article 9 of TRIPS introduced yet another cross-referencing scenario. Article 9 is part of Part II mentioned along with Parts III and IV in paragraph 1 of Article 2. Article 9, paragraph 1, creates other problematic

cross-references that are further complicated the more by a confusing second sentence. Paragraph 1, Article 9 of TRIPS mandates members compliance "*...with* ***Articles 1 through 21 of the Berne Convention (1971) and the Appendix*** *thereto. However,* ***Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6 b.i.s. of that Convention*** *or of the rights derived therefrom.*"[113] This is yet another instance of burdensome cross-referencing arrangement that unduly squanders lucidity and understanding. TRIPS writing technique complicates the instrument, creates ambiguities, hinders comprehension and compliance, and militates against TRIPS becoming that "*...effective and expeditious procedure for the multilateral prevention and settlement of disputes ...*"[114] as promised.

It will be naïve to assume that any of the above blunders came about by accident, arose out of craftsmanship incompetence, or are necessitated by compromise. Any assumptions of accident, ineptness, or exigency of compromise will be defeated on two grounds. Firstly, the quality of professional expertise and resources available to TRIPS sponsors are top notch. They are therefore above any petty craftsmanship errors. Secondly, careful study shows that there is a tailored pattern to TRIPS

113. See Article 9 paragraph 1.
114. See TRIPS Preamble, ***Stanza (d).***

madness that raises reasonable suspicion of calculated bad faith. Key policies TRIPS set out zealously to propagate are all written in very lucid, succinct, plain, and easy to understand styles. Most of the provisions, or crucial portions of them, are spared the confusing cross-referencing to other independent instruments. An example is TRIPS paragraph 2, Article 1 which in clear language imposes western peculiar definition of intellectual property. See also Article 8 which lucidly restricts Members' rights to adapt patent laws to suit their unique circumstances, Article 27 (1) which effectively imposes restrictive definition on what constitutes *'patentable subject matter'*, Article 28 which imposes stringent definition of *'exclusive rights'* conferred by patent, Article 29 that deals with universal standard of how a patent applicant should disclose the invention, Article 30 that sets the exceptions to rights conferred by patent, Article 31 which is about the longest article in the entire TRIPS, Article 32 as well as Article 33 which set the duration of patent protection to twenty years, Article 34 which upstaged burden of proof in patent process infringements suits, Article 36, Article 40, and Articles 41 to 50. The common trend observed here is that each of the above provisions is written in plain and lucid language, and contains little or no cross-references, unlike the rest of TRIPS other provisions that appear to be intentionally jumbled to confuse. On close observation also, it appears that all the aforementioned lucid provisions

coincidentally favor only the plaintiffs in patent infringement litigations. That is the kind of hidden motive that propels legislative infidelity.

2.5 **Post-Adoption Controversies That Trail TRIPS; Stirring the Hornet's Nest.**

TRIPS continued to provoke discord on many fronts even after it came into force. The Agreement's post-adoption controversies are many and varied, and the line of hostility remains mostly between the western nations and developing countries. One of TRIPS earliest disputes that went to WTO's international arbitration tribunal was between the United States and India.

The case became known as ***India Drug Patent Controversy***.[115] Summary of ***facts of the case*** explained the matter in controversy. India as TRIPS signatory had not within the grace period enacted TRIPS mandated domestic legislation necessary for granting patents to pharmaceuticals. United States filed a ***complaint with the WTO*** alleging, *inter alia*, that India's failure to craft legislation designed to permit patent protection for qualifying pharmaceuticals violated India's duties under TRIPS. ***The dispute arose three years after TRIPS adoption***. India defended on

115. See the *Report of the Panel on India – Patent Protection for Pharmaceutical And Agricultural Chemical Products*, (1997) WT/DS50/R (September 5, 1997); ***also summarized*** in Long and D'Amato, (2000), A Coursebook in International Intellectual Property, 365, 366 and 367.

the grounds, *inter alia,* that Articles 65 of the Agreement allowed TRIPS members a *five year grace period* within which to develop complying legislation. The United States disagreed, contending that Article 65 required ***legislation to be in place*** so that India would be in compliance immediately upon the termination of the grace period. Prior to reaching its final decision, the WTO Panel first decided to resolve what it called interpretation issue, thus; *"[b]efore examining specific measures in dispute, we first deal with a general interpretative issue, namely standards applicable to interpretation of the TRIPS Agreement..."* Continuing, the panel stated that; "... *the TRIPS Agreement* ***must be interpreted in good faith*** *in light of (i) the ordinary meaning of its terms, (ii) the context and (iii) its* ***objective and purpose****. In our view,* ***good faith*** *interpretation requires the* ***protection of legitimate expectations*** *derived from the protection of intellectual property rights provided for in the Agreement...*" The Panel also stated that "...*the TRIPS Agreement...* ***occupies a relatively self-contained, sui generis status in the WTO Agreement*** *... which itself builds upon the experience ... under the General Agreement on Tariffs and Trade 1947...*" Before reaching its final decision, the Panel further asserted that *"[s]ince the TRIPS Agreement is one of the Multilateral Trade Agreements, we must be guided by the jurisprudence established under GATT 1947 in interpreting the provisions of the TRIPS Agreement* ***unless there is a contrary provision****... The* ***protection of legitimate expectations of Members***

regarding the conditions of competition is a well-established GATT principle... The protection of legitimate expectations is central to creating security and predictability in the multilateral trading system.... ***In conclusion,*** *we find that, when interpreting the test of the TRIPS Agreement, the legitimate expectations of WTO Members concerning the TRIPS Agreement must be taken into account, as well as standards of interpretation developed in past panel reports in the GATT framework, in particular those laying down the principles of the protection of conditions of competition flowing from multilateral trade agreements."*[116]

The WTO Panel gave its final judgment to the United States, using some questionable legal theories.

The WTO tribunal disregarded the facts of the case, fudged the law, and resorted to fancy moral rectitude in giving judgment to the United States. The tribunal invoked some nebulous ethical phrases like "*good faith,*" "*context,*" "*object and purpose,*" "*legitimate expectations of Members,*" "*protection of legitimate expectations,*" and "*creating security and predictability in the multilateral trading system.*" However, similar moral compass was not invoked to balance disparate interests when TRIPS

116.See India Patent Controversy ibid.

was crafted. TRIPS that is tainted with bad faith, in intent and purpose as well as in form and substance, was dressed up in immaculate moralistic garb by the tribunal. Indeed, contrary to the tribunal's final judgment in the ***Indian Drug Patent Case***, paragraphs 1, 2, 3, and 4 of Article 65 upon which the tribunal purported to base its decision, clearly support India's position that India still had two more years in the grace period within which to alter its laws to conform to TRIPS. United States lacks the ***legal standing*** to dictate to India how to utilize the grace period prescribed by TRIPS. Article 65 relied upon by the United States, and upon which the tribunal based its decision, does not require that India or any other TRIPS member write the required laws in advance, nor take any particular steps in order to be in compliance immediately after the grace period. WTO tribunal's decision in favor of the United States, in the circumstances, is wrongful. The tribunal's decision was also reached ***per incuriam.*** This is because the tribunal unjustifiably based its decision on what it called "*... the jurisprudence established under GATT 1947 in interpreting the provisions of the TRIPS Agreement* ***unless there is a contrary provision***..."[117] Bottom is knocked off the tribunals' judgment because TRIPS indeed has ***contrary provisions*** that the tribunal ignored. TRIPS contrary provisions that the tribunal ignored include freedom of choice provisions contained in both Article 1, and Article 41, paragraph 5, which give discretion to TRIPS

117. See; *India Patent Controversy* supra at page 68

members on matters of choice of appropriate domestic legal system. Article 65, read together with Article 1 and Article 41 paragraph 5, strongly supports India's case in the ***India Patent Controversy***.

2.6 **Scholarly Angle to TRIPS Controversies.**

TRIPS post-adoption controversies transcends political rancor and judicial panels. Learned academics and authors also waded into TRIPS fray, some of them very forcefully. Scholarly spats over TRIPS also appear to run along the divide of developed versus developing nations. While most academic opinions from western nations extol TRIPS and even demand more coverage and stringency, voices from the other side of the divide rile at the Agreement in very strong terms. The following two examples paint vivid pictures of scholars' polarized positions over TRIPS, along the line of developed and developing nations. Views *favorable* to TRIPS are represented by this extolling passage.

"The adoption, in April 1994, by over 118 countries of the Agreement on Trade Related Aspects of Intellectual Property Rights ranks as one of the most significant developments in international intellectual property law of the Twentieth Century. Indeed, there are many that rank TRIPS as the most important development. There is no question that the post TRIPS world is a different place. TRIPS provides a forum for continuing international attention to the issues of IPR. For the first time in the history of international intellectual property relations, TRIPS (administered by the WTO) has provided potentially powerful international sanctioning tools for assuring compliance with TRIPS obligations. It has codified as an international standard, adoption of the rule of law for intellectual property legal regimes. It has served to fill many of the gaps in definition that previous multinational regimes left

vacant. And last, but by no means its least important achievement, TRIPS has established a minimum enforcement norm that requires countries to provide minimum procedural safeguards to assure enforceability of the minimum rights required under the treaty. These enforcement provisions, combined with the sanctioning power of the World Trade Organization (WTO), for treaty violation, promise to re-work the face of international intellectual property law."[118]

Above view is not clear on specifics of what it claims TRIPS got right. The opinion seems to have been expressed without sufficient study of TRIPS exact provisions. I vehemently disagree with the opinions expressed in the above article. My opposition to the article is predicated upon TRIPS shortfalls I already discussed earlier in my analysis of TRIPS, and upon my agreement with views opposed to TRIPS, represented by the opinion passionately expressed below.

Views critical of TRIPS strongly condemn the Agreement as an imperialistic plot that imposed Western intellectual property laws on the rest of the world. Academic view opposed to TRIPS is represented by ***Marcia A. Hamilton's*** poignant article published soon after TRIPS adoption. This author's incisive criticism takes a copyright perspective in vilifying TRIPS. According to Marcia A. Hamilton;

118. See, Long and D'Amato (2000), 356, supra, at page 68.

"The WTO/GATT Agreement involving Trade-Related Aspects of Intellectual Property Rights (Agreement or TRIPS) is a lot more than its moniker reveals. Far from being limited to trade relations, correcting the international balance of trade, or lowering customs trade barriers, TRIPS attempts to remake international copyright law in the image of Western copyright law. If TRIPS is successful across the breathtaking sweep of signatory countries, it will be one of the most effective vehicles of Western imperialism in history. Moreover, the Agreement will have achieved this goal under the heading "trade-related," which makes it appear as though it is simply business. To understand TRIPS, it is important to embrace an interdisciplinary approach, to widen the copyright lens to include culture, politics, and human rights. Despite its broad sweep and its unstated aspirations, TRIPS arrives on the scene already outdated. TRIPS reached fruition at the same time that the online era became irrevocable. Yet it makes no concession, not even a nod, to the fact that a significant portion of the international intellectual property market will soon be conducted on line. This silence could transform a troubling treaty into a weapon of extortion by the publishing industry, which has already succeeded in crafting TRIPS as a blunt instrument for copyright protection. While the corporeal universe has permitted Western societies to receive and copy large numbers of copyrighted works for free—through libraries, commercial browsing, personal lending, and copyright doctrines such as the first sale doctrine, fair use, and the idea/expression dichotomy, the on-line era raises the possibility that the publishing industry can track every miniscule use of a work and thereby turn the free use zone into a new opportunity for profit. TRIPS' silence threatens to make it both outdated and overprotective."[119]

Marcia Hamilton's condemnation of TRIPS is insightful, apposite, and warranted. Such strong opposition appropriately arises from TRIPS decadent policy thrust. The author argued further below that the imposition of western intellectual property tradition on the rest of the world by TRIPS, without regard to differences

119. See; Hamilton, Marcia A. (1996), *'The TRIPS Agreement: Imperialistic, Outdated, and Overprotective.'* 29 Vand. J. Transnat'l L. 613; ***See also*** Long and D'Amato (2000), 361 and 362, supra, at 68.

in culture, politics, and beliefs, truly amount to modern imperialism. Added to problems of TRIPS imperialistic gravitation, forcing nations to forsake their cultures, abandon their individualities, surrender their independence, undermine domestic laws, and enact mostly adversarial laws that reflect TRIPS' unfitting prescriptions constitute potent recipe for universal rhythm of cynicism against compliance and enforcement of TRIPS. Even with the best of intentions and efforts, nations will still lag in meeting TRIPS strange and unjust prescriptions for protecting intangible intellectual property rights.

Describing a similar situation on China's nagging predicament in fulfilling her obligations under TRIPS-like intellectual property protection treaty China signed with the United States before the advent of TRIPS, Professor William Alford noted the implications of imposing own laws without regard to cultural differences, thus;

"*...laws premised on the values and institutions of an economically advanced capitalist democracy will not generate identical results when transplanted to a different setting. Rules that presume an independent judiciary, a professionalized bar, powerful interest groups and a rights-conscious populace fall chiefly on deaf ears in contemporary China.*"[120]

120. See; William P. Alford, *(1992)*,'*Pressuring the Pirate*', L.A. Times, Jan. 12, 1992, at M5, ***cited*** in published article by Glenn Butterton, *(1996)*, 38 Ariz. L. Rev. 1081.

Professor Alford's description of China's compliance dilemma may be sprinkled with traditional American pride, but the learned professor made a great point that imposition of laws without regard to societal differences would always hit a brick wall. Amplifying the same subject, Glenn Butterton who concurred with Professor Alford to a large extent, more succinctly predicated China's compliance quandary with the same TRIPS-like treaty to cultural dissimilarities. He put his view thus;

"*...[i]n its simplest terms, the chief thrust of the explanation from culture is that China has historic-cultural roots that are profoundly different from our own, and that,* ***therefore, we cannot enter into agreements based almost exclusively on our own complex theories of property right, with all of the alien economic and cultural baggage they entail, with any reasonable expectation that they will succeed.***"[121]

Glen Butterton is absolutely correct. Butterton's educated view expressed prior to TRIPS negotiation, contain germane concerns that were regrettably overlooked when TRIPS was formulated.

The profundity and scope of Marcia A. Hamilton's culture-based criticism of TRIPS compel the temptation to reproduce more of her erudite treatise. Continuing

121.See; Glen Butterton at ***footnote*** 120, supra at page 75.

with her blunt admonishment of TRIPS, the learned author argued that;

"[t]he cultural underpinnings of existing copyright law require a reevaluation to assess their appropriateness and usefulness in building a universal copyright scheme. The subject of the AALS Symposium, the TRIPS Agreement, is the first giant step towards globalization of intellectual property rights. Globalization introduces a new level of complexity into copyright law and creates a need for more creative ways of understanding and justifying rights protected by copyright. The United States is no longer negotiating primarily with European countries that share a similar moral and religious heritage and economic understandings. Now, the United States is also dealing with the Eastern countries as well as with the world's developing countries. Therefore, focus on copyright must extend beyond markets and trade issues to interdisciplinary understandings. Cultural views on human efforts and reward are particularly important. With 117 signatory countries from around the world, TRIPS is ambitious to say the least. It is also old-fashioned, Western-style imperialism. One commentator describes the TRIPS Agreement as "impolite." This description is too polite. Despite its innocuous name, TRIPS does not merely further trade relations between these many countries. Rather, TRIPS imposes a western intellectual property system across-the-board—which is to say that it imposes presuppositions about human value, effort, and reward. And it has appeared without serious public debate over its latent political mission. It is not surprising that there might be uneven compliance across the world even after so many countries signed the TRIPS Agreement. Intellectual property is nothing more than a socially-recognized, but imaginary, set of fences and gates. People must believe in it to be effective."[122]

Hamilton's opinion exemplifies the passionate scholarly views that stack-up against TRIPS. Though Hamilton's criticism focused primarily on copyright aspect of TRIPS' flaws, the criticism is equally true for all the other branches of

122. See Hamilton, Marcia A. p. 362, supra at page 74.

intellectual property. Hamilton concluded her reprove this way;

"...By strongly supporting the TRIPS Agreement, the United State—which is to say U.S. publishers—is exporting and imposing Protestant-based capitalism. The United States is also endorsing the imposition of a revolution-tending construct of the person. Individualism, as captured in the Western intellectual property system, is the sine qua non for a society to recognize and honor personal liberty. TRIPS is nothing less than freedom imperialism ..."[123]

The renowned Nobel Prize laureate, and professor of Economics, Professor Joseph Stiglitz, also threw his eminent hat into the TRIPS ring, siding with truth as always. He singled out the Uruguay round of TRIPS negotiations as the focus of his concise view on TRIPS. Professor Stiglitz posited that;

"[t]he Uruguay Round also strengthened intellectual property rights. America and other Western drug companies could now stop drug companies in India and Brazil from "stealing" their intellectual property. But these drug companies in the developing world were making life-saving drugs available to their citizens at a fraction of the price at which the drugs were sold by the Western drug companies. There were thus two sides to the decisions made in the Uruguay Round. Profits of the Western drug companies would go up. Advocates said this would provide them more incentive to innovate; but the increased profits from sales in the developing world were small, since few could afford the drugs, and hence the incentive effect, at best, might be limited. The other side was that thousands were effectively condemned to death, because governments and individuals in developing countries could no longer pay the high prices demanded. In the case of AIDS, the international outrage was so great that drug companies had to back down, eventually agreeing to lower their prices, to sell the drugs at cost in late 2001. But the underlying problem—the fact that the intellectual property regime established under the Uruguay Round was not balanced, that it overwhelmingly reflected the

123. Hamilton, Marcia A., 363, ibid

interests and perspectives of the producers, as opposed to the users, whether in developed or developing countries—remains."[124]

Evidently, TRIPS is an unfair Agreement. The driving force behind TRIPS is imposition of will and culture with the specific aim to redouble economic aggrandizement by TRIPS sponsors. In its totality, TRIPS eloquently exemplifies legislative infidelity and the use of law for instrumentality of furthering undue economic advantage and exploitation.

Next, I will very briefly examine TRIPS failure to extend protection to long exploited intellectual property rights of the indigenous peoples and local communities of the world.

2.7 **TRIPS Neglect of the Property Rights of Indigenous Peoples and Local Communities; Another Face of Legislative Infidelity.**

Continued neglect of intellectual property rights of the indigenous people and local communities vividly portrays partiality in the jurisprudence of international economic order. TRIPS squandered a rare opportunity to extend protection to the traditional knowledge of indigenous and local communities which have been the target of wanton exploitations from time beyond memory. Protection of the

124. See; Stiglitz, J.,(2002), Globalization and its Discontents, 7 and 8.

indigenous and local communities' rights to their natural resources and know-how suffers neglect under the western concept of property rights. International communities' constant equivocations on persistent infringements of indigenous peoples' property rights have spurred numerous agitations from the victims and their growing international army of sympathizers. For many years, the topic of protection and preservation of indigenous peoples' property rights remained fringe subjects that elicited mostly dubious empathy and unfulfilled international promises. But, indigenous people persevered in their campaigns. Despite all the indigenous peoples' familiar struggles, TRIPS yet neglected to provide protection to indigenous peoples' rights over their resources and know-how. International campaigns continued to demand recognition and protection for indigenous peoples and local communities' property rights. Some of the notable campaigns include the following, amongst others;

2.7.1 **The Bellagio Declaration.**

Bellagio declaration was made in a well attended Conference held in Bellagio, Italy, on March 11, 1993, demanding recognition of indigenous peoples' intellectual property rights.[125]

125. See,Bellagio Declaration of March 1993, ***reproduced in*** Long and D'Amato (2000), 1025, supra, at page 68

The declaration was made over one year before TRIPS. The well attended Conference attracted a large group of people from many nations, professions and disciplines. The declarants included lawyers, literary critics, computer scientists and publishers, teachers and writers, environmentalists and scholars of cultural heritage who shared a common concern about the effects of international regime of intellectual property law on their communities, on scientific progress and international development, on environment, and on the culture of indigenous people.[126]

Bellagio Declaration stated in its first three, and last, paragraphs as follows;

*"[f]**irst**, intellectual property laws have profound effects on issues as disparate as scientific and artistic progress, biodiversity, access to information, and the cultures of indigenous and tribal peoples. Yet all too often those laws are construed without taking such effects into account, constructed around a paradigm that is selectively blind to the scientific and artistic contributions of many of the world's cultures and constructed in fora where those who will be most directly affected have no representation..."*[127]

*"...**Second**, many of these problems are built into the basic structure and assumptions of intellectual property. Contemporary intellectual property law is constructed around a notion of the author as an individual, solitary and original creator, and it is for this figure that its protections are reserved. Those who do not fit this mode—custodians of tribal culture and medical knowledge, collectively practicing traditional artistic and musical forms, or peasant cultivators of valuable seed varieties, for example-are denied intellectual property protection..."*[128]

126. See Bellagio Declaration, ***reproduced in*** Long and D'Amato (2000), 1025, supra, at 68
127. Bellagia Declaration, 1025, ibid
128. Bellagio Declaration, 1026, ibid

*"...**Third**, a system based on such premises has real negative consequences. Increasingly, traditional knowledge, folklore, genetic material and native medical knowledge **flow out** of their countries of origin unprotected by intellectual property, while works from developed countries **flow in**, well protected by international intellectual property agreements, backed by the threat of trade sanctions..."*[129]

*"...**In conclusion**, we declare that in an era in which information is among the most precious of all resources, intellectual property rights cannot be framed by the few to be applied to the many. They cannot be framed on assumptions that disproportionately exclude the contributions of important parts of the world's community. They can no longer be constructed without reference to their ecological, cultural and scientific effects. We must reimagine the international regime of intellectual property..."*[130]

Regrettably, and totally ignoring the foregoing, TRIPS concluded on 15 April 1994 – one year and one month after the well publicized Bellagio Declaration - persisted in neglecting the intellectual property rights of indigenous peoples and local communities of the world.

2.7.2 Scholarly Writings on the Neglect of Property Rights of Indigenous Peoples and Local Communities.

Other noteworthy efforts made in the campaign for the recognition of intellectual property rights of the indigenous peoples come by way of numerous scholarly writings. An exemplary scholarly writing is titled "***The Biotech Controversy of***

129. Bellagio Declaration, ***reproduced in*** Long and D'Amato (2000), 1026, supra at page 81.
130. Bellagio Declaration, 1027, ibid

Seeds and Shamans; The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities."[131]The author vigorously canvassed the "inventions" of the indigenous people and local communities that have been exploited and denied recognition by western interests and western system of property right. She argued that patent rights over traditional know-how are often granted to western corporations and other entities who then turn around and exploit the original owners of such patentable inventions. The writer cited several life examples to substantiate the claims. According to this author,

"[i]ndigenous and local communities have a long history of using plants for almost all needs, including food, shelter, clothing, and medicine. Common remedies used today were often first developed by healers prior to contact with industrial societies. Yet, although many of today's drugs and cosmetics originated from the stewardship and knowledge of indigenous and local communities, that knowledge remains unrecognized and unvalued until appropriated from those communities by Western corporations or institutions."[132]

The author, ***Naomi Roht-Arriaza***, went on to enumerate several cultural "inventions" of the indigenous societies that were "stolen" and patented by foreign corporations and entities, without compensating or acknowledging the

131. See Roht-Arriaza, Naomi, (1996),'*The Biotech Controversy of Seeds and Shamans; The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities.*'17 Mich. J. Int'l L. 919.
132. Roht-Arriaza ibid.

original "inventors". Some of Ms. Roht-Arriaza's examples include the well-known ***cure for malaria***, ***quinine***, which she noted come from the bark of the ***Peruvian cinchona tree***.[133] According to the author, ***Andean indigenous groups*** long used quinine as a c***ure for fever***, allegedly discovering the bark's powers after observing feverish jaguars eat them.

Another example this author cited is the ***rosy periwinkle plant***, ***unique to Madagascar***, found to contain properties that ***combat certain cancers***.[134] According to the author, ***anti-cancer drugs vincristine and vinblastine*** have been developed from the periwinkles, resulting in $100 million in annual sales for Eli Lilly and virtually nothing for Madagascar.

Next is the ***Neem tree*** which ***indigenous farmers in India*** have used the leaves and seeds for thousands of years as ***natural insecticide***. [135] Juice from the tree has also been used to prevent scabies and other skin disorders. The villagers still scrub their teeth with *neem* twigs. The author argued that several patents have now been granted in the United States and other industrialized countries for products based

133. Roht-Arriaza, supra at 83
134. Roht-Arriaza, ibid
135. Roht-Arriaza, ibid

on the *neem* plant. A U.S.-based big corporation, W.R. Grace, received a patent for insecticide based on active ingredient derived from *neem*, stating that it does not intend to compensate anyone. The corporation's V.P., Martin B. Sherwin dismissed Indian peoples' discovery and development of the plant uses as "folk medicine"[136].

Again, according to Ms. Naomi Roht-Arriaza, University of California and Lucky Biotech, a Japanese corporation, recently obtained a patent for a ***sweetening protein*** derived naturally from two ***African plants, katampfe and the serendipity berry***.[137]These plants have long been used by African peoples for their sweetening properties. ***Thaumatin***, the substance that makes katempfe sweet, is 2,000 times sweeter than sugar yet calorie-free. Although any transgenic plant containing the derived sweetening proteins would be covered by the patent, no arrangements have been made to return part of the benefits to the African communities, the author wrote.

136. Roht-Arriaza, ibid.
137. Roht-Arriaza, ibid.

The author's last two examples of indigenous peoples and local communities' knowledge unduly appropriated are ***barley gene*** and ***colored cotton***. Ms. Roht-Arriaza disclosed that the barley gene that ***confers resistance to the yellow-dwarf virus*** is the product of centuries of breeding and cultivation by ***Ethiopia farmers***.[138] That, U.S. farmers and scientists who patented this barley variety received substantial profits from its current cultivation in the U.S., but the Ethiopian farming communities that originally developed the variety received nothing.

For the ***colored cotton***, the author disclosed that in 1990, scientist Sally Fox of California received a U.S. patent for colored cotton.[139] According to Ms. Roht-Arriaza, the patent is economically significant because multinational corporations, such as Levi Struss and Espirit, want environmentally friendly materials like naturally colored cotton for their clothes. But, unfortunately, credit for the "invention'' of colored cotton was denied its true developers. She revealed that the seed for Sally Fox's patented cotton came from a United States Department of Agriculture collection obtained by Dr. Gus Hyer during his travels in ***Latin America***. That colored cotton resulted from centuries of breeding and cultivation by Latin American indigenous groups. She further stated that even now, 15,000

138. Roht-Arriaza, ibid.
139. Roht-Arriaza, ibid.

indigenous farmers grow colored cotton, and over 50,000 indigenous women still spin and weave it. But, that Fox's patent directs all profits to her, and nothing to these indigenous inventors and cultivators.

Ms. Naomi Roht-Arriaza then explained that there is a systematic method used in exploiting the knowledge and resources of the indigenous peoples. She identified the methods and mechanisms used in appropriating indigenous knowledge and resources, and summed it up as "*...the construction of conceptual and legal categories of valuable knowledge and resources that systematically exclude the knowledge and resources of local communities, farmers, and indigenous peoples.*"[140]

The author further explained that the '*construction of exclusion*' takes several forms, and categorized it into three main forms. According to her,

"*[f]**irst**, Western science characterizes certain natural materials that indigenous and local communities have cared for, preserved, improved, and developed as mere "wild" species or, at the most, as "primitive species"(commonly known as "landraces"). Formal, scientific systems of innovation and research have therefore ...denigrated and denied the value of indigenous and subsistent farmers' informal systems of knowledge-transmission and innovation. **Second**, while the products of*

140. Roht-Arriaza, ibid.

formal knowledge systems have been protected as "property," those of informal, traditional systems have been tagged the freely available "common heritage of humanity." In particular, patentability under current intellectual property law is systematically biased against the innovations and knowledge of indigenous and farmers' communities. ***Finally,*** *the products of indigenous and local communities' knowledge have been detached from their ecological and sociocultural base through removal and preservation in Northern-dominated ex situ collections and projects, while the knowledge underlying the products attains merely anthropological interest. Thus Western science and industry treat the living knowledge of existing indigenous and local communities as "quaint," "quackery," or "quits,"...*"[141]

Concluding, Ms. Naomi Roht-Arriaza argued that to a large extent these tangible resources exist in their current form thanks to the applied knowledge of indigenous and local communities, knowledge uniquely gained from conserving and often improving resources for specific purposes. That, for these communities, the differences between intellectual, cultural, and material property are artificial, that they are part of the communities' heritage.

Numerous efforts invested in trying to end the unjust exploitation of indigenous and local communities' traditional property rights are well documented, and well known in the international arena. Both the unjust exploitations and the fights against them have been going on for a very long time that the international community is well aware of them. Yet, TRIPS spared not even a mere nod at the

141. Roht-Arriaza, ibid.

indigenous and local communities' traditional property rights. Again, oversight cannot be the excuse here. If TRIPS intention was honest, examples cited by Ms. Naomi Roht-Arriaza's would have been enough to attract TRIPS attention, and compel TRIPS protection of the knowledge and common heritage of the indigenous peoples and local communities. TRIPS let down of the indigenous peoples and local communities is willful and inexcusable, and consistent with the regime of legislative infidelity and use of law for instrumentality of economic exploitation that prevail in international law.

2.8 UNCHR Sub-Commission on Prevention of Discrimination and Protection of Minorities; An Effort that was Aborted.

Interestingly, on 26 August 1994, one year and five months after Bellagio Declaration, and four months after TRIPS was adopted in Marrakesh, United Nations Commission on Human Rights Sub-Commission on the Prevention of Discrimination and Protection of Minorities, adopted a ***Draft Declaration*** on the Rights of Indigenous Peoples.[142]

142. See UN Doc. E/CN.4/1995/2; e/cn.4/SUB.2/1994/56 (28 October 1994); ***reprinted in*** (1995) 34 I.L.M. 541 and 3 Weston and Carlson III.F.4; ***See also*** Weston, Falk, etal, (2006), Supplement of Basic Documents to International Law and World Order, 4th 795, Doc. 3.43.

The draft declaration contain the first significant progress in the long journey to win due recognition to the neglected intellectual property rights of the Indigenous peoples and local communities.

Text of the Draft Declaration *affirmed that indigenous peoples are equal in dignity and rights to all other peoples.*[143] The Draft Declaration expressed concern that indigenous peoples have generally been mistreated resulting, inter alia, in their colonization and dispossession of their lands, territories and resources, and thereby prevented them from exercising their right to development in accordance with their own needs and interests.[144] The Draft Declaration emphasized that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples.[145] Paragraph (b), Article 7 of the Declaration provides that indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for "*...[a]ny action which has the aim or effect of dispossessing them of their land, territories or resources...*"[146] Indigenous peoples right to their traditional medicines and health practices, including the right to the protection of vital

143. See first paragraph of preamble to Bellagio Declaration.
144. See paragraph five ibid.
145. See paragraph seventeen ibid.
146. See Article 7 paragraph (b) of Draft Declaration, supra at page 89

medicinal plants, animals and minerals were recognized and preserved in Article 23 of the Draft Declaration. Article 29 specifically provided for indigenous peoples entitlement to the recognition of the full ownership, control and protection of their cultural and intellectual property. The draft document also provided several other basket of civil, economic and human rights' privileges to the indigenous peoples.

For all its fanciful provisions, however, the Draft Declaration remained just a symbolic draft that never had any practical beneficial impact on the rights of the indigenous people. The Draft Declaration, if it had become a binding authority in international law, would not have made much difference, anyway, since it will not govern intellectual property rights and obligations. TRIPS exclusively governs all international intellectual property rights, along with the Berne and the Paris Conventions. None of the rules and Conventions governing international intellectual property recognizes and protects property rights of the indigenous and local communities. TRIPS, for all its fanfare, also did not deem it necessary to recognize property rights of indigenous peoples and local communities. The UN Sub-Commission's Draft Declaration came late, was worth very little when it arrived, and for all intents and purposes, still remained meaningless to the economically plundered indigenous peoples and local communities of the world.

2.9 U.N. General Assembly Resolution 61/295; Real Solution that Fell Short.

In a remarkable turn of events that has more political significance than actual tangible proprietary benefits to the indigenous peoples, UN General Assembly, in September 2007, passed Resolution 61/295, a sweeping resolution.[147]Resolution 61/295 provides extensive protection to the rights of indigenous peoples, in tangible ways that have never been done before. The resolution resembles an improved version of the earlier Draft Declaration of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, but also has the added benefit of being a UN General Assembly Resolution.

Though Resolution 61/295 has the potential to boost recognition of indigenous peoples' rights, it nevertheless appears to still amount to little, for two reasons. First, in reality, TRIPS regulates international intellectual property rights and, in the conflict that now appears to exist between TRIPS and Resolution 61/295, TRIPS would likely trump General Assembly resolution. In the circumstances, the bouquet of rights and protections Resolution 61/295 provided for the indigenous people still remain merely promissory.

147. See U. N. (2007), '*Declaration on the Rights of Indigenous People*'; Adopted by General Assembly Resolution 61/295 of 13 September 2007, Official website of the UN at http://www.un.org/esa/socdev/unpfii/en/drip.html (01/2011)

Second, unfortunately, UN General Assembly resolution, though momentous, does not possess binding force like Security Council Resolutions, and cannot be enforced. Nevertheless, Resolution 61/295 is a monumental achievement for the indigenous people in the tenacious quest for their many denied rights. The resolution, without doubt, has laid a path in international law that will eventually inch indigenous people closer to their promised land – and would one day end their long and torturous journey to economic liberty that has suffered series of setbacks.

2.10 **Conclusion.**

In final conclusion of my illustration of legislative infidelity in international economic order, I reiterate that IMF, World Bank, and their respective Articles of Agreements, as well as the World Bank Guidelines for Treatment of Foreign Direct Investment, ICSID Convention, ICSID Tribunals, and TRIPS, are all veritable instruments skillfully designed to effectuate targeted exploitations of poor and weak nations of the world. The disingenuous style used in designing these instruments is what I characterized as legislative infidelity and use of law for instrumentality of advancing undue economic advantage, exploitation, and fraud. It is also my contention that this international method of legislative infidelity has surreptitiously permeated the domestic jurisprudences of many developing nations, with dire economic, social, and political consequences. My ultimate argument is

that Nigeria is one of the developing nations suffering from pandemic of legislative infidelity. And, that Nigeria's chronic case of legislative infidelity is directly responsible for the 2008 crash of the Nigerian stock market.

CHAPTER 3

Legislative Infidelity and N8.1tn ($60bn) Crash of Nigeria Stock Market; Analysis of a Premeditated Securities Fraud.

~Part 1~

3.1 **Introduction.**

2008 cataclysmic implosion of Nigeria stock market is profoundly shocking. The amount of losses that resulted from the crash broke world record. And, actions of Nigerian market authorities and government, before, during, and after the crash, raise concerns. Circumstances of the Nigeria stock market crash suggest that the event was not a fortuitous tragedy, but a carefully planned and well executed securities scheme. Evidence point to the crash being Nigeria's version of the '***hot money cycle'*** *scheme* an eminent Columbia University Professor, World Bank former Chief Economist *cum* Senior Vice President, and two-time Nobel Prize laureate in Economics accused IMF, World Bank, and colluding local officials, of precipitating in developing countries. Reporting Professor Joseph Stiglitz's interview on a *four-step method used by IMF and World Bank to destroy economies of developing countries*, a London newspaper wrote that;

"...After privatisation, ***Step Two is capital market liberalisation.*** *In theory this allows investment capital to flow in and out. Unfortunately, as in Indonesia and Brazil, the* ***money often simply flows out.*** *Stiglitz calls this* ***the 'hot money' cycle.*** *Cash comes in for speculation in real estate and currency, then flees at the first whiff of trouble. A nation's reserves can drain in days...."*

And when that happens, to seduce speculators into returning a nation's own capital funds, the IMF demands these nations raise interest rates to 30%, 50% and 80%.

'The result was predictable,' said Stiglitz. Higher interest rates demolish property values, savage industrial production and drain national treasuries…"[148]

As already noted[149], Nigeria stock market was proclaimed world best performing market in the last quarter of 2007.[150] In March 2008 the total market capitalization peaked at N21.4tn ($150bn).[151]The spectacular performance was neither supported by sound economic *foundation* nor by positive market *fundamentals*. The stellar performance was totally strange. In particular, Nigerian capital market's regulatory framework and structural arrangement display arrays of defects that the market's spectacular performance could not have been bona fide. Inadequacies that exist in the elemental framework of Nigeria stock market, and circumstance of the market's frenzied surge and precipitous crash, indicate that factors other than real *market forces* were at play.

Eventually, the hands that created the *surge* in Nigeria stock market harvested their reward, and the market capitulated with astonishing vehemence, triggering an

148.See The London Observer, Sunday 29 April 2001, at http://www.guardian.co.uk./business/2001/apr/29/business.mbas (01/2011)
149. See Page 1 of Chapter 1, supra.
150. See Bloomberg official website at http//www.bloomberg.com/apps/news?pid=newsarchive&sid=aSechJpKP2yo (08/10)
151. Bloomberg ibid.

avalanche of crashes. Stock prices tumbled down with *bearish* alacrity, resulting in cataclysmic implosion of Nigeria stock market. Just between March and May 2008, Nigeria stock market lost 75% of its All Share Index (ASI) and total market capitalization.[152] That translates to an initial loss of over N8 trillion (eight trillion Naira) ($60 billion), investors funds,[153] in just three months. And, the debacle continued. The total market capitalization ultimately bottomed-out at N4.5tn ($31.5bn) from the N21.4tn ($150bn) peak. Ostensibly, Nigeria stock market lost a total of N16.9tn ($118.5bn) from the crash.[154]

Nigeria's mostly smalltime investors were ravaged, and, suffered crushing financial losses.[155] It bears to repeat that most of the victims lost everything including family nest-eggs, personal savings, business capitals, retirement benefits and gratuities, borrowed funds, and anomalous *margin loans* brokerage firms and banks *forced upon* customers to purchase the banks'

152. Note; ***All Share Index*** refers to the *aggregate quantity of shares* traded in a stock market in a given period. ***Total market capitalization*** means the *total value of traded equities* in a given periodic session.

153.See; Bloomberg's report ***republished*** in Nigeria's **Punch Newspaper** of 02/02/2009 titled *'Nigeria stock market losses, highest in the world'*. - Nigeria's market capitalization peaked at **N12.4tn** in March 2008, but fell to **N4.5tn** by end of March 2009.

154.Bloomberg ibid.

155. For Example; See newsreport that former Governor of Ogun State, Nigeria, Chief Shola Osoba, lost N500million ($3.35million) in Nigeria market crash; @ http://odili.net/news/service/2009/feb/14/505.html (12/09)

stocks.[156] Many who sold landed properties and other earthly possessions, and invested the proceeds in the over-hyped stock market lost it all in the crash. It was a painful national calamity. Yet, in a strange twist, Nigerian government simply looked the other way, as the stock market hemorrhaged and the economy collapsed. No official investigation or inquiry was ordered on the crash, till date.[157]

International financial news media[158] rated the crash as the worst of its kind in the annals of financial market history.[159] Global rating agencies downgraded Nigeria financial markets, and rated Nigeria stock market the worst performing market in the world.[160] The scenario played out like a theatrical paradox. Nigeria market rated the world's best performing stock market in late 2007, with N21.4tn ($150bn) market capitalization in March 2008, had by the first quarter of 2009 slumped to the world's worst performing market. The total market capitalization plunged down from N21.4tn ($150bn) to mere N4.5tn ($31.5bn). Beneficiaries of the Nigerian stock market disaster celebrated their success with upsurge of status contest.[161]

156. See news report that His Royal Highness, The Oba of Lagos, lost N850million ($5.66million) personal money in the crash; http://odili.net/news/source/2009/apr/13/424.html (12/09)
157. Note; Absence of official inquiry into the crash of Nigeria stock market means that greater reliance is placed on unofficial sources such as news reports, as resource materials, for facts of the crash.
158. Note; Story of the crash was widely reported in Bloomberg, CNN Money, MSNBC Financial, Wall Street Journal, and many international and local newspapers.
159. See Bloomberg Report @ http//:www.bloomberg.com/apps/news?pid=newsarchive&sid=aSechJpKP2yo (12/2009)
160. Bloomberg, ibid.
161. See News report, soon after the crash, titled- "*Nigerian Bank executives intensify status contest with Private Jets*"; http://odili.net/news/source/2009/feb/20/405.html (12/09)

Usually, when severe financial crisis occur, governments tackle the problem promptly to save their national economies and to protect investors. Governments strive to swiftly unravel underlying causes of financial crisis, and finding solutions. World-over, examples abound of radical financial market reforms that resulted from different governments prompt responses to serious financial crisis. Instances where drastic market crashes provoked dramatic responses from authorities and governments include –Britain 1840[162], U.S. 1933, 1934, 2002, and 2010[163], India 1992[164], Kenya 2007[165], to name just a few. Following the 2008 Kenyan stock market crisis that resulted in total loss of Sh1.9bn (Kenyan Shillings) (equivalence of $77 million) Kenyan government closed down the stock market, and hired PricewaterhouseCoopers to audit and investigate Kenyan stock market.[166] Shocking revelations from PricewaterhouseCoopers' audit and investigation formed the basis for subsequent reforms that were instituted in Kenyan financial markets. Nigeria is a different story. The world's worst securities scheme remained ignored, while many of those who would have been held accountable for the tragedy still hold sway.

162.Note; After South Sea Corporation's scams, then British Parliament enacted the world's first comprehensive Financial Regulation Act, i.e., the English Company Act of 1840. However, Financial Services and Markets Act 2000 applies now in UK.
163.Note; After the Great Depression and 'Enron Scandal' U.S. Congress enacted the revolutionary 1933/34 and 2002 Securities Acts. Also, President Obama's extensive financial market reform of 2010 was enacted after the recent global financial crisis.
164.Note;India responded to its stock market crash of 1990 by enacting the SEBI Act of 1992 which totally transformed India's Stock Market regulation system.
165.Note;Kenyan Govt shot down her stock market and hired PricewaterhouseCoopers to audit and investigate the cause of Kenya's 2008 $77 million stock market crash. Afterwards, changes were enacted in the nation's financial market regulation.
166. Ditto.

3.2 **What Caused Nigeria's N8.1tn ($60bn) Stock Market Crash; Fortuitous Tragedy or an Organized '*Hot Money Cycle*' Scam Scheme?**

The circumstance of Nigeria stock market crash raises suspicion. A suspicion heightened by the strange nature of the market structure in place in Nigeria, the hype unleashed on investors that generated frenzied trading leading up to the crash, the drama of distraction that greeted the crisis, barefaced misinformation and blatant malpractices by market operators, mishandling of the crisis, and the official indifference that trailed the disaster. In many ways, Nigeria stock market crash fits a reenactment in Nigeria of IMF and World Bank's '*hot money cycle*' scheme,[167] with a mix of the epic 1720-1825 crisis in the English 'share market' caused by South Sea Corporation's scams.[168] In many ways too, the Nigerian catastrophe also imitated some elements of events that preceded the 1929 U.S. stock market crash.

Describing the impact of, and some of the reasons for, the 1929 U.S. stock market crash, three notable securities regulation professors jointly wrote that

"[t]he decline in value of outstanding securities was dramatic and painful. For example, the total value of all New York Stock Exchange listed securities declined from a pre-crash 1929 high of $89 billion to $15 billion in 1932...

167.See Footnote 148, at page 96 supra.
168.See Cowless, Virginia (1960), '*The Great Swindle: The Story of the South Sea Bubble*'. ***Cited in*** *1 Cox, Hazen, & O'Neal (2000), Corporation, s.2.2*

....The pre-crash market was driven not by fundamentals, but by speculative frenzy... A significant amount of all investment was on margin, in which an investor borrowed most of the stock's purchase price. There was no limit on the amount of credit that could be extended to an investor for margin trading. Typically, the lender was the brokerage firm, which in turn borrowed the funds from a bank...

Much of the hearings leading up to Congress' enactment of the securities laws was devoted to accounts of trading practices by unscrupulous market manipulators. The hearings produced reports that the bull market of the 1920s was the heyday of the crooked stock pools. These were devices used by brokers and dealers to create a false appearance of trading activity by simultaneously buying the same security they were selling. Innocent investors were attracted to the manipulated stock by its price and volume changes. Eventually, unwitting investors' orders provided all the upward momentum to the stock's price. And, as the price rose, the brokers and dealers behind the scheme dumped their holdings at the higher price created by the unwitting investors' interest...

There also was plenty of evidence that stock prices were adversely affected by false and misleading information and that corporate insiders took advantage of their access to confidential inside information to further their own trading profits. Related to this was the absence of legal compulsion for publicly traded firms to make timely disclosures of material information or to publish even annual financial reports. A further problem was the belief that public corporations were not sufficiently responsive to their owners due to weakness in the proxy solicitation process."[169]

Above scenario describes events that precipitated the 1929 crash of U.S. stock market. In all material particulars, the above setting depicts some of what transpired in Nigeria stock market leading up to the 2008 crash. Except that in Nigeria, worse things actually happened.

170. See Cox, Hillman, and Langevoort, (2006), Securities Regulation Cases and Materials, 5th Ed. 5 and 6.

An attempt to determine the proximate cause of Nigeria stock market crash will begin with the conducts of Nigerian officials, before, during, and after the stock market crash. Thereafter, brief review of few provisions of Nigeria's Investments and Securities Acts (ISA) of 1999 (repealed) and 2007, analysis of Nigeria's abnormal legal framework, and a study of the aberrant structural arrangement foisted on Nigeria capital market, will follow. In the next chapter (***Chapter 3***, ***Part 2)***, the analysis will continue with a review of anomalous power arrangement in Nigeria's securities statutes which allowed Nigerian Investment and Securities Tribunal ('IST' or 'the tribunal') to topple Nigeria's Security and Exchange Commission (SEC). I will also review in the next chapter a few IST judgments and the complicit role the tribunal plays in Nigeria stock market fraudulent scheme. If time and space permit, I will also review therein subsidiary legislations and rules market operators enacted, purportedly, pursuant to Nigeria's principal securities Acts. Otherwise, those matters will be examined later in chapter five (***Part 3)***.

3.3 **Events Associated with the Crash:** Beginning with events that occurred *during and immediately after* the Nigerian market crash, spurious excuses were initially given for the stock market protracted crisis, and the eventual crash.[171] The excuses ranged from bogus global food crisis,[172]to *profit-taking* by investors and

171.Example – news report that 'Dr. Akingbola, CEO Intercontinental Bank blame market crash on careless statements@ http://allafrica.com/stories/200902180188.html (06/2010)
172.See Nigerian Vanguard Newspaper of January 13, 2009; Also reported at http://odili.net/news/source/2009/jan/13/305.html (04/2009).

self-correction by the market. Also, *divestments* and *decoupling* from Nigeria by undisclosed foreign investors whose unidentified home economies were allegedly hit by the then emerging global financial crisis.[173]Not the global financial crisis itself. And, at last, the global financial meltdown itself became the choice excuse for the crash.[174]Each false excuse was accompanied with reassurances that the market would turn around for the better, and that *all* investments were safe.

Equivocation by Nigerian financial market operators and regulators, on the cause of the crash was strange, and sufficient to have attracted government intervention. Oddly too, no attempt was made to temporarily *halt trading* in the sinking market so as to minimize damages to investors. These odd omissions point to culpability.

Actions of financial market authorities *prior to* the market crash also raise concerns. Again, as already noted,[175]just before the market crash, then Governor of Central Bank of Nigeria (CBN), a Harvard trained economist and World Bank protégé, publicly announced that he had devised and put in place sure measures

173. See footnote 21, page 7 of chapter 1, supra.

174. See 'Yar'Adua admits impact of financial meltdown on Nigeria' http://odili.net/news/source/2009/jan/15/413.html(12/09)

175. See page 7, chapter 1, supra.

that would totally insulate Nigeria's economy from impacts of the then burgeoning global financial crisis.[176]Nigeria's apex bank chief publicly assured the people of Nigeria that, under his watch, global financial crisis would never impact Nigeria's economy.[177] To buttress his claims, the CBN Governor claimed that eleven nations had approached him asking to be taught the iron-clad, global financial crisis-proof measures he invented.

The CBN Governor did not name any of the nations that approached him. When Nigeria stock market eventually crashed, the Governor made an about-turn and denied ever promising the nation any insulation from the global meltdown.[178] He contended that he was *misunderstood* (not that he was *misquoted*). He was neither misunderstood nor misquoted. Global financial crisis eventually became the preferred reason for Nigeria stock market crash.[179]

Global financial crisis had nothing to do with the crash of Nigeria stock market.[180] There was *no nexus* between Nigeria stock market and the epicenter of the global

176. See news report '*Global Financial Meltdown: 11 Countries seek Nigeria's safety model, Says Soludo'*. In ***ThisDay*** Newspaper of Sunday, October 12, 2008.
177. See news report 'Global Financial Meltdown, ibid
178.Note; CBN Governor made the surprising denial while explaining a $13.9bn capital flight from Nigeria. See news report in http://odili.net/news/source/2008/dec/5/306.html (12/2009)
179.See President '*Yar'Adua admits impact of financial meltdown on Nigeria'* http://odili.net/news/source/2009/jan/15/413.html(12/2009)
180.Note; Global financial crisis began in U.S. Capital market and spread to other western financial markets that have links with the U.S. market. Most developing markets without such linkages escaped direct hit from the global meltdown. For example see performance of Iraqi stock market (ISX) during the global financial crisis, supra, at pages 10 and 11.

financial crisis for Nigeria market to be so brutally impacted by global financial crisis. No Nigerian company traded in the U.S. or any other major world markets at the time of the global crisis, and vice versa.[181]

At the time Nigeria stock market crashed precipitously, and global financial crisis was wrongly blamed for it, many similarly situated emerging stock markets performed spectacularly well.[182] The *contrarian* performance was squarely attributed to absence of *linkages* between the emerging markets and capital markets of U.S. and other major economies which were the origins and ground-zeros of the global financial crisis.[183]

War-torn, *rag-tag,* Iraqi stock market (ISX), and other similarly insulated emerging stock markets, proved that global financial crisis had nothing to do with the crash of Nigeria stock market.[184]

181. **See** news report; *'Why Foreign Investors Shun Nigeria'*, By Nigerian SEC @ http://odili.net/news/source/2009/apr/12/200.html(11/2009}

182. Note; Iraqi stock market (ISX) became world's most famous contrarian performer amongst markets not linked to U.S. and other major economies.

183. See AP News of 10/12/2008 *"I don't think that the current financial crisis will hurt our economy and especially this market* ***because we are not connected to any of the global markets and we have very few foreign investors,"*** by Omar Mouwaffak – ISX Market Operator. Syndicated in World Business news on MSNBC.Com (12/2010), See also pp. 10 and 11 supra.

184. See Associated Press report of 10/12/2008 that while the rest of the world faced financial meltdown, Iraq Stock Exchange boomed. That the ISX index soared nearly 40 percent during September. The ISX is only **open two hours a day, three days a week** and **brokers track trading activity on the floor with colored markers and white bulletin boards instead of computers.**

3.4 **SEC Board's Trips to U.S.:** Nigerian SEC board's meaningless trips to NYSE and Columbia University, U.S.A., to seek solution to Nigeria's protracted stock market crisis, and their boast on return that they had found the solutions to Nigeria market crisis,[185] also deserve a passing mention.

Careful study revealed convincing evidence that Nigerian stock market crash resulted from meticulously planned and assiduously executed securities scheme, and not from global financial crisis as alleged. Top Nigerian financial market operators, including principal securities market operators, leading bankers, and financial market regulators have questions to answer for the crash.[186]

Nigeria's financial-sector leaders brought home the decadent jurisprudential norm of the international economic order. Like in history's biggest financial swindles, Nigeria stock market crash resulted from ***legislative infidelity*** and ***the use of law for instrumentality of undue economic advantage, exploitation and fraud.***

185.See '*SEC meets U.S. Counterpart, Others over market recovery*'; http://odili.net/news/source/2008/nov/26/300.html(6/2010)
186.See news report of 10/8/2010; *"CEO of Oceanic Bank convicted of bank and securities frauds -- Dr. Cecilia Ibru to forfeit N150bn ($1bn), and go to prison for 18 months"* - @ http://www.saharareporters.com/news-page/former-md-oceanic-bank-cecilia-ibru-convicted-bank-fraud. (10/2010).

Legislative infidelity is the practice of using law to advance economic exploitations and fraudulent agenda. Nigerian securities law was purposely manipulated to facilitate an organized securities scheme. I will show the plots.

Similar scheme is currently going on in Nigeria's bond market, without let. The same scheme is being replicated in Nigeria's other financial sectors, and staggering amount of money is being funneled offshore in plain sight, under questionable circumstances, and yet Nigerian authorities act in tacit consensus of silence. [187]

3.5 *'Legislative Infidelity'* Designed into Nigerian Securities Acts and Subsidiary Legislations.

Evidence of legislative infidelity in the crash of Nigeria stock market is splashed allover in the precision distortions of the legal, structural, and infrastructural framework of Nigeria capital market. Critical safety-nets and vital anti-fraud mechanics of Nigeria's securities market were meticulously expunged in the principal securities statutes. Regulatory structures were artfully disarranged and damaging loopholes skillfully designed into the laws. Lacunas were craftily created and exploited in a coordinated way that point unequivocally to existence of preconceived plan to execute securities fraud.

187.CBN Governor admitted funneling billions of dollars overseas, after the crash, and claimed the money belonged to foreigners divesting from Nigeria. **See also** *'Huge capital flight hits Nigerian economy. S13.9bn repatriated in 8 weeks—CBN'* at http://odili.net/news/source/2008/doc/5/306.html (06/2010)

Loopholes, distortions, and flaws crafted into the laws, structural imbalance, and the odd supervisory arrangement of the Nigerian market stand as eloquent testimony to existence of prior dishonest intentions. Tested and proven safety-nets, key anti-fraud provisions, and settled principles recognized by international best practices, and used universally to guarantee market integrity, transparency, orderliness, investor protection, and fair and equitable principles of trade, are conveniently left out in Nigeria capital market arrangement. The result is that Nigeria stock market is stripped bare of all the essential checks and balances, vital internal control and immunity mechanics, tested in-house codes of ethics and discipline, and self sustenance tools, in a coordinated fashion that point to the existence of legislative infidelity.

United States introduced SEC system of capital market regulation to the world.[188] Under the SEC system invented under U.S. Securities Exchange Act of 1934,[189] SEC sits firmly as the apex regulatory and supervisory authority of the Capital Market, but works in joint cooperative regulatory efforts with industry-sponsored groups called self-regulatory organizations (SROs).[190]It is this apex SEC regulatory system that Nigeria borrowed, for regulation of Nigeria capital market. However,

188. Note; SEC as apex regulator of capital market was invented by U.S. Congress in the Securities Exchange Act of 1934.
189. See s.4, Securities Exchange Act of 1934, 15 U.S.C Ss 78d, 1934.
190. See Cox, Hillman, and Langevoort, (2006), SECURITIES REGULATION Cases and Materials, 5th Ed., 16

in Nigeria's arrangement, provisions of the principal securities Act are completely turned against the SEC, rendering Nigeria SEC totally powerless. Nigerian SEC is statutorily shackled, circumscribed, and officially incapacitated.

Title to Nigeria's principal securities law explicitly proclaims that its purpose is to make SEC the apex regulatory authority of Nigerian capital market. The supreme regulatory authority of the SEC is also reinforced by substantive provisions of the law. Yet, the same principal law contains many adverse provisions that profoundly undermined SEC's powers, and the agency's capacity to regulate Nigeria capital market. Analysis of SEC arrangement under ISA 2007 will hereby follow.

3.6 Nigerian Securities and Exchange Commission; Capital Market Regulator Officially Sabotaged in the Securities Act.

In its opening section, Nigerian Investments and Securities Act 2007('ISA' or '2007 Act') display a glitzy headline proclaiming that the Act is;

> *"[a]n **Act... to Establish the Securities and Exchange Commission as the Apex Regulatory Authority** for the Nigerian Capital Market as well as Regulation of the Market to ensure the Protection of Investors, Maintain Fair, Efficient, and Transparent Market, (and for the)*
>
> *'Reduction of Systemic Risk', and related Matters."*[191]

191. See *Explanatory Note* to Nigeria's Investments and Securities Act, 2007, Act No.29

The above headline creates an immediate impression that Nigerian Investments and Securities Act 2007 is designed to put Nigeria Securities and Exchange Commission (SEC) securely in charge of regulating Nigeria capital market. Repealed 1999 ISA failed to firmly put Nigerian SEC in charge of regulating the capital market. Regulatory vacuum occasioned by the 1999 blunder created the opportunity that allowed market operators to engage in frauds and abuses in Nigeria capital market.[192]

Market abuse was at its worst when the new 2007 Act was promulgated. Expectations were high that the new law would remedy the known short-comings in the market's regulatory system.

Rather than introduce the needed changes in the new statute, the repealed 1999 Investments and Securities Act (ISA) was reenacted verbatim as the 2007 Act, with minor modifications that involved merely rephrasing provisions relating to *mergers, acquisitions*, *take-overs*, and *collective investment scheme*.[193]Nothing

192. Examples; '*AP shares manipulated 30 times in two weeks*', at http://odili.net/news/source/2009/apr/7/707.html (05/2010) ***See also*** '*SEC Director-General blames stock crisis on graft*' at http://odili.net/news/source/2008/nov/28/17.html (05/2010).

193. See ISA (2007), Explanatory Memorandum of.

significant in the 1999 Act was altered in the new 2007 Act. Entirety of the chaotic regulatory baggage that existed in the 1999 Act was carried over to the 2007 Act. Yet, the 2007 Act proclaimed conspicuously in its heading that it is enacted to establish SEC as the apex regulator, to ensure protection of investors, maintain fair, efficient, and transparent market, and to reduce systemic risk. That is far from true.

Many features in Nigeria's securities laws indicate the presence of premeditated plots against Nigerian capital market. However, the torrent of attacks mounted on Nigerian SEC in both the repealed 1999 Act and the 2007 Act stands out the most as evidence that Nigeria capital market is set up with sinister motive.

S.1 (1) of the 2007 ISA established SEC for Nigeria.[194] Besides the Act's superficial proclamations that SEC is the apex regulatory authority, ***S.13*** of the Act expressly designated ***SEC the apex regulatory organization*** for the Nigerian capital market.[195] Paragraphs ***(a)*** to ***(z),*** and z(***aa)*** to z***(dd)*** of section 13 (a total of thirty paragraphs) enumerated SEC's *powers and functions*.[196] ***S.3 (1)*** of the Act

194.See s.1(1) ,(2007), Investments and Securities Act,.
195.See s.13 ibid
196.See paragraphs (a) to (z), and z(aa) to z(dd) of s.13

established a ***Board of Commission*** for the SEC.[197] Both the composition and the tenure of office of the Board of Commission is laid-out in paragraphs ***(a) – (f)*** of subsection (1) of s.3.[198]

3.6.1 **Part-Time, None-Executive SEC Chairman:** In a surprising move that defies logic, offends universal norm, and harms special need of securities markets, Nigeria's SEC board is headed by a ***part-time*** non-executive Chairman.[199] Instead, a lower office of ***Director-General*** is statutorily designated the ***Chief Executive and Accounting Officer*** of Nigeria's SEC.[200] Other members of the *nine member SEC Board* are three ***full time*** commissioners, a ***representative of the Federal Ministry of Finance***, a ***representative of the Central Bank of Nigeria***, and two ***part-time*** commissioners. Position of the Chairman of Nigerian SEC, the capital market's designated apex regulatory authority, is a part-time position, so also the positions of two other SEC Commissioners. The SEC Chairman is also neither the Chief Executive nor Accounting Officer of SEC. A Director General is given those two powerful responsibilities. No reason was given for this anomalous arrangement enshrined in the 2007 Act.

197. See Paragraphs (a)-(f), subsection (1) of s.3
198. See paragraphs (a) – (f), subsection (1), s.3
199. Ibid.
200. See paragraph (b), subsection (1), s.3

The part-time arrangement does not help the capacity, competence, or efficiency of the SEC. The situation rather weakens the SEC by segregating the ranks of the Commissioners along the lines of fulltime and part-time tenures, and executive and non-executive classifications, thereby setting up the SEC for power struggle and discord. SEC's structural deformity inexorably spilled over to the Nigerian stock market. This is one sign of legislative infidelity under Nigerian securities laws.

Ramification of Nigerian SEC Chairman's part-time position becomes clearer when s.3 (1) *part-time* prescription is read together with s.10 (2) and (4) of ISA 2007. ***S.10 (2)*** provides that ***the SEC Chairman shall preside at every meeting of the Commission***, except when he is absent.[201]Also, ***s.10 (4)*** provides that SEC Chairman's vote shall break the tie in cases of equality of votes in SEC board decisions.[202] SEC's important regulatory and enforcement functions listed both in the thirty paragraphs of s.13, and the other six paragraphs of subsection (1) of s.4[203] are to be deliberated upon, decided, and approved, during SEC meetings *presided over* by this ***part-time***, ***non-executive*** SEC Chairman. The Director-General whom the Act designated *Chief Executive* and Accounting Officer of Nigerian SEC board

201. See subsection (2) of s.10.

202. See subsection (4) of s.10

203. See paragraphs (a) to (f), subsection (1) of s.4

has no powers under any circumstances to preside over SEC meetings, even in the Chairman's absence. These are flaws that do not just occur, if all things are equal.

3.6.2 **Sabotage of SEC on Appointment:** To further weaken Nigeria's SEC, another blunder was committed in ISA 2007 on ***appointment*** of members of the board of the SEC Commission. S.5 of the Act provides for ***appointment*** of members of the SEC board, in a way that ridicules the office of the SEC Chairman. ***Subsection (1) of s.5*** provides that the *Director-General* and the *three full-time commissioners* shall be *appointed by the President*, upon the *recommendation of the Minister*, and *confirmed by the Senate* of the Federal Republic of Nigeria.[204] But, appointments of the SEC Chairman and the two part-time Commissioners are excluded from these regal treatments.

Indeed, I did not find any provision in the entire 2007 Act, or in any other law, prescribing whose responsibility it is to appoint Nigeria's SEC Chairman, nor how the appointment shall be carried out. Searches for appointment provision of SEC Chairman, in both the repealed 1999 ISA and the extant 2007 Act, did not yield any result. If nobody is authorized under Nigerian law to appoint the

204. See subsection (1) of s.5

Chairman of Nigeria's SEC, it will amount to an unmitigated absurdity that confirms the existence of dishonest intentions. This bizarre 'loophole' would only escape detection in a situation of tacit pact for foul play, on many fronts. The situation may be laughable, but the setting is a disingenuous act of coordinated scheme skillfully designed to prevent Nigeria SEC from performing. Yet, again, the 2007 Act that created this conundrum boldly proclaims in its ***preamble*** that it's 'purpose is to make Nigerian SEC the apex regulatory authority for Nigeria Capital market', to 'ensure the protection of investors', 'maintain fair, efficient, and transparent market, (and for the) 'reduction of systemic risk'. Match Nigerian appointment provisions against the U.S. SEC's where the Chairman and all the Commissioners are appointed by the President.[205]

"The U.S. SEC is an ***independent****, nonpartisan agency created by the Securities Exchange Act of 1934... The Commission is composed of five commissioners appointed by the President to five-year terms. The terms are staggered so that one expires each June, and not more than three commissioners may be of the same party as the President. One of the commissioners is designated by the President to serve as the chairman of the Commission."*[206]

Nigeria's SEC Commissioners and other board members are appointed by Nigerian President, and approved by the Senate, but not the Nigerian SEC Chairman and two part-time Commissioners. Yet, all the Commissioners have equal votes, and

205. See footnote 190 supra. ***See also*** footnote 207 infra.
206. See Cox, Hillman, and Langevoort, (2006), Securities Regulation Cases and Materials, 5Ed. 11

the part-time Chairman presides over all the SEC meetings where all the important supervisory and regulatory policies are formulated, and decisions made. The Nigerian setting is inexcusable under any circumstances. The setting focuses singularly on diminishing the capacity of Nigeria's SEC to regulate the capital market. On the contrary, the conscientious design of the U.S. SEC came with many benefits including superior SEC efficacy and enhanced reputation described below;

"[t]he SEC has long held a reputation for quality and vigor that sets it apart from many of its regulatory peers. This reputation is of considerable importance: It aids in the recruitment of new personnel and serves as a form of psychic compensation to the staff to help offset some of the financial sacrifices of government service. It also gives to the Commission a considerable level of public support from which to draw when it takes action."[207]

3.6.3 **Tenure and Devotion:** Nigeria's 2007 ISA continued its needless offensive against the SEC in its provision on ***tenure of office*** for members of the SEC board. ***Subsection (2) of s.5*** provides that the ***Director-General*** shall hold office for ***five years***, in the first instance, and ***may be reappointed for a second five year term***.[208] Conversely, both ***subsections (3) and (4) of s.5*** lumped together the tenures of office of *SEC* ***Chairman*** and all the other ***Commissioners***, and provided in sum that ***the part-time Chairman***, the ***three full time Commissioners, and the part-time Commissioners***, shall each hold office for only ***four year single term***.[209]

207. See Cox, Hillman, and Langevoorte, 13, supra at page 115
208. See subsection (2) of s.5
209. See subsections (3) and (4) of s.5

As a corollary to the tenure arrangement, ***s.6*** commands that the Director-General and the three fulltime Commissioners ***devote full time*** to the service of the Commission.[210] The SEC Chairman is not required to devote full time to service. Notably too, s.6 also ***banned the full time Commissioners from holding any other office or employment***.[211] This important *ethics rule* does not bound the SEC Chairman, and the part-time Commissioners. Nigerian SEC Chairman and the two part-time Commissioners are free to hold other paid positions without regard to conflict of interest violations in their duties as regulators. This is another loophole.

S.6 loophole brought many problems for Nigeria capital market, but s.6 most famous skirmish arose from the many conflicting jobs SEC Chairman holds in public companies he regulates. The incumbent Nigerian SEC Chairman is as well a *salaried* executive of Unilever Nigeria PLC, Vice Chairman of Linkage Assurance PLC, and a fulltime board Chairman of UACN PLC, all listed *blue-chip* companies whose shares are publicly traded in the Nigerian capital market. The three companies are under the direct regulatory supervision of the SEC Chairman who also doubles as a paid senior employee in each of the companies. SEC Chairman's entrenched economic interests in the companies conflict with his official duties.

210. See; s.6 ISA 2007
211. Ibid

The SEC Chairman's conflicted positions stirred up public uproar that made Nigerian Senate Committee Chairman on Capital Market, to write a strong petition to Nigeria's Minister of Finance complaining against SEC Chairman's engagement in conflict-of-interest dealings.[212]Despite all the furors, nothing came out of the Senator's complaint. An Act the distinguished Senator voted to help pass into law on the floor of Nigerian Senate gave the SEC Chairman the *free pass*.

3.6.4 **Sabotage of SEC on Salary**: The harshest line of statutory assault on Nigerian SEC is on ***salary, remuneration, and allowances*** as provided in ***s.9*** of the 2007 ISA.[213] The SEC board's salary disparity replicated the absurdities that exist in the power, control, appointment, and tenure structures. ***Subsection (1) of s.9*** awards open-ended salary munificence to the Director-General and the three fulltime Commissioners. S.9 gives the full time board members freedom to pay themselves any salary, perquisites, and perks they wished.[214] SEC board has a total of nine members.[215] The Director-General and the three fulltime Commissioners are already empowered by other perquisites of office to become advantaged bloc within the SEC rank. Special salary largesse is further added to the privileged

212.See *'Senate Petitions Finance Ministry Over Udoma's 'conflict of interst'* in http://odili.net/news/source/2010/feb/11/810.html (06/2010)
213. See s.9 2007 ISA.
214. Ibid
215. See s.3 (1) (a)-(f).

clique's bloated fortunes. The elite clique is SEC'S real power brokers. Likely, this group of generously remunerated, well treated, fulltime Commissioners easily sways the representatives of the Ministry of Finance and Central Bank of Nigeria in decision-making. Possibly too, the clique also influences the low morale, poorly paid, part-time Commissioners. Within the SEC board, the part-time, poorly paid SEC Chairman and the two part-time poorly paid Commissioners are statutorily marginalized and kept in permanent discomfiture. Nigeria's SEC *house* is pragmatically divided against itself in a crafty way that left the Director-General and the three fulltime Commissioners holding all the aces. And, their bloc loyalty belongs to where their '*manna fell down*' from; the market operators.

The positions of SEC Chairman and his two part-time, brethren Commissioners, are, again, statutorily humiliated by the 2007 Act's salary provisions. ***Subsection (2) of s.9*** awards mere "*allowance*" to the SEC Chairman and part-time Commissioners.[216]The Act stipulates clearly that the ***measure of their allowance*** shall be ***in accordance with the prevailing guidelines on remuneration for part-time members of public bodies*****, as** issued by the appropriate agency of the Federal Government.[217] This salary provision means that Nigeria's SEC Chairman and the

216. See subsection (2) of s.9
217. Ibid

two part-time Commissioners are statutorily ranked and paid *below* the lowest government workers in Nigeria (*at par with part-time workers of public bodies*), are paid pittance as remunerations. Comparatively, they belong to the cadre of *temp workers* and *part-time employees* in the U.S. public service. Worst still, the Chairman and the two part-time Commissioners' respective salaries are in reality far less than the least paid U.S. temporary workers. Yet their job descriptions boldly specify that they are the apex regulators of Nigeria capital market.

Nigeria's SEC salary arrangement is manifestly bad. The salary arrangement is grossly disproportionate and demoralizing, creates division in SEC board, and aligns the loyalties of the well paid, fulltime, SEC Commissioners with their market operator benefactors. The arrangement also places the livelihood of the poorly paid SEC Chairman and part-time Commissioners in the hands of market operators. Add the bad salary situation to the fact that SEC Chairman and the two part-time Commissioners are excluded from the *statutory prohibition* on holding other jobs, it becomes obvious that the flood-gate is indirectly left open for easy subornment of the SEC Chairman and Commissioners. This is yet another legislative infidelity trickery that drastically weakened Nigerian SEC, polluted the market place, and ultimately paved the way for Nigeria's edition of '*hot money cycle'* fraudulent scheme.

Consequences of Nigeria SEC disarrangement are many. SEC's ability to regulate Nigerian capital market is severely undermined, statutorily. The statutory disarray left Nigerian investors without any protector, hence, gravely vulnerable, and open to exploitation. The foul situation sent open invitations to worst financial market vultures (foreign and domestic) to descend on Nigeria capital market for a rare feast. The *invitees* responded overwhelmingly, plundered unwary Nigerian investors,[218] and drained Nigerian national economy.

Ramifications of Nigeria arrangement to SEC competence, independence, and effectiveness are profound. Considering the enormity of the job statutorily assigned to the Nigerian SEC, and which SEC traditionally performs, the massive amount of capital and wealth SEC regulates, the caliber of financial institutions and personalities under its supervision, and the eternal prevalence of temptation and corruption in the capital market, Nigeria SEC is *ab initio* condemned to failure. The SEC charade did enormous damage to Nigeria capital market. The only reason why Nigeria's SEC would be placed in tragic situations like the above is apparently to make way for the sinister plots in the capital market. No other reason. Only a nefarious motive would prompt this elaborate sabotage of Nigeria's SEC.

218. See for example; '*SEC Director-General blames stock crisis on graft*', at http://odili.net/source/2008/nov/28/17.html (06/2010). ***See also*** '*AP shares manipulated **30 times in two weeks***'; at http://odili.net/news/source/2009/apr/7/707.html

Crash of Nigeria stock market is a well planned and perfectly executed securities' fraud. The $116bn aggregate loss in the market crash is probably the targeted bounty. Nigerian stock market crash is a classic case of the IMF, World Bank, and local underlings *'hot money cycle'* scheme Professor Stiglitz described in his interview in London *Observer* newspaper.[219]

Granted, that Nigeria has the right to adapt the borrowed U.S. SEC framework to suit its domestic situation. But, the adaptation ought to be reasonable, sensible, constructive, and beneficial to the Nigeria capital market, to investors, and consistent with market integrity, not undermine the market. There is no redeeming ground upon which to predicate even a tenuous defense of the blatant travesties that inundate Nigeria capital market.

3.7 **India Stands as a Reproach to Nigeria**: India is a *classic example* of everything Nigeria got wrong in her adaptation of SEC regulatory system. India copied the SEC system, but altered the system in ingenuous ways that empowers India's apex market regulator, ensures integrity and transparency in India's capital

219. See ***The Observer***, Sunday 29 April 2001, at http://www.guardian.co.uk./business/2001/apr/29/business.mbas (01/2011)

market, and yet, serves India's peculiar needs. After a 1990 massive stock market crisis, India radically overhauled her market regulatory system.[220]

India's 1990 market crash was precipitated by financial scam perpetrated by one Mr. Harshad Mehta, a man also called "*big bull*" of India stock market.[221]Indian investing public became aware that Mr. Mehta diverted large sums of money from Indian banks through fraudulent means.[222] Millions of small-time investors lost lots of money in Mr. Mehta's fraud as the Indian Sensex plummeted 570 points.[223] Indian government instantly recognized the inadequacy of India's securities market regulatory method, and the urgent need to overhaul the system. Indian government swiftly rose to the occasion, forsook her old regulatory style, chose SEC core principles, passed an Act of Parliament that established SEBI (Securities and Exchange Board of India) as India's[224] apex securities market regulator.[225]

220.See '*The Evolution Of Indian Stock Market*' http://shareskool.com/articles/View Article.inf?article=The+Evolution (03/2010)
221. Ibid
222. Ibid
223. Ibid
224. See S.3 (1), The Securities and Exchange Board of India Act No. 15 of 1992. The Act came into force on 4th April, 1992.
225. See s.11 (1) ibid.

Overhaul of India's securities market regulatory system was articulated in the SEBI Act of 1992. SEBI Act introduced bona fide and effective innovations into India's capital market supervision. Besides instituting a centralized apex regulatory method, India's SEBI Act also introduced a *trend-setting* Securities Appeal Tribunal (SAT).[226] Presiding Officers of India's SAT is statutorily limited to only ***sitting or retired Supreme Court Judges and sitting or retired Chief Justice of a High Court.***[227] That is a novelty. The caliber of personnel that sits in India's SAT as Presiding Officers guarantees integrity in justice dispensation over securities disputes. Appeals going from SEBI decisions to a tribunal presided by such proven judicial talents would not put Indian SEBI's apex regulatory authority in the kind of jeopardy that Nigeria's SEC is maneuvered into.

India's SEBI arrangement has an added benefit of sending clear message to local and international *venture capitalists* and *portfolio investors* that India is serious about market integrity. India's SEBI Act stands as a reproach to Nigeria's ISA 2007. Compared to India's SEBI, Nigeria's SEC arrangement does not pass muster. Nigeria's SEC is designed for the pursuit of a common intention to prosecute unlawful purpose; to commit organized fraud in Nigeria capital market.

226. See S.15K , India SEBI Act 1992, footnote 224, supra at page 123,
227.See S.15M, ibid.

3.7.1 **Nigeria Arrangement is unlike no Other**: No justification or alibi can excuse the chaos that exists in the design of Nigeria's SEC, *a fortiori*, the entire 1999 and 2007 ISA. Nigeria's flawed SEC arrangement mirrors the more sinister provisions cleverly crafted into Nigeria's 1999 and 2007 ISA. The faulty SEC charade reflects the bigger toxic setting in Nigeria capital market. Clamping down the SEC is a willful plot used to facilitate the abysmal crash of the stock market.

3.7.2 **Nigeria Arrangement is not Like the British System**: Many flaws that exist in Nigeria's SEC arrangement cannot be justified on the basis that the flaws, somehow, may resemble some elements of British financial market regulatory system. Nigeria operates an SEC system which the British system is not. Indeed, the British financial market regulatory system, though also a centralized regulatory system, is everything SEC system is not. British financial market is regulated by the Financial Services Authority (FSA), deriving its powers from the Financial Services and Markets Act 2000.[228]According to FSA "*[w]e are a company limited by guarantee and* ***financed by the financial services industry***."[229] British FSA proudly owns up to being financed *entirely* by the very industry it regulates, i.e., the financial market operators. That is exactly what SEC system is not.

228. See '*GIM3050 – Regulatory framework: the Financial Services and Markets Act 2000 (FSMA 2000)*' at http://www.hmre.gov.uk/manuals/gimanual/gim3050.htm (12/2010)81.
229. See *FSA. Who are we'* at http://fsa.gov.uk/Pages/About/Who/index.shtml (12/2010

Independence is a pivotal feature of an SEC system. A regulatory agency that receives money for its survival, solely or at all, from the entities it regulates can neither be independent nor effective. Such regulatory agency is a pretender that is preprogrammed to fail. Mutually beneficial economic interdependence between a regulator and the regulated renders the regulator susceptible to corruption. British FSA is antithetical to the philosophy of integrity and sacredness a genuine SEC system represents. Any attempt to predicate a defense of the Nigeria SEC system on its slight resemblance to the British FSA will fall flat. Two diametrically opposed systems cannot pragmatically be muddled up into one enactment.

Another prominent factor that distinguishes British FSA from SEC system is that while SEC focuses all its regulatory energy on the securities market, British FSA regulates the gamut of entire British financial markets including the banks, insurance business, capital market, mortgages, and more. According to FSA's description of its regulatory reach,

"[t]he FSA has been the single regulator for financial services in the UK since December 2001, when we were given our statutory powers by the Financial Services and Market Act 2000 (FSMA)."[230]

230. See '*FSA Regulatory Approach*' at http://fsa.gov.uk/pages/About/What/Approach/index.shtml (05/2010)

Explaining further the scope of its regulatory authority, the British FSA stated that

"...Financial Services and Market Act 2000 (FSMA 2000) created a single statutory regulator, the Financial Services Authority (FSA) for regulating all deposit taking, insurance and investment business in the UK... FSMA 2000 therefore provides the framework in which all forms of financial services business, including insurance companies, Lloyd's, banks, building societies, friendly and mutual societies, credit unions, investment and pensions advisers, stockbrokers; investment services firms, fund managers, derivative traders, and so on, are authorized and regulated."[231]

FSA regulates all UK financial industry, and entities. And, also earns its operational funds from the many financial-sector operators which it regulates. Nigeria SEC on the other hand, has powers to regulate only the Nigerian securities industry.[232]Similarly, the U.S. SEC is restricted to regulating only the U.S. capital market[233] and the Indian SEBI regulates only the Indian Capital Market.[234] So it is in all SEC systems including Japan, Ghana, Kenya, Vietnam, etc.

The narrow focus of SEC's regulatory scope boosts SEC's efficacy, and constitutes one major attribute of the SEC system. Like the other SEC systems, Nigerian SEC shares no commonalities with the FSA, and cannot pretend to have borrowed any of FSA features.

231.See *GIM3050 – Regulatory framework: the Financial Services and Markets Act 2000 (FSMA 2000),* at http://www.hmrc.gov.uk/manuals/gimanual/gim3050.htm
232.See s.13 ISA
233.See s.4, (1934), Securities Exchange Act, 15 U.S.C Ss 78d.
234.See s.11.(1) (1992), SEBI Act of India.

The last reason Nigerian SEC could not have borrowed from the British FSA is that Nigerian ISA 1999 that reintroduced SEC in Nigeria came into existence one year *before* the British FSMA 2000. Nigerian statute that is earlier in time cannot possibly borrow from a later British Act. Nigeria's SEC arrangement is simply an awkward design that squandered vital nuances and substances that make SEC system special, and market regulation successful. Nigeria SEC arrangement is an incomparable tragedy that is unlike no other.

Nigeria SEC arrangement did incalculable damage to integrity, transparency, and orderliness in Nigeria capital market. Nigeria SEC situation turned Nigeria capital market into one giant crime scene. The scenario is part of many programmed intrigues that resulted in the eventual crash of Nigeria stock market. Contributions Nigeria's SEC arrangement made to the crash of Nigeria stock market will become clearer after a brief analysis of securities is done; securities peculiarities, uniqueness, sensitivity, and vulnerability, all of which themselves constitute the reasons securities market demand special regulation, attention, and protection.

3.8 **Nature of Securities and the Implication to Securities Regulation.**

According to Professor Bloomenthal, story of securities regulation is about the *cupidity of market operators* and the *gullibility of investors*.[235] Professor Thomas Hazen went further to explore the intricacies of the United States securities laws, and the complexity of securities transactions. He concluded that;

"[s]ecurities regulation is an extremely complicated field. At the federal level, it is implemented by a myriad of statutes and regulatory rules. The statutes and rules are extremely complex and detailed. The case law is particularly perplexing because of the degree of detail and complexity the law imposes. However, it is not only the law that is difficult and elaborate. The transactions that implicate the securities laws are extremely intricate as well."[236]

Both Professors Bloomenthal and Hazen are arguing in effect that securities market is laden with hazards. That, the perils mostly arise from human greed — the cupidity of unscrupulous market operators and complicit regulators -- and, the vulnerability of unwary investors, exacerbated by gullibility. And, that, other threats arise from inherent nature of securities, from the complexity of securities transactions, and from the intricate details of securities rules.

235.See Bloomenthal,(2008), Securities Law Handbook (2008-2009 ed.), Vol. 1,7.

236.See Hazen, Thomas L. (2005), Treatise On The Law of Securities Regulation, 5th Ed., Vol.1, 3.

Illustrating the functional importance of securities, in another of his many books, Professor Hazen argues that;

"[s]ecurities occupy a unique and important place in American life. Securities are the instruments which evidence the financial rights, and in some instances, the power to control, the corporations which own the great majority of our nation's and the world's productive facilities. Securities are the instruments through which business enterprises and governmental entities raise substantial portions of the funds that are used to finance new capital. Securities are the instruments in which many millions of American (and investors all over the world) invest their savings in order to provide for their retirement income, education for their children, or in the hopes of achieving a higher standard of living for themselves and their family. And, invariably, ***securities are the instruments by which unscrupulous promoters and sales people prey on those hopes and desires by selling overvalued (or even worthless) paper to many thousands of people every year.****"*[237]

3.8.1 **Distinguishing Feature of Securities.**

Professor Hazen distinguishes securities from other goods and commodities, and attributes *securities special regulatory needs* to securities uniqueness. He also described the distinctive feature of securities. According to the professor, the unique feature which distinguishes securities from most other commodities in which people deal is that ***securities have no intrinsic value*** in themselves – securities ***represent rights in something else.***[238]

237. See Hazen, Thomas L.(2006) The Law of Securities Regulation, *Revised* 5th Ed., 9.

238. See Hazen, Thomas L. (2006) ibid.

Professor Hazen argues that the *value* of a *bond*, *note*, or *other promise to pay* depends upon the financial position of the promisor. That the value of a share of stock depends on the profitability or future prospects of the corporation or other entity which issued it. And, that, the market price of stock depends on how much other people are willing to pay for the stock, based on their evaluation of the company's prospects.[239]

Continuing, Professor Hazen, argues also that ***the foregoing features of securities give a distinctive coloration to the regulation of transactions in securities, in contrast to the regulation of transactions in goods or commodities.***[240]That most goods are produced, distributed, and used or consumed. And, that, governmental regulation of goods generally focuses on protecting the ultimate consumer against dangerous articles, misleading advertising, and unfair or non-competitive pricing practices.[241]He concluded that ***Securities are different*** in four ways. He listed the four ways in which securities are different, and articulated their corresponding implications to regulation of securities, as follows;

239. Hazen, (2006), 36, supra at page 130
240. Hazen, (2006) Ibid
241. Haze, (2006) Ibid

3.8.1.a). **Securities are Created, not Produced:** Securities ***first difference*** from other goods and commodities is that ***securities are created rather than produced.***[242] Securities can be issued in unlimited amounts and virtually without any costs since securities are nothing in themselves but rather represent only an interest in something else.[243] ***Therefore, an important focus of securities regulation is assuring that when securities are created and offered to the public, investors have an accurate idea of what that "something else" is and how much of an interest in that "something else" the security in question represent.***[244]

Professor Hazen's point here is that a good securities regulatory mechanism must contain provisions specifically tailored to compel creators and offerors of securities to completely, truthfully, accurately, and timely, *disclose* all facts and information (good and bad) that will give all investors (not just a privileged few) accurate idea, at all times, what that security actually is. And, the true value of the corporation each tranche of the security represents. Hence, full disclosure is of paramount importance to every security market. Disclosure rules have to be elaborate and mandatory, and not be left to the whimsical discretion of market operators.

242. See Hazen, Thomas L. (2006), 38, supra at page 130
243. Hazen (2006) Ibid
244. Hazen (2006) Ibid

Failure to make disclosure-needs of the market a regulatory priority in Nigeria capital market left openings for creators and offerors of securities to routinely cheat investors.

3.8.1.b). **Securities are not used or Consumed:** Securities ***second difference*** is that ***unlike goods, securities are not used or consumed*** by their purchasers.[245] ***Securities become a kind of currency, traded in the secondary markets at fluctuating prices.***[246]The secondary transactions far outweigh, in number and volume, the offerings of newly created securities (IPOs). Prof. Hazen argues that ***a second important focus of securities regulation, therefore, is to ensure that there is a continuous flow of information about the corporation or other entities that is represented by the securities being actively traded in the secondary markets.***[247]

The eminent professor is emphasizing here that the special information need of the secondary market necessitates that every securities law must ensure that there is a *continuous flow of* accurate, honest, unscripted, non-sifted, and timely *information*, to all investors, on the condition of all traded corporations. In effect, Professor

245. Hazen, Thomas L (2006), 38, supra, at page 130.
246. Hazen (2006) Ibid.
247. Ibid

Hazen reiterates a common understanding that security trading is, in principle, the buying and selling of information. That honest information is paramount, and occupies a special place in the securities market. Information management is very crucial to every capital market. Market regulation and regulators ceaselessly strive to curb information abuse and manipulation, and yet maintain enough balance to allow traded companies put out adequate information to the investing public.

Management of information symmetry is a hot issue in the regulation of the capital market. Scrupulous array of rigorous rules are traditionally put in place to guard against abuse or mismanagement of information by publicly traded corporations, investment analysts, investment advisers, and sundry invested interests. Information is so crucial to securities transactions that a special theory evolved under the capital market jurisprudence on relationship between *price* of security and *information*. The theory is called ***"Efficient Market Hypothesis".***

3.8.1.b.i) **Efficient Market Hypothesis:** This is the groundwork upon which disclosure policies are formulated.[248] It espouses the relationship between price and information, and posits that an efficient market is the best measure of value.[249]

248. Simon, Timothy A. (2008), Classroom lecture in *Securities Regulation* at Golden Gate University, Spring Semester.
249. Simon, Ibid

Information is a major issue in the terminal conflict between management and shareholders in every public corporation.[250]

Efficient market hypothesis, in brief, espouses categories of capital markets, predicated exclusively on the synergy of price and information flow.[251] "*The efficient market hypothesis is a powerful descriptive theory of the relationship between the disclosure of financially significant information and changes in securities market prices.*"[252] According to Kraakman, "*...in discerning ex ante the intrinsic value of a security, the conventional view simply argues that the consensus of an efficient market will be the best possible measure of value at the moment, usually falling somewhere in the middle between extreme optimism and pessimism.*"[253]

Traditionally, market efficiency is believed to occur in three different levels; ***the weak form***, the ***semi-strong form***, and the ***strong form*** of market efficiency.[254] The ***weak form*** of market efficiency exists when security prices reflect all the information *embodied* in the *past prices* of that security.[255] That is, if securities

250. Simon,**(2008)**, supra, at 134
251. See Beaver, (1981) Market Efficiency, Acct. Rev. 23
252. See Cox, Hillman, and Langevoort (2006) Securities Regulation Cases and Materials, 5th Ed., 105
253. See Kraakman, (1988), '*Taking Discounts Seriously; The Implications of ''Discounted'' Share Prices as an Acquisition Motive'*. 88 Colum. L. Rev. 891, 898-901.
254. See Cox, Hillman, and Langevoort, 106, supra at footnote 252.
255. Cox, Hillman, and Langevoort, 106 ibid.

markets are efficient in the weak form, investors cannot extrapolate a security's future price from a series of past prices.[256]The ***semi-strong*** form of market efficiency exists if security prices reflect all *publicly* available information.[257]A logical explanation of why stock prices follow a *random walk* is that stock prices quickly reflect successive pieces of new information as that information becomes available.[258] The ***strong form*** of market efficiency occurs when security prices reflect *all information*, whether that information is publicly available or not.[259]

The strong market form is the ideal market. Securities regulatory policies are formulated to achieve the market category where security prices reflect *all information* about every listed company, *whether the information is publicly available or not*. This category means a market where information flow is at ***equilibrium***, and insiders, for instance, are pragmatically precluded from using inside, non-public information, to trade. Only quality and proper statutory, structural, and regulatory frameworks, matched with independent and effective enforcement capability can succeed in establishing the appropriate information management standard in a capital market. Unfortunately, Nigerian arrangement falls abysmally short of this important threshold of information management.

256. Cox, Hillman, and Langevoort, 107, supra, at 135.
257. Ibid
258. Ibid
259. ibid.

3.8.1.c) **Intangible and Complex Nature of Securities**: Continuing with his illustration of the four ways securities are different, Professor Hazen argues that the ***third difference*** between securities and goods involves the ***intangible and complex nature of securities***.[260] That, since the ***complexity of securities invite unscrupulous people to attempt to cheat or mislead investors and traders, the securities laws contain provisions prohibiting a wide variety of fraudulent, manipulative, or deceptive practices***.[261]

Intangible and complex nature of securities demands regulatory provisions that must scrupulously mirror securities peculiar nature. Such provisions must address wide range of activities including trading on inside information (insider-trading), misleading corporate publicity, improper dealings by corporate management, mandatory compliance with disclosure rules, etc. Securities regulation is a complex business that requires special rules. In sum, good securities regimen must reflect the philosophy embodied in Justice Brandeis' famous quote that "*[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman.*"[262] Again, Nigerian securities laws drastically deviated from this important requirement.

260. See Hazen, Thomas L (2006), 10,supra, at page 130.
261. See Hazen, (2006), ibid
262. See Brandeis L.D. (1914), Other People's Money, 16.

3.8.1.d). **Higher Regulatory Standard:** Professor Hazen's ***fourth,*** and final difference between regulation of securities and the other goods and commodities is that, since ***a large industry has grown up to buy and sell securities for investors and traders, securities regulation is concerned with the regulation of people and firms engaged in the business, in order to assure that they do not take advantage of their superior experience and access to overreach their nonprofessional customers.***[263]

Challenge posed by Professor Hazen in his final argument is that securities law must seek to address in ample details, the intricate activities of each of the numerous categories of participants in the large securities industry, both in their many complicated buying and selling transactions, and in their entire conducts and activities that occur in the market place, or otherwise influence the market. Security market operators are professionals and experts. Majority of investors are non-professionals, unwary, and vulnerable individuals and entities that rely on advice and expertise of the professional market operators. Securities investment stake is high for investors hence they deserve protection at all times. Securities regulations, therefore, aim to superintend professional traders, protect investors,

263. See Hazen, Thomas L (2006), 10,supra, at page 130

establish order in the market, and instill integrity, efficiency, transparency, fair and equitable principles of trade. Market regulation is a solemn task the successful execution of which produces a strong capital market. Nigeria securities regulatory and structural frameworks are intentionally distorted, with dire consequences.

Sabotage of Nigeria's SEC does not end with statutory incapacitation of the agency. The siege on Nigeria's SEC gets worse with the tactical positioning of Investments and Securities Tribunal, and, aggravated by statutory provisions that forced SEC to surrender its statutory apex authority to the tribunal.

3.9 **Nigerian Investments and Securities Tribunal (IST); a Strategic Impediment to Nigeria's SEC.**

Assault on Nigerian SEC continues with statutorily situating Nigeria's Investments and Securities Tribunal ('IST' or 'the tribunal') in a tactical position that allowed the tribunal to successfully wrestle SEC's apex authority.

Nigeria's Investments and Securities Tribunal was first created under the repealed 1999 Investments and Securities Act, and subsequently under the extant 2007 Act.[264]As already noted,[265] both the preamble to ISA 2007 and the explanatory

264. See s.274 (2007), Investments and Securities Act.
265. See Pages 109 and 111, supra.

note thereto makes SEC Nigeria's capital market apex regulator. S.13 of the 2007 Investments and Securities Act also stamped Nigeria's SEC regulatory primacy.[266] In effect, Nigerian law clearly declared SEC the designated supreme regulatory authority over Nigerian capital market, but unfortunately, also sabotaged the SEC.

S.274 of the 2007 Act established an Investments and Securities Tribunal (IST) for Nigeria.[267] However, against the structure that exists in the U.S. and many other SEC systems, Nigeria opted for an unusual tribunal format that is adversarial to Nigeria's SEC. ***S.284 (1)*** ISA 2007 conferred Nigeria's IST with ***exclusive jurisdiction***, over all securities matters in Nigeria, without any preconditions.[268] The exclusive jurisdiction conferred on the tribunal by s.284 (1) provided the ground for the tribunal to engage in needless power tussle with Nigeria's SEC. The exclusive jurisdiction also resulted in the 2007 Act being in conflict with the 1999 Nigerian Constitution, vis-à-vis the jurisdiction of Nigerian Federal High Courts[269] (equivalence of U.S. District Courts).

In addition to s.284 (1) which confers exclusive jurisdiction on the tribunal, ***s.289 (1)*** specifically gives the tribunal ad nauseam '*right of judicial review and*

266. **See** s.13 ISA.
267. **See** s.274 (1) ISA
268. **See s.** 284 (1) (a)-(f)
269. **See** s.251 (1), (1999), Constitution of the Federal Republic of Nigeria (Promulgation) Decree.

appeal over decisions of the SEC.'[270] The tribunal's jurisdiction under s.289 (1) includes both ***original*** and ***appellate*** powers. The plain meaning of s.289 (1) is that any decision made or any sanction imposed by SEC in the discharge of its apex regulatory authority, is subject to capricious review, or reversal, by the Investments and Securities Tribunal. The tribunal's review and reversal powers over SEC decisions amount to indirectly placing the tribunal above the SEC in the hierarchy of regulatory authorities over Nigeria capital market. Provision of s.289 (1) also means that market operators can circumvent or frustrate Nigerian SEC by taking prospective or pending SEC investigations or proceedings direct to the more favorable tribunal venue. This is a clever roundabout way of using s.289 (1) to topple the apex regulatory status conferred on SEC by s.13 ISA – a legislative infidelity hallmark that strikingly resembles the kind of legislative intrigues found in TRIPS Agreement, IMF and World Bank's respective Articles of Agreements.

Nigerian IST makes the most of s.289 (1), and routinely overturns disciplinary actions SEC meted out to high profile market operators found guilty of securities infractions, malpractices, and frauds. This point will be elaborated in the next chapter when some questionable IST judgments will be examined.

270. See s.289 (1) ISA

Further on IST's usurpation of SEC apex authority, Nigeria's tribunal arrangement drastically departed from the borrowed U.S. system. Under U.S. capital market adjudicatory system, independent Administrative Law Judges have *non-exclusive* original jurisdictions over certain category of securities disputes.[271] More importantly, appeals and reviews of final judgments of Administrative Law Judges go to the U.S. SEC, and not vice versa.[272] U.S. SEC has powers to affirm or reverse decisions of the Administrative Law Judges, unlike in Nigeria where the tribunal has absolute powers to affirm or reverse SEC decisions.[273] Yet, unlike the Indian tribunal where quest for integrity led to an innovative prescription that only Supreme Court judges and High Court Chief Justices preside in India's appellate tribunal. Nigerian lax tribunal arrangement allows market operators to recruit and recommend cronies and allied neophytes to serve as Nigerian tribunal judges. Also, India's SAT sits only on appeals over SEBI's decisions, but Nigerian tribunal exercises both ***appellate*** and ***original*** jurisdictions, thus tussling with Nigeria's SEC. That appeals and reviews under the U.S. system lie from judgments of Administrative Courts to SEC Commissioners is a vital element of the apex authority of U.S. SEC in the U.S. capital market. This key element of SEC system was skillfully upturned in the Nigerian SEC arrangement.

271. Administrative Law Judges exercise jurisdiction over cases SEC brings against entities SEC regulates.
272.See Office of Administrative Law Judges; Administrative action. At http://www.sec.gov/alj.shtml (03/2011)
273. Ibid

Finally on Nigerian tribunal's exclusive jurisdiction, ***s.294*** of the 2007 Act repeated, rather superciliously, the provisions of s.284 (1) that the tribunal shall have exclusive jurisdiction on all matters specified in the Act.[274]

3.10 **Conclusion.**

The 2007 Act's barrage of attacks on SEC, and the adversative positioning of the Investments and Securities Tribunal atop the SEC, in Nigeria's regulatory format, constitutes the most damaging plots that coalesced with other intrigues to wreck Nigeria capital market. The Nigerian SEC arrangement is an essential component of a definitive scheme that involves legislative infidelity and use of law for instrumentality of undue advantage, fraud, corruption, and exploitation in Nigeria capital market.

My next chapter will focus on Nigerian Investment and Securities Tribunal's judgments. Especially, the tribunal's zealous attacks on Nigeria SEC and its obsessive inclination to reversing SEC sanctions against market operators, in ways that demonstrate the tribunal's complicity in the capital market scheme. The style of the tribunal leaves no doubt that the tribunal is intent on hurting the SEC.

274.See s.294, ISA.

CHAPTER 4.

Legislative Infidelity and the N8.1tn ($60bn) Crash of Nigeria Stock Market: Analysis of a Premeditated Securities Fraud.

~Part 2~

Complicity of Nigeria's Investments and Securities Tribunal (IST) in the Securities Fraud that Crashed Nigeria Stock Market.

4.1 Introduction.

The sudden rise of Nigeria stock market to become world's highest performing market in the last quarter of 2007 was astounding.[275]Neither the Nigerian national economy nor any sound *economic* or *market fundamentals* supported the market's outlandish performance.[276]The feat defied logic and reason. But, the precipitous crash of the market in early 2008, soon after reaching a record high,[277] became even more perplexing than the meteoric rise. Protraction of Nigeria market's *bullishness* and the swiftness of the cataclysmic *crash* raise suspicion that the market was manipulated.[278] The odd framework of Nigeria capital market,[279] synchronization in timing of the crash, and conducts of Nigerian government and market officials before, during, and after the crash[280] show that the market's mishap was induced.

275. See Official website at http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aSechJpKP2yo (visited 08/10)
276. Note; Nigerian economy continued in steady decline even when the stock market soared to be the highest in the world.
277.See; Bloomberg's report ***republished*** in *Punch Newspaper* of 02/02/2009 titled *'Nigeria stock market losses, highest in the world'*. - Nigeria's market capitalization peaked at **N12.4tn** in March 2008, but fell to **N4.5tn** by end of March 2009.
278. Bloomberg, ibid. ***Note also***; The market surged steadily to its highest peak, and immediately declined swiftly to the bottom.
279. Note; For details of the odd frameworks of Nigeria capital market, go to pp. 109 to 121, etal, chapter 3 of dissertation, supra.
280. For summary of conducts that occurred before, during, and immediately after the crash, see pp. 102-106, Chap.3, supra.

Nigeria stock market crash strikingly resembles ***'hot money cycle'*** scheme which an eminent Columbian University professor of Economics, and two-time Nobel Prize laureate, Professor Joseph Stiglitz,[281] accused IMF and World Bank of precipitating in developing countries.[282] Details of Nigeria market crash[283] support a conclusion that the crash is Nigeria's own '*hot money cycle*' scheme. Careful scrutiny of Nigeria market's legal framework reveals that the market was intentionally designed to fail,[284] ostensibly, as part of the '*hot money cycle*' scheme. In addition to the design flaws that abound in Nigeria capital market, Nigeria's SEC is acutely incapacitated in unusual ways by Nigeria's principal securities statutes.[285]The legal and structural arrangements of Nigeria capital market are utterly chaotic, and the market is left in a state of contrived dysfunction.

Hostility mounted against Nigeria's SEC in the principal securities statutes grossly weakened the regulatory agency, and created predictable harms that wrecked Nigeria capital market. In addition to Nigeria market's countless ills, Nigerian Investments and Securities Act 2007 ('ISA' or 'the 2007 Act') also established an

281. Note; Prof. Stiglitz was also Chairman of President Clinton's Economic Advisers, World Bank's Chief Economist and V.P.
282. See ***The Observer***, Sunday 29 April 2001, at http://www.guardian.co.uk./business/2001/apr/29/business.mbas (01/2011)
283. Note; For details of Nigeria stock market crash, go to pp. 1-9, Chapter 1 of dissertation, supra.
284.Note; The design flaw in Nigeria capital market's legal and structural frameworks is skillful, very profound, and elaborate.
285.Note; For details of SEC incapacitation by the securities Act, see pp.109-121, Chapter 3 of dissertation, supra.

Investments and Securities Tribunal[286] ('IST' or 'the tribunal') and positioned the tribunal to dominate and further impede Nigeria's SEC.[287]The tribunal lives up to its assignment, perhaps too much.[288]

Nigerian Investments and Securities Tribunal uses its enormous powers and strategic advantage to frustrate the SEC, and to routinely overturn SEC penal actions against fraudulent market operators.[289] Brief analysis of few of the tribunal's appellate judgments that overturned disciplinary sanctions imposed by SEC's Administrative Proceedings Committee (APC), will show the tribunal's persistent hostility towards SEC. But, analysis of SEC's powers over market infractions, exercise of which powers led to appeals to the tribunal, will come first.

4.2 **Powers of Nigeria's SEC (through APC) to Investigate and Punish Securities Malpractices, Under ISA 2007.**

Nigerian Investments and Securities Act 2007 expressly designated Nigeria's SEC the apex regulator of Nigerian capital market.[290] The 2007 Act also assigned thirty different duties and responsibilities to the SEC as the apex market regulator.[291]

286. See; S.274, (2007), Investments and Securities Act. (ISA).
287. See; S. 284, (1) (a)-(f) and s.289 (1), ibid.
288. Note; For full analysis of the Investments and Securities Tribunal's hostilities towards Nigeria's SEC see pp.147-185, infra.
289. See; ibid.
290. See; S.13, ISA, supra.
291. See; Paragraphs (a) – (z) and z (aa) – z (dd), s.13 ibid.

S.303(2) and (3) of the 2007 Act gives SEC the *power to impose penalty* on violators of the Act, and to make order for compensation of victims of market infractions, as well as to order forfeiture in appropriate cases.[292] In particular, ***s.305 (1)*** provides that ***where an offence has been committed*** *by a company, every person in charge of the company, every person responsible for the conduct of business of the company, as well as the company itself,* ***shall be deemed to be guilty of the offence*** *and shall* ***be liable to be proceeded against.***[293] Additionally, subsection ***(2) of s.305*** provides that *where an* ***offence has been proved to be committed by a company*** *with the* ***consent or connivance*** *of, or* ***attributable*** *to any neglect on the part of* ***any officer*** *of the company,* ***such officer shall also be deemed to be guilty of the offence*** and shall be liable to be proceeded against.[294]

Explicit in the clear wordings of subsections (1) and (2) of s.305 is that where a company commits securities offence, both the company and its officers shall be deemed guilty of the offence, and shall be liable to be proceeded against. Furthermore, ***paragraphs (a)*** and ***(b)***, subsection ***(3)*** of ***s.305*** accentuates SEC's penal powers.[295]For its relevance, provisions of subsection (3) (a) and (b) of

292. See; S.303 (2) and (3), ISA 2007, supra.
293. See; S.305 (1), ISA, ibid.
294. See; S.305 (2), ibid.
295. See; S.305 (3), (a), and (b), ibid.

s.305 merit full reproduction. Subsection (3) and its two paragraphs provide that;

> *"[i]f **the Commission is satisfied** that a person (corporate or individual): (a) is engaged or has engaged in any form of market abuse or other violations under this Act; or (b) by taking or refraining from taking any action, has required or encouraged another person or persons to engage in behaviour which if engaged in by a market participant or company would amount to market abuse or violation under this Act, **it may impose on the person a penalty of such amount or of such nature as it considers appropriate...**"*[296]

The foregoing are some of the statutory powers under which the Administrative Proceedings Committee (APC), a staff-division of the SEC, imposed many of its sanctions that went on appeal to the Investments and Securities Tribunal. The tribunal upheld some APC sanctions relying on SEC's statutory penal powers. But the tribunal invented unsound logics, arbitrarily excuses and faulty reasoning to quash many APC sanctions, and free proven securities fraudsters – mostly rich market operators who committed very serious securities and accounting frauds.

4.3 Nigerian IST through the Cases: IST's Judicial Hostility towards SEC; Happenstance or Evidence of Complicity in Securities Fraud?

Nigeria's SEC is severely weakened in the Investments and Securities Act 2007.[297] Position of the Chairman of SEC is statutorily ***non- executive*** and ***part-time***.[298] Positions of two SEC Commissioners are part-time and non-executive also.[299]

296. **See;** S.305, (3), (a), and (b), ISA 2007
297.See; Footnote 285, p.145, supra.
298. **See;** Paragraphs (a)-(f), subsection (1), s.3, 2007 ISA, supra.
299. Ibid.

But, positions of the other three SEC Commissioners are both ***executive*** and ***fulltime***.[300] Rather than the SEC Chairman, a lower office of Director-General is designated both the ***Chief Executive and Accounting Officer*** of the SEC.[301] Other areas Nigeria's SEC is statutorily sabotaged include ***salary*** and ***remunerations***,[302] ***appointment***,[303] ***tenure***,[304] ***devotion to duty***,[305] and prohibition from violation of ***ethics rules***.[306] In each of these vital matters, SEC board is statutorily split into two unequal parts, yet, all the SEC board members hold equal votes and perform the same functions. The part-time, non-executive, poorly paid Chairman heads all SEC meetings,[307] and is additionally reposed with powers to cast the tie breaker in SEC votes.[308] The abnormal statutory arrangement of Nigeria's SEC board is evidently calculated to divide the board, create internal power struggle, and render SEC board susceptible and beholden to market operators.

The awkward SEC arrangement left an acutely weak SEC to regulate and supervise Nigeria capital market. SEC weakness is exacerbated by IST's propensity to overturn SEC sanctions on flimsy excuses. Whether IST's persistent overturn of

300. See; Paragraphs (a) – (f), subsection (1), s.3, ISA, supra.
301. See; Paragraph (b), subsection (1), s.3, ibid.
302. See Subsections (1) and (2), s.9, ISA, supra.
303. See; Subsection (1) of s.5, ISA, supra.
304. See; Subsections (2), (3), and (4), s.5 ISA, ibid.
305. See; S.6, ibid.
306. Ibid.
307. See; Subsection (2), s.10, ISA, ibid.
308. See; Subsection (4), s.10, ibid.

SEC sanctions against big securities fraudsters is isolated inadvertence, or evidence of complicity in the larger securities scheme in Nigeria capital market, is open to debate. But, consistency of occurrence of the reversals, flimsiness of the tribunal's excuses for the reversals, statutory provisions that empower the tribunal to freely accept monetary grants and donations, and the aberrant positioning of the tribunal with mandate that allows it to usurp SEC apex authority, point to the tribunal's complicit alliance in the securities scheme that reign in Nigeria capital market.

4.3.1 Examples of the Tribunal's Judgments that Freed Securities Fraudsters.

The following are few of the tribunal's questionable appellate judgments that overturned SEC (APC) sanctions. But first, here is one appellate judgment in which the tribunal *said* and *did* all the right things.

4.3.1.i). ***Union Bank of Nigeria (UBN) PLC v. SEC;***[309]

paragraph B, the tribunal held that

> *"... we are inclined to hold that the Respondent (SEC) is empowered by s.8 of ISA (the 1999 Act), to act in the interest of the public as the apex regulatory agency supervising the capital market.* ***Inaction on the part of the Respondent (SEC) in respect of a scam of this magnitude could be regarded as breach of statutory obligations. It would definitely be inimical to the overall development of the capital market, if fraud of this nature goes unpunished, whether there are ascertainable investors or not....*** *"*[310]

309. See; (2004), 1 (Nigerian Investments and Securities Law Report) NISLR 115.
310. Ibid, page 161,paragraph B of law report.

The tribunal held in the above appeal that paramount interests of the public and the capital market, not some fanciful legal technicalities, should guide SEC's disciplinary actions against entities that commit securities frauds. SEC and the tribunal are of the same opinion that the appellant's infractions in the above case are minor, and did not involve any *"...manipulative and deceptive contrivances..."* but merely that the appellant company and its CEO

> *"...failed to exercise due care and supervision over the activities and staff of the company when it failed to ... re-verify the diskette forwarded to it by the CSCS (Central Securities and Clearing Systems)..."*[311]

And, that the appellant "... *also failed in its duty to notify the Commission of the suspected breach or non compliance with any of the regulations of SEC..."* Yet, the tribunal held that;

> *"... the above actions/omissions of UBN Registrars (appellant) constituted* ***acts capable of adversely affecting the investing public's image of and confidence*** *in the Capital Market..."*[312]

In that appeal, the tribunal upheld the appellant counsel's submission that the *restitution order* made by APC was wrongful and posed *risk of multiplicity and double compensation*. Nevertheless, the tribunal relied strongly on the *'image of and confidence in the capital market'* doctrine to refuse the appellant counsel's

311. **See;** Page 161, supra at page 150.
312. Ibid.

forceful plea to *void* the restitution order. Instead, the tribunal made an order *remanding* the case to APC, only for a *proper apportionment of the restitution.*

The premise and reasoning of the tribunal's affirmation of APC sanction in the ***Union Bank Case***, above, is sound and representative of the higher disciplinary benchmark needed in Nigeria capital market. If the tribunal had maintained that threshold of discipline, Nigeria capital market would have benefitted immensely. Higher regulatory and adjudicatory standard is one feasible way to instill integrity, transparency, orderliness, fair and equitable principles of trade, and enhance investor protection, in the capital market.

However, problem arises when in very serious securities fraud cases, the tribunal arbitrarily veers off the sound criterion it laid down in the ***Union Bank of Nigeria Case***, and rely heavily on tenuous logics and flawed reasoning to routinely *quash* SEC sanctions. See for example the case of

4.3.1.ii). ***Molten Trust Ltd & Another v. SEC***;[313] The 2nd appellant is the Managing Director of the 1st appellant company. 1st and 2nd appellants were summoned ***jointly*** by APC for investigation over allegation of serious securities frauds. As MD of the

313. See; (2007)2 NISLR 137 at 170-171, paras F-A.

company, 2nd appellant appeared for and represented the company throughout the proceedings. 2nd appellant filed defense, testified under oath, and was cross-examined. In the end, 1st appellant (the company) was found liable and sanctioned. 1st appellant's punishments included an order not to operate in the capital market for three months. Because of his personal role in the proven fraud, 2nd appellant (MD of the company) was also barred from participating in the market for 12 months. 2nd appellant appealed to the tribunal against his 12 months suspension. 2nd appellant's argument in the tribunal was *that he did not have a fair chance to defend himself before the SEC, that, he defended only the 1st appellant*. The tribunal upheld 2nd appellant's specious argument holding that

> *"[a]part from bringing violations of the market rules against corporate bodies, the* ***employee of the corporate body/company that is involved in the case should also have his separate and specific violations pressed against him according to his level of involvement****. In this way the principle of fair hearing would be fully enforced and observed."*[314]

Based on the above reasoning, the tribunal set aside the twelve months suspension APC imposed on the 2nd appellant. The tribunal did not show concern for the serious securities frauds the 2nd appellant committed. The tribunal did not even

314. See; Molten Trust Ltd, and Anor. v. SEC, paragraphs F-A., 170-171,supra at p.152.

order a retrial of the 2nd appellant. The tribunal simply let off the 2nd appellant, but upheld the sanction imposed on the company (i.e. 1st appellant) for the same frauds. The company acted through the 2nd appellant in committing the frauds.

The flaws in the tribunal's decision in ***Molten Trust Case*** are many. But due to constraints in time and space, I will limit my analysis of the case. First, as noted earlier,[315] s.305 (1) provides that where a company commits an offence, every officer in charge of the company is deemed equally guilty and liable to be proceeded against.[316] S.305 (1) is directly on point in the **Molten Trust case**. S.305 (1) is one of the few *bona fide* provisions that exist in Nigerian ISA 2007, but the tribunal appears determined to frustrate the beneficial operation of the section. The section is a *special anti-fraud provision* in recognition that corporations commit frauds only through human beings, i.e., their officers. By the operation of s.305 (1), the 2nd appellant who is the M.D. of 1st appellant is, on that basis alone, adjudged guilty and liable to be proceeded against for the 1st appellant's securities offence. That is the explicit provision of s.305 (1). Since APC concluded that the company committed the offence, APC need not do more to sanction the M.D. i.e. 2nd appellant. That the tribunal upheld the company's guilt automatically settles the 2nd

315. See; Footnote 293, , supra, at page 147.
316. See; S.305 (1), ISA

appellant's guilt also. The 1st appellant's guilt ropes in the 2nd appellant, without more, according to the plain wordings of s.305 (1). Subsection (2) of s.305 re-enforces the provision of subsection (1).

Nonetheless, SEC gave the 2nd Appellant notice and the opportunity to participate in the investigation and administrative proceeding, before finding him and the company liable. The tribunal's reversal of the 2nd appellant's punishment based on the ground that APC ought to have, *in the invitation*, separated the employee from the company, and have the employee's separate and specific violations pressed against him, is frivolous, flawed, and unrepresentative of the law.

Second, in the ***Molten Trust Case***, the tribunal abandoned the *'overall interest of the market'*, and the *'possibility of wrong perception by the public in the event of failure of SEC to punish identified culprits'* doctrines it espoused earlier in the ***Union Bank Case***, above. Rather, the tribunal made an about turn, and relied on an inapplicable excuse of *'breach of fair hearing'* to absolve the 2nd appellant, and annul his 12 months suspension. The facts of Molten Trust Case do not support 2nd appellant's claim of breach of fair hearing.

More so, Nigeria's SEC does not conduct criminal proceedings. SEC only carries out civil investigations and administrative proceedings. Nigeria SEC is by law bound to channel all criminal cases to the

> *"...appropriate criminal prosecuting authorities, such as, the office of the Attorney-General of the Federation, the Attorney-General of a state, and the Economic and Financial Crimes Commission."*[317]

By operation of law therefore, SEC does not undertake criminal prosecutions to necessitate the kind of separate *invitations* with distinct charges the tribunal wrongly demanded for 2nd appellant in the ***Molten Trust case.***

Another of the tribunal's decisions of interest is an appeal over APC sanctions against appellants who committed horrible securities fraud;

4.3.1.iii).***Nova Finance & Securities Ltd and Mr. Eugene Anenih v. SEC;***[318] Summary of the facts of the case is that SEC investigated appellants (stock brokers), and found them guilty of brazenly manipulating African Petroleum Plc (AP Plc) shares in the stock market. SEC investigations found that appellants manipulated AP Plc's shares ***thirty-two (32) times within a period of two weeks.***

317. See; S.304, ISA, supra.
318. See; ***(Unreported)*** (2009), Case No. IST/APP/02/09. Judgment delivered on Wednesday, 9th September, 2009.

Losses inflicted on AP Plc by the appellants' misconducts totaled N117.2 billion ($820.4 million). It is pertinent to observe that prior to SEC's action against the appellants, Nigerian Stock Exchange (NSE) had carried out similar investigations over the same allegations of serious frauds, found appellants liable for manipulating AP Plc's shares as alleged, and punished them accordingly. Appellants accepted the punishment imposed by the Nigerian Stock Exchange without complaint. However, when SEC found appellants liable and imposed sanction on them, appellants appealed against SEC's sanctions. In its judgment, the tribunal embarked on a voyage of pure speculations and conjectures to hold that

> *"... at the rate the AP Plc shares fell between Jan. 16th to Feb. 10th when the Appellants had not come to the picture,* ***the price would have gone down in 6 weeks by N155.70, and in eight weeks could have gone down by N207.60****. The inference/conclusion from the facts is that factors other than the transactions by the Appellants* ***contributed*** *to the steady decline in the share price of AP Plc from Jan. to March, 2009 without going further."*[319]

> *"... [a]dditionally, as at the time of these transactions,* ***we note*** *that the share prices of other petroleum companies were also on the decline like that of the AP Plc.* ***There was also global financial crisis,*** *the* ***price of crude oil was going down*** *and the* ***debate on the effect of these events on the Nigerian economy was widespread*** *at this time."*[320]

319. See; Nova Securities & Finance Case, page 15 of *'certified true copy'* of judgment, supra at page 156
320. See; page 16, Ibid

The tribunal concluded that *"[m]uch as we want to agree with the Respondent* ***that any transaction of 50,000 units in the stock of a listed company could move the price*** *either upwards or downwards within the 5% margin,* ***we are not convinced*** *that the Appellants' transactions caused the decline in price of AP Plc shares..."*[321]

The tribunal also invoked its ultimate '*weapon against SEC*', i.e., *breach of fair hearing* excuse, and surmised in page 18 that

> *"...it is clear that* ***only one letter of invitation was extended to both Appellants. No other evidence was submitted to show that any invitation was sent to the 2nd Appellant personally****. The* ***question is whether the notice is adequate for both Appellants*** *and whether less than 24 hours notice is sufficient for the Appellants. The* ***answer is in the negative.****"*[322]

Continuing at page 19, the tribunal derided the content of SEC's notice of invitation to Appellants, and held further that

> *"[i]f the hearing was meant to be an adjudicatory type, the party invited should know what specific act or conduct of his gave rise to the alleged violation. He should also know that he is invited to defend himself and show why disciplinary action should not be taken against him. In this case, the vague general wording of the letter of* ***invitation*** *fails in all regards except as* ***notice*** *to* ***Appellants to assist the respondent in the course of its investigation.****"*[323]

In the end, the tribunal overturned all SEC sanctions against the appellants. The tribunal totally absolved the appellants and sent them back into the stock market.

321. See; Nova Securities & Finance Case, page 16 of 'certified true copy' of judgment, supra at page 156
322. page 18, ibid
323. page 19, ibid

Appellants whom SEC and NSE found liable for manipulating AP Plc stocks 32 times in two weeks, and caused N117.2bn ($820.4 million) in losses went scot free.

Many vexing issues are raised by the tribunal's judgment in ***Nova Securities Case***.[324] First issue raised in the judgment is the tribunal's conclusion that;

> *"... [a]dditionally, as at the time of these transactions,* ***we note*** *that the share prices of other petroleum companies were also on the decline like that of the AP Plc.* ***There was also global financial crisis,*** *the* ***price of crude oil was going down*** *and the* ***debate on the effect of these events on the Nigerian economy was widespread*** *at this time."*[325]

The above quoted portion of the tribunal's judgment is not supported by any iota of evidence on record. The conclusion was based entirely on the tribunal's own imagination and conjecture. If the tribunal considered those matters important to the appeal before it, the tribunal would have called for fresh *viva-voce* evidence on the matters rather than resort to speculations. The tribunal was not as appropriately situated as the SEC and NSE to fathom the cause of the decline in value of the shares in question. Securities and finance professionals working in both the SEC and the Nigerian Stock Exchange (NSE) already determined that appellants' fraudulent activities caused the drastic losses in AP Plc's shares. The appellants

324. See; Page 156.
325. Ibid.

agreed to those findings and abided by the sanctions NSE imposed. The expert finding trumps the tribunal's uneducated guesswork, and was enough to establish the facts of the fraud, unless the tribunal saw reason to impugn the credibility of the expert findings. No such reason was raised in the tribunal's judgment.

Second issue that arose from ***Nova Securities Case*** relates to confusion of legal issues. There is a confusion that manifests repeatedly in the tribunal's "*special*" judgments. The tribunal appears in ***Nova Securities Case*** (as in many similar cases) to struggle with the proper characterization of APC disciplinary functions. The tribunal's judgment in ***Nova Securities Case*** and similar class of cases erroneously assume APC investigation and enforcement actions to be court trials. This mistaken assumption led the tribunal to wrongfully invoke higher benchmark of fair hearing to strike down many APC sanctions. SEC is a statutory administrative agency with mandate to regulate the capital market, investigate infractions, inspect books and records, and where appropriate, to impose sanctions after hearing the parties.[326] SEC is the capital market police, constantly in hot pursuit of securities fraudsters, and not a trial court.

326. See; S.13 paragraphs (r) and (t), and s.304 of the 2007 Act.

A combined reading of s.13 (r) and (t), and s.304 of the 2007 Act, shows that SEC merely carries out investigations, not trials, for the purpose of supervising and regulating Nigeria capital market. There is a world of difference between SEC's administrative proceedings, and criminal trials. In ***Molten Trust Case***,[327] supra, the tribunal acknowledged the investigative nature of SEC functions, but inexplicably missed the relevance of that vital point in choosing the appropriate criterion for fair hearing for SEC enforcement actions. The tribunal's understanding of the functions of the SEC led it to rightly make the point in ***Molten Trust Case*** that

> *"...[t]he Act also empowers the Respondent (SEC) in the public interest, having regard to the protection of investors and maintenance of fair and orderly market, to* ***investigate****, prevent fraudulent and unfair trade practices relating to the securities industry."*[328]

The 2007 Act does not require SEC to conduct court-like elaborate trials as a necessary process for determining infractions committed in the capital market, or for purposes of ascertaining the degree of culpability of any individual or entity. SEC, through APC, merely carries out investigations and administrative proceedings to determine whether violations occurred, who committed the violations, and to impose appropriate sanctions. Measure of fair hearing for SEC investigations, therefore, ought to recognize SEC's duties. Though s.303 (5)

327. Moilten Trust Case, supra at page 152
328. Ibid.

provides that SEC shall accord fair hearing to a person in violation, in the exercise of its enforcement powers, but, fair hearing under s.303 (5) must be interpreted in harmony with s.305 (1) and (2), and must be in consonance with SEC arduous duties, such that every suspect must be fully heard before condemnation. Right of fair hearing under the type of proceedings Nigeria SEC is saddled with does not mean that Nigeria's Criminal Procedure Law book will be thrown at the culprit. SEC does not conduct criminal trials to warrant such exceptional measures.

SEC duties in the capital market would not accommodate the luxury of procedural extravagance, for obvious reasons. At the stage APC sends out invitations, culpability of individuals or entities may not have been determined yet. Specificities of individual violations and exact culprits may not yet be discernible. So, SEC will not be in a position, while sending out invitations, to separately charge each invitee, as demanded by the tribunal. Above all, the statutory mandate and purely civil and administrative nature of SEC proceedings make strict adherence to criminal trial benchmark for fair hearing unnecessary, impossible, and counter-productive. Demand for fair hearing must take into consideration the totality of all the circumstances of SEC situation, so as to avoid undue narrow and technical assessment of SEC disciplinary sanctions. The tribunal understands

this, and stated so in ***Molten Trust Case.***[329] The tribunal also confirmed its understanding of SEC unique situation in its judgment in another appeal – ***Cadbury Nigeria Plc vs. SEC & Another***[330](2008), where Appellant's Counsel vigorously canvassed breach of fair hearing principles of ***audi alteram partem*** and ***nemo judex incausa sua***. The tribunal vehemently rejected both arguments on that occasion, and eloquently framed SEC's distinctive role vis-à-vis rights to fair hearing. The tribunal held in that case that;

> *"[t]he 1st Respondent (i.e. SEC) is the Apex regulatory authority in the Nigerian capital market. Its functions include overseeing the operations, transactions and overall development of the capital market. Under section 8 of the Investments and Securities Act 1999 (now repealed) the 1st Respondent (SEC) has powers to regulate, control, monitor, investigate, and prevent fraudulent and unfair trade practices in the market. Inherent in its powers is the power of sanction where there are established cases of infraction of the law and the rules made pursuant to the law by capital market operators."*[331]

Continuing, the tribunal asserted that

> ***"[i]t is pertinent to state that carrying out investigation and subsequently proceeding against any party at the APC itself does not constitute a violation of the Appellant's right to fair hearing…"***[332]

The tribunal showed an understanding of SEC job in the above quotes. But, the tribunal expediently forgets SEC duties when *certain* appellants appear before it.

329. P.169, paragraph E, supra at page 152.
330. See; (*Unreported*) (2008), *Appeal* No.IST/APP/01/08 *delivered* on 12th November, 2008.
331. Ibid.
332. Ibid.

Again, although the tribunal reached a wrong decision in the ***Molten Trust Case***,[333] the tribunal made two significant restatements of the law that suggests the tribunal, when it chooses, has a clear understanding of the appropriate threshold of fair hearing required of SEC. The tribunal in ***Molten Trust case*** first stated that;

> *"...[s].36 (1) (Nigeria's constitutional guarantee of right to fair hearing)* ***is also modified where the determination of the administering authority is not final and conclusive such as a situation where APC's decisions are not final*** *but have to be referred to the board of SEC for final decision."*[334]

Continuing at page 169, the tribunal stated that

> "***[f]air hearing is not to be assessed from a narrow and technical perspective*** but in substance"[335]

It is beyond question that, on a '*good day*', the tribunal clearly understands the law on right to fair hearing, and correctly restates the principles. However, consistency appears to be a virtue the tribunal struggles with. The tribunal needs to show uniformity in its good understanding of fair hearing principles, in all its judgments, not just in some, if the tribunal is sincere in its pursuit of justice.

333. Supra, at page 152.
334. See; Paragraph B, page 167, ibid.
335. See; Page 169, ibid.

Moreover, ***S.36(1)*** of the 1999 Nigerian Constitution which guarantees to Nigerians the right to fair hearing, limits fair hearing rights only to proceedings conducted by *"...a court or other tribunal...."*[336] The Administrative Proceedings Committee (APC) of the SEC is neither a court nor a tribunal, but a statutory administrative investigative body. APC falls within the class of authorities for which ***subsections (2) (a) and (b) of s.36*** of the 1999 Nigerian Constitution *toned down* the threshold of fair hearing because their decisions are not final.[337] All APC decisions are subject to SEC approval.

Contrary to the tribunal's decisions, APC's ***joint invitation*** to a corporation and its staff does not amount to breach of fair hearing. Notice of pendency of APC's investigation and administrative proceedings is a matter of procedural due process. Due process rights and principles are notorious and settled area of the law. Adequacy of notice of proceedings is not chiseled in stone but depends on the circumstances of each case. Purpose of notice is to officially make all the affected parties aware of the pendency of a proceeding, and to formally give them the opportunity to attend and participate, if they wish. APC *joint letter* to a company and its staff are sufficient notice for APC administrative proceedings.

336. See; S.36 (1), (1999), Constitution of the Federal Republic of Nigeria.
337. See; Subsection (2), (a), and (b), of s.36, ibid.

Notice to defendant in APC proceedings is very important. Nevertheless, it is trite law that inadequacy of notice is a procedural defect that can be waived by the affected party. Where the appellants fully participated in SEC proceedings as in the ***Molten Trust Case***, ***Nova Securities & Finance Case***, ***Olisaemeka Case***, ***Akintola Williams Deloitte Case***, etc., and did not complain about inadequacy of notice, at all, throughout the APC administrative proceedings, they are deemed to have waived any breach of notice. Breach of notice does not amount to breach of fair hearing if the affected parties waived the breach. The matter is foreclosed, and cannot be raised for the first time on appeal, and cannot sustain a reversal of SEC just sanctions. The foregoing is a notorious principle of law that does not require citation of legal authorities. The tribunal chose to reverse APC sanctions contrary to the basic principles of law. The tribunal is utterly wrong, and insincere on the use of breach of fair hearing excuses.

Furthermore, the tribunal's unrelenting exculpation of proven securities fraudsters on frivolous excuses has profound implications. The tribunal sends confirmed securities fraudsters back into the market. Invariably, they become more confident and hardened, and assured that they can commit any frauds and infractions and get away with it. The tribunal's incessant discharge of proven securities fraudsters sends wrong message to other market participants, and to the market place. The act

is injurious to market integrity, transparency, and orderliness, and imperils investor protection. Another implication of the tribunal's action is that the tribunal is intentionally ***aiding and abetting*** securities fraud. The action makes the tribunal ***accessory after the facts*** to securities crimes. The tribunal's brazen recklessness confirms that the tribunal is eagerly complicit in the organized securities scheme that crashed Nigeria stock market, and continues unabated.

Third issue raised by ***Nova Securities Case*** is the need to identify and address the root causes of the tribunal's continuing misbehavior. The tribunal's appalling misconducts traces back to contrived dysfunction of the regulatory framework of Nigeria capital market, and the excision of safety features of the borrowed U.S. SEC system. If Nigeria's Investments and Securities Tribunal is subordinated to Nigeria's SEC, as Administrative Law Judges are to the U.S. SEC,[338] Nigeria's tribunal will be the securities 'court' of ***first instance***. Appeals would go from the tribunal's judgments to Nigeria's SEC board, rather than the current vice versa. The tribunal's tactical advantage over SEC would not exist, and the tribunal's frequent collusions to free high-profile securities fraudsters, and unleash them back into Nigeria capital market and on innocent investors, would probably not occur.

338. See; Office of Administrative Law Judges; Administrative action. At http://www.sec.gov/alj.shtml (03/2011)

Moreover, if the Nigerian system had adhered to the U.S. system, Nigeria's SEC (or its alter ego, APC) would focus on investigating securities frauds and violations, and not be also mired in administrative proceedings. In U.S., it is the independent Administrative Law Judges under the auspices of the SEC that conduct securities administrative proceedings.[339] Enforcement Division of the SEC conducts investigations, gathers evidence of securities frauds and relational infractions, and sends the case to the Administrative Law Judge in civil proceedings (or to U.S. Attorney's Office for criminal prosecutions).[340] The parties vent their issues before professional judges who understand all the legal intricacies and nuances involved, including fundamental right issues. The Judge renders a verdict. Dissatisfied parties appeal to the full board of U.S. SEC.[341] The U.S. SEC system epitomizes the apex authority of SEC. The U.S. arrangement is an important SEC internal adjudicatory structure that is distorted in Nigeria's SEC.

Fallout from the Nigerian muddle is that Nigerian APC, manned mostly by non-lawyers, is wrongly subjected to the difficult task of conducting administrative proceedings. Nigerian tribunal judges see a loophole in the faulty Nigeria's SEC adjudicatory arrangement and ill-use the opportunity to indulge in self fulfillment.

339. See; Footnote 338, supra at page 167. ***Note*** that it is only from ALJs' civil proceedings that appeals go to the SEC board.
340. See; Footnote 338, ibid. ***See also***, Cox, Hillman, Langevoort, (2006), Securities Regulation; Cases and Materials, 11.
341. Footnote 338, ibid.

The tribunal capriciously raises the bar for APC sanctions, and demand from non-lawyers to conduct proceedings like professional trial judges. Why Nigeria SEC is boxed into the awkward position remains unclear, but the model is demoralizing to SEC staffs, and dovetails into the securities scheme that crashed the stock market.

4.3.1.iv) Again in the case of ***Olisaemeka v. SEC***;[342] breach of right to fair hearing was used to pardon an Appellant who admitted that he attended the APC proceedings, but;

> "… ***was only asked questions about himself and his involvement in the UAC share scam as well as the alleged falsification of the signature of the Managing Director*** of the firm."[343]

The U.A.C. share scam in the capital market and forgery of the MD's signature were the key issues in the case. Appellant admitted that he was asked *questions* on those issues. APC eventually found appellant liable for complicity in fraudulent dealings involving UAC shares and falsification of signature of MD of the firm. Appellant was banned from doing business in the capital market by SEC and handed over to Economic and Financial Crimes Commission (EFCC) for criminal investigation and possible prosecution. In the light of the those facts, the

342. **See;** (2007) NISLR 175.
343. Ibid.

tribunal still ***held*** that the Appellant's right to fair hearing was breached because

> *"[t]he Appellant was **not invited as a separate party** to the proceedings at APC **nor was he informed of the issue in dispute at the proceedings**."*[344]

If the tribunal's 'breach of fair hearing excuses' amounted to bad justice in the above three cases, things got even worse. In another high-profile, serious securities fraud matter that went on appeal to the tribunal, the tribunal took misuse of judicial authority to a new high and invented new inane reason to quashed APC sanctions;

4.3.1.v). ***Akintola Williams Deloitte v. SEC and 20 others;***[345]

This case reenacted in Nigeria the infamous ***Arthur Anderson, Inc.,*** and ***Enron Corporation's*** accounting scams that occurred in the United States. The facts of the case are that SEC discovered multiple irregularities in Cadbury Nigeria Plc's (Cadbury) Annual Reports and Accounts. SEC found overstatements in Cadbury's 2002-2006 annual reports. SEC also noticed drastic deteriorating financial condition of the company, declining profitability, worsening leverage ratio, and deteriorating cash flow. Cadbury was also implicated in inadequate disclosure, non-compliance with Corporate Governance Code, and obtaining loans for the payment of dividends to shareholders contrary to SEC regulations. SEC queried

344. See; Olisaemeka v. SEC, supra at page 169.
345. See; (***Unreported***) Appeal No. IST/LA/APP/01/08, judgment delivered on Tuesday, 10th February, 2009.

Cadbury. In answer to SEC query, Cadbury *"cooked"* its financial books and annual reports to cover those irregularities. The financial books, annual reports, and accounts were prepared for Cadbury by the Appellant (Akintola Williams Deloitte), Nigeria's topmost accounting firm that serves as external auditors to Cadbury. The appellant was found complicit in "cooking" Cadbury's financial books. Appellant was the 20th party APC invited for investigation. Upon conclusion of proceedings, Appellant and many other invitees were found liable and fined. Appellant was ordered to pay a relatively paltry N20 million ($140,000.00) fine. Most of the sanctioned culprits, including Cadbury Nigeria Plc, appealed to the tribunal on grounds of breach of right to fair hearing, amongst other grounds, but *lost*. Appellant also appealed against APC sanctions, to the tribunal. Out of appellant's nine hotly contested grounds of appeal, the tribunal latched onto two trivial issues to totally free yet another high-profile (accounting) fraudster.

In the appeal, the tribunal hinged its ***quashing*** of APC sanction on two issues; First, the tribunal held that SEC failed to prove that it complied with ***s.310 (3) of the ISA 2007, and Rule 12 of the Rules of Procedure of SEC Administrative Proceedings Committee*** contained in Schedule VII of the Rules and Regulations of SEC. S.310 (3) and Rule 12 both require that a decision of any committee of the

Commission shall not be of any effect until it is *confirmed* by the Commission. Rule 12 additionally stipulates that the Commission's confirmation shall be made within 14 days after the decision, and that the Secretary of the Commission shall communicate in writing to the affected parties within 5 days of the confirmation of the decision by the full board of the Commission.

SEC board's confirmation of APC decisions is SEC's internal procedural matter meant only for *administrative convenience*. Non-confirmation of APC decision does not strike at the root of APC's enforcement actions. The tribunal itself has held on many occasions that APC and SEC are one and the same. Hence confirmation of decision of APC by SEC is a mere internal formality, and failure to abide by the directive, if proved, should not be a ground for the tribunal to reverse a just decision of the APC. The reversal amounted to undue reliance on fanciful technicalities to undermine SEC in the discharge of its duties. The tribunal's unjust decisions will, and certainly do, have a chilling effect on Nigeria capital market.

Second, the other *excuses* upon which the tribunal quashed sanction APC imposed on the top accounting firm, proven to be guilty of serious accounting and securities frauds, are (i) that the APC (of SEC) did not *properly evaluate the evidence* before

reaching its decision, (ii) that APC *gave no reasons for its decision*, and (iii) APC *did not indicate the evidence upon which it came to its conclusion*, hence APC sanction was quashed and the appellant was set free, to go *'sin some more'*.

The premises of the tribunal's second reasoning in ***Akintola Williams' Deloitte Case*** are abysmally flawed, and the tribunal's conclusions manifestly wrong. The flaws poke into the eyes, and beckon for analysis. The second reasoning in ***Akintola Williams Deloitte Case*** will be briefly analyzed, in two parts, as follows;

The first part of the second ground the tribunal based its reversal of SEC decision in ***Akintola Williams Deloitte Case*** is that APC ***did not properly evaluate the evidence before reaching its decision***. The tribunal's heavy reliance on improper evaluation of evidence appeared in the following passages of its judgment;

> *"[t]he Court of Appeal had, on how a **trial court** should evaluate evidence, held in Olaleye vs Adejumo ...thus: A **trial court** before which evidence is adduced by the parties in a civil case **should first put the totality of the evidence of both parties on an imaginary scale and then see which is heavier**... In determining which is heavier, the trial court should have regard to the **admissibility, relevance, credibility and conclusiveness of the evidence** adduced by the parties."*[346]

346 .See; Akintola Williams Deloitte v. SEC and Ors, p. 16, supra at page 170

Continuing, the tribunal stated that;

> *"In the instant appeal, we may not need to repeat all the submissions on improper evaluation of evidence. We have looked at the Record of Proceedings and* ***find the oral evidence of the Appellant's witnesses*** *were* ***paraphrased****…. "*[347]

In conclusion, the tribunal rendered its decision on the issue of 'evaluation of evidence' thus;

> *"In the instant appeal,* ***we find that APC did not do a proper evaluation of all the evidence that were placed before it****. This invariably impacted on the decision reached thereby. In view of the foregoing,* ***we have no hesitation in resolving this issue in favour of the Appellant****."*[348]

The tribunal expended much of its valuable judicial energy espousing the well known rule on a ***trial court's*** proper evaluation of evidence. The law guiding a trial court's evaluation of evidence is trite and settled. If the appeal under consideration originated from a ***trial court's*** decision, the tribunal would have done a good job. However, the tribunal shot far off mark. The appeal in ***Akintola Williams Deloitte Case*** arose, not from a considered judgment of a trial court, but from an administrative proceeding conducted by an administrative agency, charged with the responsibility of policing the Nigeria capital market. APC of SEC is not a trial court. APC need not, and does not, deliver well considered judgments like regular

347.See; Akintola Williams Deloitte Case, supra at page 170.
348. Ibid.

courts and judicial tribunals, and therefore cannot evaluate evidence like trial courts. Policing the market, investigating frauds and malpractices, inspecting books and records, and sanctioning market violators, do not turn APC into a trial court. The authorities cited by the tribunal accurately represent the law on proper evaluation of evidence, but are totally irrelevant to Akintola Williams Deloitte appeal. To rely on trivial and inapplicable issue of improper evaluation of evidence to reverse APC sanction for Akintola Williams Deloitte's heinous accounting frauds is the closest thing to the tribunal's public confession of corruption.

For the tribunal to so casually set free an appellant who committed for Cadbury Plc (in Nigeria) the same heinous accounting and securities frauds Arthur Anderson, Inc. committed for Enron Corporation in U.S. and lost its occupational license,[349] is wrongful. To base the judicial bravado on unseemly reasoning that APC "... *paraphrased...*" the testimony it obtained during investigation, and that 'APC failed to properly evaluate evidence', amounts to extreme judicial immoderation.

Nothing generates more public opprobrium and oils the current rhythm of national cynicism against Nigeria capital market than the unremitting orgies of frauds that

349. Note; The former global accounting firm, Arthur Anderson, fraud with Enron Corporation led to the demise of both firms.

drown the market. Regrettably, the situation is exacerbated by the tribunal's abnormal justice policy. Arbitrariness displayed in the tribunal's many judgments take toll on the level of confidence it commands from the public, and may have been the reason many victims of Nigeria market swindles chose to bear their losses with equanimity rather than gamble their fate in the tribunal, and lose twice.

A retired Nigerian Supreme Court Justice fittingly restated what judges need to do to kindle public confidence. He spoke like he was directly addressing the Nigerian tribunal, and concluded with the timeless dictum of an eminent English **Master of Rolls, Lord Alfred Thompson Denning** (as he was). According to the retired Justice of the Nigerian Supreme Court;

> *"To inspire public confidence in the judicial process, judges should not only be transparently impartial but also should be seen to be accentuated only by the principles of justice and fair play. The judge should therefore scrupulously eschew bias in any shape or form. It is not merely of some importance, but is of fundamental importance, that justice should not only be done but should manifestly and undoubtedly be seen to be done. Justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking – "the judge was biased."*[350]

350. See; Oputa, Chukwudifu (2002), *'Judicial Ethics and Cannons of Judicial Conduct'*, ***published in*** *'JUSTICE IN THE JUDICIAL PROCESS: ESSAYS IN HONOR OF JUSTICE EUGENE UBAEZUONU,'* 193, 201 (C.C. Nweze ed.).

The zeal with which the Nigerian tribunal sets aside APC sanctions, and reinstate big-time securities fraudsters back to the stock market, speaks volume. The tribunal's actions speak not only to the porosity and debility of Nigerian securities laws, but also reflect on the character and integrity of Nigeria's tribunal judges. A vivid image of a corrupt judge is aptly painted by Justice Niki Tobi of Nigerian Supreme Court. According to the eminent Justice;

> *"[a] judge who is corrupt is the greatest enemy of the judicial process. A corrupt judge is blind to the truth. He is incapable of searching for the truth in the judicial process. His mind is diseased and he is incapable of doing justice in the matter before him. He likes the party who has given him the bribe. He hates the party who has not given him the bribe. He therefore, gives judgment to the party he likes and gives judgment against the party he hates."*[351]

One way to change the current '*wheeler-dealer*' mentality that pervades the Nigerian securities tribunal is to devise sure means to determine the moral worth of persons appointed to serve in the tribunal. Morally upright judges dispense justice without fear or favor. A morally upright judge called upon to administer justice would resist temptation and do justice even if the law is facially unjust, and even when injustice solicits. The desirability for quality individuals to serve as jurists is captured in this apposite opinion;

351. See; Tobi, Niki (2004), '*Code of Conduct and Professional Ethics for Judicial Officers in Nigeria*', ***published in*** '*JUDICIAL EXCELLENCE: ESSAYS IN HONOR OF HON. JUSTICE ANTHONY I. IGUH,*' 37, 82-83 (J.O. Irukwu and A.I. Umezulike eds.).

> *"The types of jurists who serve on the bench have a significant impact on whether a 'feeling of injustice' exists among the people. Regardless of the substantive law applied throughout history, all peoples 'seem to have been unanimous in the desire for judges who could be trusted to judge justly and without fear or favor.' This is because the 'quality of justice' is more dependent on the quality of the individuals administering the law rather than on the 'content of the law they administer'."*[352]

The second part of the second ground the tribunal based its quashing of APC sanction in ***Akintola Williams Deloitte Case*** is that ***APC did not give reason for its decision***. The tribunal adamantly persisted in the same wrong of misclassifying APC of SEC as a trial court. The tribunal's reasons for reversing APC sanction in **Akintola Williams Deloitte** appeal is represented in the following passage;

> *"In the instant appeal, the Appellant has argued that **APC did not consider the sworn declarations made by witnesses** for the prosecution and defense. Going through the records, **this Tribunal cannot find that the APC considered and gave reasons for their findings and decisions** particularly as it relates to the Appellant. This issue is therefore resolved in the favor of the Appellant."*[353]

The tribunal went on a frolic in this part of the judgment. The tribunal made a mountain out of improper consideration and evaluation of evidence by an

352. **See**; Smith, Lavenski R. (2008), *'Judicial Selection: Its' More About the Choices than Who Does the Chosing'*. 30 U.Ark. LITTLE ROCK L. Rev. 799, 801. ***Cited in*** Oko, Okechukwu (2009) *'Lawyers in Fragile Democracies and the Challenges of Democratic Consolidation: The Nigerian Experience'*. Fordham Law Review, vol.77, footnote 39, 1304.
353. **See**; Akintola Williams Deloitte Case, supra at page 170.

administrative agency, and, in consequence, upturned APC disciplinary sanction against Akintola Williams Deloitte. The decision is contrary to the demand of justice. The tribunal, in general, displays arbitrariness in its conception of justice.

The fact that the tribunal bent backwards in ***Molten Trust, Nova Securities, Olisaemeka,*** and ***Akintola Williams Deloitte*** cases, amongst others, to absolve market operators SEC punished for committing worst forms of frauds, without minding the seriousness of their offences, and the impact their unmerited release would have on sensitivity of Nigeria stock market, point conclusively to the tribunal's active ties to the web of frauds that run in Nigeria capital market.

To use sacred privileges of judicial authority to routinely absolve crooked market operators penalized by SEC amount to impartiality, and, is a form of judicial corruption. The tribunal's conduct stains the purity of justice, and pollutes the integrity and transparency of Nigeria capital market. According to the eloquent statement of an eminent Nigerian Supreme Court Justice,

> *"[t]he purity of administration (of justice) is so jealously guarded that if there are any circumstances so affecting a person or a body of persons called upon to determine the right of fellow human being, as to be calculated to create in the mind of a reasonable man a suspicion of those person impartiality; those circumstances in themselves and*

by themselves alone are sufficient to disqualify the person or persons from adjudicating."[354]

A tribunal that has held on occasions that the capital market is a very sensitive market,[355] and emphasized that justice must not be sacrificed for technicality,[356] to repeatedly invoke shallow technicalities to exonerate the worst securities swindlers and return them to the sensitive market, constitutes circumstances that creates in the mind of a reasonable man or woman a suspicion of the tribunal's impartiality. Nigerian securities tribunal has become a formidable sanctuary for injustice.

Another area the tribunal spats with Nigeria's SEC, besides the frequent reversal of APC sanctions, is on the petty matter of award of costs. The tribunal redoubled its assault on SEC by quashing every cost APC awards to SEC to recoup investigation and proceedings expenses. Recovering investigations and administrative proceedings expenses is one major source of revenue to SEC. The law was hazy under the erstwhile 1999 ISA, and the tribunal quashed every cost APC awarded to SEC. But later on, under the extant 2007 ISA, SEC became specifically empowered to levy costs to cover expenses for administrative proceedings.

354. See; Oputa JSC (Justice of the Supreme Court), (1985), LPDC v. Fawehinmi, 2 NWLR (Pt.7) 300.
355. See; Union Bank of Nigeria Case, supra at page 150.
356. Ibid.

4.4 **Award of Costs to SEC; Nigerian Tribunal's Rivalry with APC and SEC.**

In most appeals lodged in the tribunal against APC sanctions, award of cost to SEC formed grounds of appeal. In addition to imposing sanctions against culprits, APC also awarded reasonable costs to SEC to defray expenses for investigations and for the proceedings. The tribunal reversed every cost APC awarded to SEC in all the appeals, as if the tribunal's agenda is to bankrupt SEC. See the following cases;

4.4.1). ***Central Securities Clearing System (CSCS) v. SEC;***[357]**(2004),** the tribunal held that;

> *"[w]e therefore hold that the order as to cost be set aside. The Respondent (SEC) is hereby directed to refund to the Appellant the sum of two hundred and fifty thousand naira (N250,000.00) only paid by the Appellant as cost of APC proceedings. The tribunal hereby holds that the Respondent is not entitled to award cost to itself, accordingly the money paid to it as cost by the Appellant shall be refunded to the Appellant within thirty days from the date of this judgment."*[358]

4.4.2). In ***Lighthouse Assets Management Company Ltd v. SEC;***[359] the tribunal held that;

> *"[h]aving considered the evidence, the points canvassed by counsel on both sides and the guiding principles on the award of costs, we hold that cost is not for the adjudicating body but the parties. We have not only searched through the judicial authorities in Nigeria but also the jurisprudence of other Securities Law with similar jurisdiction and*

357. See; (2004) 1 NISLR 41.
358. Ibid, at 78.
359. See; (2004) 1 NISLR 81, at 110

there is no record where an administrative body performing quasi-judicial function like SEC awards costs to itself..."

..."The Respondent's counsel submitted that Section 8 (s) of ISA empowers SEC to "levy fees or other charges on any person for carrying out investments and securities business in Nigeria" and argued that this power also includes awarding of cost as a regulatory body. It would appear that the drafters of ISA did not intend that the award of cost be connoted as "other charges". ***In the absence of a clear provision to this effect this Tribunal is reluctant to import such meaning into section 8 (s) of ISA****."*[360]

4.4.3). Also in ***FIS Securities Ltd v. SEC***;[361] **(2004)**, the tribunal held that

"[h]aving considered the evidence and the points canvassed by counsels, costs are not for the adjudicating body but the parties. By the provision of ISA of penalty to be awarded by the Commission for contravention or violation of the Act, it was not the intent of the Act that costs be awarded to the SEC as the Commission is a statutory body carrying out its statutory functions. We therefore hold that the APC Order awarding costs to SEC be and is hereby set aside."[362]

Under the 1999 ISA, APC based award of cost to SEC on the notion that cost follows event. On appeals lodged against costs, SEC relied on the tribunal's discretion to defend the costs. As the tribunal reversed every cost APC awarded to

360. See; Lighthouse Assets Management Company Ltd v. SEC, page 110, supra at page 181.
361. See; (2004) 1 NISLR 165.
362. Ibid, at p.204, paragraph E,

SEC, Counsel to SEC changed tactics in one of the appeals, and urged the tribunal to rely on s.8 (s) 1999 ISA to exercise discretion in favor of allowing cost. S.8 (s) empowers SEC to "*levy fees or other charges on any person for carrying out investments and securities business in Nigeria*".[363]S.8 (s) did not specifically authorize SEC to levy cost. No law prohibits APC from awarding cost to SEC. The tribunal did not base its rejection of costs on any legal authority.

However, it may be argued in favor of the tribunal, for rejecting costs, that the word "*cost*" was not specifically used in the provisions of s.8 (s), and therefore the tribunal was right in holding that the drafters of the 1999 ISA did not intend the Commission to recover costs and expenses. The tribunal stated in **Lighthouse Assets Management Company Case that *"[i]n the absence of a clear provision to this effect this Tribunal is reluctant to import such meaning into section 8 (s) of ISA*.**[364] Under the 1999 ISA regime, therefore, the tribunal cannot justifiably be vilified for rejecting costs APC awarded to SEC. At that earlier time, too, the tribunal could not rightly be accused of hostility towards SEC for rejecting costs.

363. See; ***Repealed*** (1999) ISA, s. 8 (s)..
364. See; Lighthouse Assets Management Case, supra at page 181.

However, upon coming into force, the 2007 ISA changed the law on SEC powers to levy cost. ***Paragraph (u) of s.13***, 2007 ISA,[365] vests SEC with powers to;

> *"...levy fees, penalties and* ***administrative costs of proceedings or other charges*** *on any person in relation to investments and securities business in Nigeria in accordance with the provisions of this Act."*[366]

The ordinary meaning of s.13 (r) is that from the day the 2007 ISA came into force, SEC has powers to levy "*...administrative costs of proceedings...*"The expectation was that thenceforth, the tribunal would uphold any costs APC award to SEC. But that is not to be. The tribunal refused to let SEC recoup any cost, even in the face of a clear statutory mandate. This is when the tribunal began its hostility over cost. The tribunal remained adamant, in defiance of the express provision in the 2007 Act which authorizes SEC to levy costs for administrative proceedings. As if determined to thwart~~ing~~ SEC by all means, the tribunal began inventing reasons to quash costs APC awarded to SEC. In its first ~~appeal~~ decision over cost under the provisions of the 2007 ISA, the tribunal abandoned its previous reasons for rejecting cost, and, instead, ruled for the first time that cost is '***a special damages claim that must be specifically pleaded and proved***'. In that decision under the new law, the tribunal ruled that;

365. See; Paragraph (u) of s.13, 2007 ISA
366. Ibid.

> *"[a]t any rate, the Tribunal has overruled APC on the issue of* ***cost*** *and* ***asked SEC to refund same.****" "...relating to the sum of N6 million* ***being costs and expenses*** *incurred at APC and IST for representation.* ***This type of claim falls under the category of special damages which must be specifically proved...****" "The 1st Applicant (SEC) has failed to comply with this requirement of law. The leg of the claim fails."*[367]

The tribunal's decision that a claim for cost "*...falls under the category of special damages which must be specifically pleaded and proved*" is a misstatement of the law on cost. While the tribunal is right on the law that special damages must be specifically pleaded and proved, the tribunal is wrong to hold that cost must be specifically pleaded and proved. Cost is not special damages, and is not required to be pleaded and proved, like special damages. Costs and special damages are different legal concepts, and their rules are entirely different.

The tribunal's decision denying cost to SEC, in ***Central Securities Clearing Ltd v. Bonkolans Investment Ltd,*** was reached *per incuriam* because the tribunal ignored provisions of s.13 (u) of ISA 2007 which expressly empowers Nigeria SEC to levy fees, penalties, and ***administrative costs for proceedings***..."[368]

367. **See**; Central Securities Clearing Ltd and Anor v. Bonkolans Investment Ltd and 5 Ors, (2007) 2 NISLR 95, at page 135
368. See; S.13 (u), ISA 2007.

The tribunal is primed to seize every opportunity to attack SEC. On occasions, the tribunal invents implausible principles of law and flimsy excuses to punish the agency. A tribunal which openly sabotages Nigeria's SEC does not mean well for Nigeria capital market. Whatever is the tribunal's intention for antagonizing SEC, the tribunal's open hostility tarnishes its reputation, undermines SEC, and destroys Nigeria capital market. As it stands, it is a no win situation for the trio.

If there is one provision in the Investments and Securities Act 2007 to which the tribunal's unsettling behaviors could mostly be attributed, it is the tribunal's odd power to accept money grants and donations from the public.

4.5 **IST Power to Accept Monetary Gifts and Donations: Affront to Justice.**

S.286, ISA 2007, gives Nigerian securities tribunal a strange power to accept *monetary grants* and *contributions* from the *public*. According to s.286;

> *"[t]he **Tribunal may accept any grant of money or contributions** on such terms and conditions if any, **as may be specified by the person or organization making such grant or contribution** provided that the terms and conditions are consistent with the functions and objectives of the Tribunal."*[369]

369. See; S.286, ISA 2007.

The reason for vesting the tribunal with powers to accept money and gifts is unclear. The 2007 Act is silent on why it is necessary to invest the tribunal, a "*court of justice*", with statutory powers to "*accept any grant of money or contributions*" from any "*person or organization*". Worse still, the right to set '*terms*' and '*conditions*' of the monetary grants and donations is statutorily vested in the persons or organization making the monetary grant or donation.

How the gift powers would enhance the tribunal's capacity to dispense justice fairly and justly is not disclosed. Certainly no benefit can accrue from giving a court of justice the authority to accept money from the public. On the contrary, the gift mandate renders the tribunal accessible to bribery and corruption. Money grants and donations mandates to a tribunal that has exclusive jurisdiction over all Nigeria capital market disputes, that sits on appeal over SEC sanctions and decisions, and dispenses justice to individuals and entities who commit assorted securities violations, exposes the tribunal to infinite tempting by market operators entangled with the law. This is an open solicitation for bribery and subornation.

Mischief inherent in the tribunal's gift powers is heightened by absence of guidelines on how the power is to be exercised. No rule is prescribed for exercise

of the gift powers. Also, no limitations on the amount, or the purpose, and no control are placed on the power. In the absence of guidelines, the door is open for anybody to freely, and '*legitimately*', offer any amount of money or gifts to the tribunal, for any reason, as long as the grant and donation meets the imprecise requirement that "*…the terms and conditions are consistent with the functions and objectives of the tribunal.*" Nobody or entity is assigned the duty to watch for when the term and condition of any gift or donation conforms with the "*...functions and objectives of the tribunal*". It does not matter that a donor is under SEC investigation, a prospective party to, or an existing party in, a case pending before the tribunal. There is no directive whether the gift shall be channeled officially through the tribunal's registry, or delivered personally to the judges, probably, in their respective homes, or worst, paid into the judges' bank accounts – domestic or foreign. There is no requirement to keep record of the gifts and donations, or for audit to determine whether there are abuses. The gift power is a huge mandate with great ramifications, yet without any modicum of control.

The gift power opens a floodgate for bribing the tribunal judges. The gift power may be responsible for the tribunal's reversal of many sanctions SEC imposed on deep-pocket securities fraudsters. Desperate market operators faced with the prospect of paying huge fines imposed by APC, suspension or banning from

trading, stigma of tarnished image, and possible criminal prosecution and jail time, because of securities frauds they committed, would eagerly exploit the gift power *loophole* to pay their way out of trouble with the law.

In particular, the money and donation mandate could hold the clue to the tribunal's routine absolutions of appellants in ***Akintola Williams Deloitte Case*** (appellant 'cooked' accounting books for Cadbury Plc), ***Nova Securities and Finance Case*** (appellants manipulated AP Plc shares 32 times in two weeks causing $820.4 million in losses), ***Olisaemeka Case, Molten Trust Case,*** and many similar large-scale fraud cases. In each of the appeals, the tribunal behaved as if it was under duress to free the Appellants, and desperate to act to fulfill an obligation.

4.5.1 **Gift Powers not Based on Economic Need**: The tribunal's power to accept monetary grants and donations is not dictated by economic exigency. 2007 ISA made ample provisions for government to fund the tribunal, and also gives the tribunal the power to internally generate additional revenues. ***S.285 (1)*** of ISA 2007 provides that; *"[t]he Tribunal shall establish and maintain a fund, which shall be applied towards the discharge of its functions under this Act."*[370]

370. See; S.285 (1) ISA 2007.

Subsection (2) of s.285 provides further that;

> *"[t]here shall be paid and credited to the fund established under subsection (1) of this section (a)* ***annual subventions from the Federal Government*** *with respect to recurrent and capital expenditure; (b)* ***fees collected for the services rendered by the Tribunal*** *under this Act; and (c) such* ***other sums of money as may be provided by the Federal Government*** *for the Tribunal."*[371]

It is clear from s.285 that the tribunal is adequately funded. There is no compelling need to vest the tribunal with additional powers to receive money and donations from 'persons' and 'organizations', in total disregard to the sensitive nature of the tribunal's responsibilities. The tribunal is not starved of funds to warrant squandering its prized dignity, integrity, and honor, going '*cap-in-hand*' amassing gifts and monetary donations from the public. The money gifts under s.286 does not form part of the money the tribunal is required by s.285 (2) to pay and credit into the fund for its upkeep pursuant to subsection s.285 (1). Therefore, the gifts and donations probably go into private pockets of the tribunal judges.

The tribunal's issues with money and '*monetized*' justice appears to get a boost with the bequest of an '*overriding objective*' that centers on the '*resources of parties*' that come before the tribunal.

371. See; Subsection (2) of s.285 ISA.

4.6 **Rule 2(2),(c), IST (Procedure) Rules 2003; Money Boost in the Tribunal.**

There is a phrase the tribunal cites with callous relish in many of its judgments. The phrase is incorporated into the tribunal's procedure rule, and encapsulates what constitutes the *overriding objective* of the tribunal in dealing with cases "*fairly and justly*". According to ***Rule 2, (2), (c), of the IST (Procedure) Rules, 2003***, dealing with cases fairly and justly, means "*dealing with cases in ways which are **"proportionate to... the resources of the parties**.*"[372]The tribunal's procedure rule defines the tribunal's ***overriding objective*** in dealing with cases ***fairly and justly*** to mean ***dealing with cases in ways which are proportionate to...the resources of the parties***. This procedure rule constitutes the tribunal's *mission statement*, and the tribunal apparently misconstrues the statement.

The tribunal had an opportunity to interpret Rule 2, (2) of IST (Procedure) Rules 2003, and regaled in the *subjective meaning* of the provision.[373] The tribunal behaves as if its official mission in dispensing justice "fairly and justly" is to dispense justice ***'in proportion'*** "to the resources of the parties." Thus, it became the tribunal's official policy to dispense justice according to the '*weight of each party's pocket*'. In effect, the party who offers more money to the tribunal wins. Hence, the many arbitrary decisions reversing APC just sanctions.

372. See; Rule 2, (2), (c) of Investments and Securities Tribunal (Procedure) Rules, 2003.
373. See; Samuel Osigwe v. Bureau of Public Enterprises, (2004), 1 NISLR

4.7 **Conclusion.**

The dangers in misinterpreting Rule 2, (2) of IST (Procedure Rules) 2003 deepen when the rule is read together with the tribunal's power to accept monetary grants. Conclusion from a combined reading of the phrase "dealing with cases in ways which are proportionate to… the resources of the parties" and the tribunal's unlimited powers to accept money grants and donations under s.286, became that the party that offers more money or makes more donation, wins both the tribunal's favor and judgment. It does not matter if the money or donation is a bribe. Also, joint reading of both provisions lays bare the fallacy that favoring a generous benefactor amounts to fair justice, and satisfies the need to deal with cases "fairly and justly". Therein lay the reasons for the tribunal's baffling behaviors. Misinterpretation of the rule is improper, and contradicts the universal notion of justice. The misreading led to boldly offering justice for sale to market operators entangled with the law. It breeds fraud and pollutes Nigeria capital market. Justice dispensed according to the size of litigants' pockets is *jungle justice*. True justice is predicated entirely on law and on the merit of the facts. Unfortunately, Nigerian securities tribunal seizes every chance to trample upon justice. The tribunal's behavior is a reflection of the critical policy thrust of Nigerian Investments and Securities Acts 1999 and 2007. The Acts are designed solely for fraud. The tribunal is merely a macabre contrivance tactically positioned to expedite the well planned elaborate fraud.

CHAPTER 5

Legislative Infidelity and the N8.1tn ($60bn) Crash of Nigeria Stock Market: Analysis of a Premeditated Securities Fraud.

~Part 3~

More Evidence of Contrived Dysfunction: Other Plots that Abet Fraud in Nigeria Capital Market.

5.1 Introduction.

The basic structure, elemental framework, and the critical strategic policy thrust of Nigeria capital market are erected on a foundation of elaborate deceit.[374] Nigeria's Investments and Securities Act 2007 ('ISA' or '2007 Act') is drenched in egregious defects[375] that range from surgical expunction of vital antifraud and safety-net provisions, detailed incapacitation of SEC, anomalous positioning and empowering of Investments and Securities Tribunal (IST), to downright overall distortion of Nigeria capital market. The faulty design of Nigeria capital market turned the market into an abnormal securities market. Nigeria capital market is mired in contrived dysfunction. The deviant arrangement is an offshoot, and a vital piece, of the plots of an elaborate securities scheme.[376]The statutory damage done to Nigeria capital market is profound. The damage heralded an elaborate securities

374. See; In general, chapters 2 and 3 of this paper.
375. Ibid.
376. Ibid

scheme that was set in motion by the 2005 *forced* mergers and consolidations of Nigerian banks,[377] and ultimately led to the 2008 crash of Nigeria stock market. The wheels of Nigeria's securities racket still grinds steadily, and surely unabated.

Besides the plots designed into Nigeria's (repealed 1999 and the) extant, 2007 ISA, the weakening of Nigeria's SEC,[378] tactical positioning of the securities tribunal,[379] the tribunal's odd power to accept monetary gifts and donations from the public,[380] and the tribunal's complicitous acquittal of deep-pocket securities fraudsters,[381] other smaller but potent plots also exist and abet the massive fraud that thrives in Nigeria capital market. Those diverse smaller plots facilitated the N8.1tn ($60bn) *'hot money cycle'* fraudulent scheme[382] which crashed Nigeria stock market. The array of smaller plots also bolsters the pattern of incorrigibility and sense of invincibility that reign amongst fraudulent operators in Nigeria capital market.

Most of the smaller plots in Nigeria capital market are designed into the provisions of Nigerian securities statutes. Many are delicately built into the structure of the

377.Note;Nigerian banks were forced into hasty *mergers* and *consolidations* in 2005. Many were closed for missing the deadline.
378. See; S. 1, s.3,(1),(a)-(f),s.5(1),(2),(3)and(4), s.6, and s.9(1) and (2) ISA 2007. ***See also***; Chapter 3, pp. 109-121 of this paper.
379. See; S.284,(1),(a)-(f), s.289,(1), ISA, supra at footnote 5. ***See also*** Chapter 4, pp. 145 & 146 of this paper for a full analysis.
380. See; S.286, ISA, supra. ***See also*** Chapter 4, pp. 186-189 for a full discussion.
381. See; Chapter 3, pp.147-185 of this paper for a full discussion.
382. See; In general chapters 1, 2, 3, and 4 of this paper for full discussion.

securities tribunal. Other plots exist in the form of self-serving, cartel-interest, rules and subsidiary legislations. While the rest manifest in contemptible conducts of securities market agencies and complicit officials. A common feature to all the smaller plots is that, with skillful accuracy, each of the small plots surgically targets and disables particular vital safety-net and anti-fraud devices needed in Nigeria capital market. Origin and consequences of the smaller plots are in some instances distinct and circumscribed. In other instances, they interlace the entire spectrum of Nigeria capital market. Analysis of few of the supplementary plots will show their individual links to the larger securities racket that runs in Nigeria capital market. The additional plots include;

5.2 Size of the Investments and Securities Tribunal; A Means of Obstructing Access to Justice.

Size of Nigerian securities tribunal is one innocent-looking plot that defeats the end of justice. The tribunal judges are few in number. And, the limited number of the tribunal judges impedes access to justice. ***S.275 (1),*** and ***s.276 (1)*** and ***(2),*** of the 2007 Act, deal with *composition* and *constitution* of Nigerian securities tribunal.[383] S.275 (1) provides that the tribunal *shall consist of ten persons*,[384] while s.276 (1) stipulates that for the purpose of exercising its jurisdiction, the tribunal shall be

383. See; S.275,(1), and s.276, (1) and (2), ISA.
384. S.276,(1), ibid.

duly constituted if it consists of not less than three (3) members.[385]The joint meaning of sections 275(1) and 276(1) is that the total number of judges in the tribunal is ten (10), while each *duly constituted panel* of the tribunal shall comprise of three judges or more. The highest number of *panels* of judges the tribunal can constitute is three (3), since the judges are statutorily limited to ten. The three-panels tribunal has exclusive jurisdiction over all securities disputes and matters in the entire Nigeria.[386] Market participants and corporations solicit and draw large customer pool from far-flung nooks and corners of Nigeria through branch offices, agents, surrogates, internet, print and electronic media. Smaller stock-trading exchanges named *'Capital Trading Points'* also exist all over the nation. Securities disputes arise from all across Nigeria. Only the three panels of the tribunal exist to adjudicate over all the disputes that occur in the big Lagos stock exchange and in the numerous capital trading points, and stock brokerage firms that operate all across Nigeria. With the best of intentions and effort, it is pragmatically impossible for only three panels of the tribunal to adjudicate over all the numerous securities disputes that arise in Nigeria. Nigeria is Africa's largest country with a population of over 150 million.[387] Add Nigeria's vast population to the unguarded infomercials ferociously mounted in the hay-days of the stock-trading frenzy, which misled

385.See; S.276,(1), ISA 2007
386.See; S.284,(1),(a)-(f), and s.289(1), ISA 2007
387. See; U.S. State Dpt. 2010 Country Report on Investment Climate; http://www.state.gov/e/eeb/rls/othr/ics/2010/138123.htm (03/2011)

many Nigerians to believe that the stage-managed and over-hyped stock market was the definitive thicket to achieving their economic hopes and dreams. Nigerians wagered all their life savings, nest-eggs, business capitals, retirement benefits, borrowed funds, *margin loans* and more, without restraint. Many sold landed properties and other earthly possessions and hurled the proceeds into the pit of the speculative frenzy. Diaspora Nigerians funneled tons of money from all over the world into the raging stock market. They were all callously swindled. Considering the countless frauds, violations, and grievances that occur in Nigeria capital market, three-panel tribunal is grossly inadequate. Many grievances are, inevitably, sacrificed for expediency. Too many abuses and complaints would fall through the cracks, and never see the light of day. The fact that the tribunal occasionally sits on rotational assizes between Abuja and Lagos does not touch the tip of the iceberg. The scanty panel arrangement appeared first in the 1999 Act. It is obviously a key component of the bigger securities scheme—legislative infidelity *par excellence.*

The tribunal arrangement would not elude detection if it was unintentional. If the size of the tribunal was an oversight in the repealed 1999 Act, the mistake would have been discovered and corrected in the subsequent 2007 Act. On the contrary, the arrangement was deliberately put in place to serve as solid impediment to access to justice for the numerous aggrieved investors and to protect market

operators in Nigeria capital market. The insufficient tribunal left most investors without legal recourse. The limit in the number of the judges squandered the tribunal's usefulness, and created opportunity that allowed many dishonest market operators to escape justice. Lawyers would have kicked against the insufficient judges of the tribunal if not that lawyers themselves were cleverly shortchanged.

5.3 **Constraining Lawyers and Clients; Further Obstruction of Access to Justice.**

One bold demonstration of problems that arose from mismanagement of Nigeria capital market is the blanket prohibition of lawyers from appearing in the securities tribunal, and from practicing law in the securities sector.[388]The only exception is for lawyers who are specially *permitted* by the capital market authority.[389] ***S.313 (1)*** of the Investments and Securities Act 2007 empowers SEC to "... *make rules and regulations for the purpose of giving effect to the provisions of the Act...*"[390]There is nothing in s.313 nor in any other section of Nigeria's securities statute that require lawyers to get permission before dealing in securities matters.

388. See; Rule 39, SEC Rules and Regulations Pursuant to Investments and Securities Act 1999.
389. Ibid.
390. See; S.313,(1), ISA.

S.313 (1) is in *pari materia* with similar provisions in ss. 29 (1) and 30 of the repealed 1999 ISA. Pursuant to the provisions of the repealed ISA now reenacted in the 2007 ISA as s.313 (1), SEC promulgated ***"Security and Exchange Commission Rules and Regulations Pursuant to Investments and Securities Act 1999."***[391] Rule 39 of the SEC Rules and Regulations prescribes that only lawyers interviewed, selected, and registered with the SEC would be allowed to represent clients in securities matters.[392] All other lawyers are precluded from practicing in securities related matters.

Rule 39, in effect, requires all lawyers in Nigeria to first apply, be interviewed, and be selected by SEC or its designated agents, before they can practice law in securities related matters. However, Rule 39 fails to lay down any criterion for the interview. The interviewers are not required to be law professionals, or to assign reasons for their decisions accepting or rejecting a lawyer. The interviewers are market operators, their agents, and surrogates. The interview is based entirely on arbitrary and capricious exercise of discretion. The requirement is draconian unlawful, and absolutely of no benefit to Nigeria capital market and investors.

391. See; SEC Rules and Regulations, supra at page 198.
392. See; Rule 39, SEC Rules and Regulations, ibid.

Lawyers traditionally detest unwarranted interference with their noble profession. Predictably, most Nigerian lawyers avoided the whimsical interview, preferring to stay away from the securities sector. All carders of Nigerian lawyers became discouraged and deterred by the unusual screening requirement. The plot to divert lawyers away from the surreptitious securities scheme, from Nigeria capital market, and from the securities tribunal was accomplished in one clean sweep.

A lawyer's right to practice law in Nigeria is governed by the Legal Practitioners' Act, 1962.[393] The Legal Practitioners' Act 1962 and the Legal Practitioners Council established under the Act regulates the practice of law in Nigeria. The Act empowers Nigerians duly trained in law in Nigerian Universities and in recognized foreign universities to practice law in Nigeria. The only conditions are that each lawyer must first train in, and pass the compulsory Nigerian Law School's administered bar examination, be duly called to Nigerian Bar, be enrolled in the Supreme Court, and remain in good standing.[394] Nigerian securities Act does not contain any provision pertaining to law practice in the securities sector, or mandating the interview of Nigerian lawyers. Reason for excluding lawyers could be to hide the securities frauds from prying eyes of lawyers.

393. See; Council of Legal Education; the Legal Practitioners' Act, 1962.
394. Ibid.

Collaterally, the interview prerequisite that impedes lawyers also impacts clients' rights to hire lawyers of their own choice. Lawyer of the clients' choice may be amongst the many lawyers that preferred not to subject themselves to the interview. Or, who may have attended and unjustifiably failed the interview. An aggrieved client will, in that circumstance, be left with the only option of hiring *strange* lawyers who passed the interview, an option that is fraught with many problems for the client. Hence, the odd interview and pre-approval requirement also constitute impermissible constraint on clients' access to justice, and an inexcusable breach of the clients' constitutional due process rights. The interview requirement represents additional method of ensuring that aggrieved investors are left with little opportunities to have their day in court, albeit, in the tribunal.

But, a prominent Nigerian lawyer and retired law professor would not endure a personal humiliation that arose from SEC's draconian interview rule. The eminent lawyer, and seasoned law professor, did not apply for the SEC interview. SEC denied him an opportunity to represent a bank which hired his law firm to assist and advise the bank in the process of listing in the capital market. The senior lawyer challenged SEC's action in the Federal High Court (equivalence of U.S. District Court), claiming declaratory reliefs and anticipatory damages. He roundly won the case both in the court of first instance and on appeal in the Nigerian Court

of Appeal. (*SEC v. Prof. A.B. Kasunmu, SAN (Practicing under the name and style of Prof. A.B. Kasunmu's Chambers) and Attorney-General of the Federation*).[395] SEC appealed further to the Nigerian Supreme Court. SEC's appeal against the Court of Appeal judgment is still hanging precariously in Nigerian Supreme Court.

In the above suit, the Federal High Court's judgment that *"Rule 39 of the SEC Rules requiring registration of solicitors (with SEC prior to practicing law in securities sector) is ultra vires the SEC, and therefore void because there is no enabling power to regulate solicitors under the substantive provisions of section 29 of the ISA"* was upheld by the Court of Appeal.[396] SEC appealed against the High Court judgment to the Court of Appeal, and lost, hence, SEC's further appeal to the Nigerian Supreme Court. Rule 39 of the SEC Rules have not yet been amended or repealed. SEC is probably waiting to exhaust its rights of appeal, before bringing the rule in conformity with the courts judgments, if at all. Meanwhile obstruction of lawyers continues.

395. See; (***Unreported***), Appeal No. CA/L/451/2004, Court of Appeal Lagos Division, judgment delivered on Thursday, 6th of November, 2008.).
396. Ibid.

5.4 **Stifling Robust Shareholders Activism; Repressing 'Citizen Police'.**

Shareholder activism is an unofficial but powerful anti-fraud and safety-assurance measure that coexists with other regulatory procedures in the capital market. Vigilant shareholders constitute a veritable source through which regulatory authorities become aware of numerous infractions that would have otherwise evaded detection in the market place, and inside the inner confines of public companies. Shareholders are known to be whistleblowers, '*citizen police*', and '*private attorney-generals*', for promptly detecting and challenging improper conducts of corporate executives and market operators. Robust and independent shareholder activism is popular, and deliberately encouraged as an important component of market regulatory arrangement. Traditionally, there is no love lost between shareholders associations and corporate executives, and market operators. In general, dishonest market operators and unscrupulous corporate executives resent shareholder activists, and would go to any length to stifle shareholder activism, if they found the opportunity.

S.310 (1) of the Investments and Securities Act 2007 empowers SEC to appoint Committees for its operations.[397] ***Paragraph 2 (1)*** of the *First Schedule* to the

397. See; S.310,(1), ISA

2007 Act also made similar provision.[398] Pursuant to powers granted by the Act in the two provisions, SEC set up the ***Committee of Regulatory Agencies*** in the financial sector, an ad-hoc committee. The Committee comprises of the SEC, Central bank of Nigeria (CBN), Corporate Affairs Commission (CAC), National Insurance Commission (NAICOM), Nigerian Stock Exchange (NSE), and the Bureau of Public Enterprises (BPE).[399] Neither Nigerian shareholders association nor their representatives were included in the Committee's deliberations, nor invited to participate. Members of the Committee are principally professional investment bankers, market operators, and corporate executives with invested interests that are adversarial to the interests of shareholders. Composition of the committee was not counterbalanced by inclusion of representatives of shareholders associations or other independent interests.

The Committee of Regulatory Agencies was given *six terms of reference* which are; "(a) [t]o ***review the relevance of Shareholders' Associations*** vis-à-vis the original objectives of establishing them. (b) To ***identify the challenges posed by the activities of Shareholders' Associations in the Nigerian Capital Market***. (c) To ***make recommendations for appropriate regulatory oversight*** (scope and type)

398. See; Paragraph 2 (1) of the *First Schedule* to ISA 2007.
399. See; *(Unpublished)* Report of the Committee of Regulatory Agencies in financial sector.

on their activities. (d) To ***formulate workable guidelines for the Associations' registrations and operations***. (e) To ***examine the funding arrangements for their activities***, and (f) To ***make recommendations on the modalities for sponsoring/implementing enlightenment and other educational programmes on their rights and responsibilities*** as well as their role on Corporate Governance implementation."[400]

Key phrases in each of the above six terms of reference conceal self-serving agenda. To understand the motive behind embarking on its mission, composition of the Committee of Regulatory Agencies must be put in proper perspective. The Committee comprises almost entirely of accomplices and the same entrenched interests that designed the chaotic Nigeria's SEC system, set up the odd Investment and Securities Tribunal, crafted the distorted market regulatory frameworks, and foisted the dysfunctional capital market arrangement on Nigeria. Their intentions towards the shareholders associations cannot be any different. The committee membership constitutes top echelon of the cabal that controls and profits from the malfunctioning Nigerian financial sectors. They defend entrenched interests that diametrically conflict with the general interests of ordinary Nigerian shareholders and citizens. Shareholders associations arose out of the fierce urgency to redress

400. See; Unpublished Committee Report, supra at page 204.

wanton excesses of the Nigerian financial-sector cabal. Nigerian shareholders associations organized themselves in lawful ways that make them strong, and best advance their common interests. It is not surprising, therefore, that the ways that maximally protect shareholders associations do not suit the adversarial interests of the Nigerian financial market operators and corporate executives. Setting up a committee comprising solely of financial market operators to design binding code of conducts for Nigerian shareholders associations is inherently dishonest.

"*Activities of shareholders associations*" in the Nigeria capital market consist mainly of vigilance in detecting fraudulent and relational infractions by corporate executives and market operators. Shareholders associations comprise merely of an ensemble of minority shareholders led by individuals who understand the intrigues of corporate management, and the need to work together as a group to protect their combined *little* investments. The protection of common interest is the gravamen of "*...the challenges posed by the activities of Shareholders' Associations...*" which the Committee of Regulatory Agencies is set up to "*...identify...*", and to stop. As a collection of small shareholders, shareholders associations do not shape corporate policies nor pose any threat to the capital market, to deserve such negative official attention. The committee eventually enacted a draconian code of conduct that literally '*killed*' the traditional shareholders usefulness in Nigeria.

5.4.1 **Code of Conduct for Shareholders Associations in Nigeria.**

The Code of Conduct for Shareholders' Associations[401] ('Code of Conduct'), promulgated by the Committee of Market Regulators, satiated the cabal's wish to stifle Nigerian shareholders associations. The promulgated Code of Conduct is designed in *three parts*. ***Part 1*** covers *'Establishment and Membership of Shareholder Associations'*,[402] and consists of twelve paragraphs. Five-paragraph part 2 is titled *'Attendance of Annual or Extra-Ordinary General Meetings of Public Companies'*.[403] Finally, *'Membership of Audit Committee'* is the title of the three paragraphs part 3.[404] A stand alone ***section 4*** completes the document.[405] The document gags shareholders associations and struck them where it hurt most.

5.4.2 **S.40 1999 Nigerian Constitution**: Before summarizing the provisions of the Code of Conduct, let me first mention ***s.40 of the 1999 Nigerian Constitution*** which guarantees *"[r]ight to peaceful assembly and association"* to all Nigerians. S.40 provides that *"[e]very person shall be entitled to assemble freely and*

401. See; ***Unpublished*** Code of Conduct for Shareholders Associations promulgated by Committee of Market Regulators.
402. See; Part 1, ibid.
403. See; Part 2, ibid.
404. See; Part 3, ibid.
405. See; S.4, ibid.

associate with other persons, ***and in particular he may form or belong to any*** *political party,* ***trade union or any other association for the protection of his interests****."*[406] It is in exercise of the constitutionally protected rights under s.40 that Nigerian investors organized themselves into shareholders associations and registered with the appropriate government agencies as required by law. It is the enjoyment of this constitutional right that the Committee of Regulatory Agencies set out to extinguish, through formulation of the harsh Code of Conduct.

5.4.3 **Analysis of the Code of Conduct for Shareholders**: Part 1 of the Code of Conduct titled *'Establishment and Membership of Shareholders Associations'* stipulates in relevant parts that *"...not less than 50 shareholders of public companies..."* shall be the *minimum number* of persons that can form a shareholders association.[407] This provision connotes that 49 or less number of Nigerian citizens are forbidden from organizing themselves into shareholders associations for the protection of their common interests guaranteed under s.40 of the 1999 Nigerian Constitution. A minimum of 5 persons shall be the Trustees.[408]

406. See; S.40, (1999) Nigerian Constitution Promulgation Decree, 1999 Laws of Nigeria.
407. See ; Part 1, Code of Conduct for Shareholders Associations, supra at page 207.
408. Ibid.

The Executive Committee shall be 10 or less officers constituted through an electoral process.[409] *Tenure of office of officers* of the association shall be limited to *"...two terms of 3 years and such a shareholder shall not be eligible for election until the expiration of 3 years after his six year term."*[410] The association *shall maintain books of accounts which shall be subject to annual audit by a qualified auditor*.[411]The association *shall file annual returns like incorporated trustees*.[412] It shall also *file annual reports of its activities with the SEC*.[413] The association must meet at least twice a year.[414] These are scare tactics intended to intimidate citizens.

Part 2 titled *Attendance of Annual or Extra-Ordinary General Meetings of Public Companies* provides that *members and officers of shareholders' associations should conduct themselves with decorum during AGM or EGM of their companies*.[415]Provisions of the shareholders Code of Conduct show that Nigerian shareholders are by far more stringently regulated than corporate executives, market operators, and SEC board combined.

409. See; Part 1 Code of Conduct, supra at page 207.
410. Ibid.
411. Ibid.
412. Ibid.
413. Ibid.
414. Ibid.
415. See; Part II, Code of Conduct, supra, footnote 402.

Part 3 titled *Membership of Audit Committee* provides in pertinent part that *membership of Audit Committee shall be one term of three (3) years subject to good performance.* A *shareholder who is member of Audit Committee shall not be eligible for re-election until expiration of 3 years after his term.*[416] Shareholders Associations shall ***ensure that the internal control system of the companies*** in which they are shareholders, are effective. The foregoing constitute overregulation.

Section 4 of the Code of Conduct commands that *all shareholders associations shall adopt the code of conduct in their constitution, and that the regulatory authorities would only recognize shareholders associations which comply with the provisions of the code of conduct.*[417]

The above diktats of the Code of Conduct for shareholders associations raise serious issues the least of which is opportunistic propagation of adversarial self-interest. It is wrong to mandate market operators and cabal of corporate executives, with entrenched opposing interests, to design binding rules intended to encumber shareholders associations. Again, the Code of Conduct is *facially*

416. See; Part III, Code of Conduct, supra at page 207.
417. See; S.4, Code of Conduct, ibid.

unconstitutional because it conflicts with s.40 of Nigerian 1999 Constitution, which gives Nigerians unfettered right to form and belong to any association for the protection of their interests. To enact code of conduct that unduly interferes with the citizens' enjoyment of their right to peaceful assembly and association amount to a violation of the citizen's constitutional right. The code of conduct is inconsistent with the express provisions of the 1999 Nigerian Constitution.

Supremacy clause of the Nigerian Constitution provides that the Constitution is supreme and binding on all authorities and persons in Nigeria.[418] ***Subsection (3)*** thereof provides that *"[i]f any other law is inconsistent with the provisions of this constitution, the constitution shall prevail, and that other law shall to the extent of the inconsistency be void."*[419]Being inconsistent with s.40 of the Nigerian Constitution, the Code of Conduct for Nigerian shareholders associations is void to the extent of the inconsistency. Stifling Nigerian shareholders with the 'Code of Conduct' is a genre of legislative infidelity and use of law as instrumentality of exploitation and fraud. The situation left Nigeria capital market without the important vigilance and monitoring contributions robust and unrestrained shareholders activism brings to securities market policing.

418. See; Subsection (1), s.1, (1999) Nigerian Constitution
419. See; Subsection (3), ibid.

5.5 Damndest Conflict of Interest Situations: When the Regulator Doubles as the Regulated.

Conflict of interest ranks high amongst the epidemic of maladies that afflicts Nigeria capital market. Capital market is a very sensitive market.[420] It is susceptible and very sensitive to frauds and corruption.[421]The threshold of integrity and transparency required in the market place is high. Like Cesar's wife, market regulators must not only be above board, they must be seen to be above board, in order to meet the requisite integrity benchmark for their enormous responsibilities. Owing to the sensitive nature of their duty, market regulators must eschew every semblance of impropriety. To ensure transparency, integrity, and orderliness, and safeguard the interest of investors, conflict of interest situations are traditionally forbidden in the capital market. However, consistent with impunity that reigns in Nigeria capital market, sacred rules against conflict of interest are drastically stripped down in Nigerian securities laws. The result is that principal regulators, without restraint, simultaneously hold conflicting positions both as principal regulators and major operators in the market, with resulting negative impacts on Nigeria capital market. Market operators also shuttle between market regulation and plum positions in boards of big public corporations, which positions are usually negotiated in advance while the regulators are still in office.

420. See; *Union Bank of Nigeria Plc. v. SEC*, (2004), 1 NISLR 115 at 161.
421. Ibid,

One example of the many unrestrained conflict of interest situations in Nigeria capital market is the case of the current Chairman of Nigeria's SEC. The SEC Chairman is at the same time a fulltime paid board member of several traded corporations he regulates in the capital market. To mention a few, he is a paid board member of Unilever Nigeria PLC, Vice Chairman of Linkage Assurance, and later became the substantive Chairman and an Executive Officer of UACN PLC, all blue-chip corporations whose shares are traded in Nigeria capital market, and, all of which are under the regulatory supervision of SEC and its board of Commission.[422] SEC Chairman's multiple conflicted interests became so upsetting to the Nigerian public that Chairman of Nigeria's Senate Committee on Capital Market personally petitioned Nigeria's Minister of State for Finance over the SEC Chairman's embarrassing situation.[423]

Another barefaced multiple conflicts of interest situation in Nigeria capital market is the appalling case of the immediate past Director-General ('D-G') and Chief Executive of Nigeria Stock Exchange ('NSE'), the "*Cupidity Queen*" of Nigeria capital market. This top officer's finger is in every single securities pie in Nigeria. This topmost officer is uniquely responsible, more than any other individual, or

422. Note; Revelation of SEC Chairman's many conflicting positions came from Nigerian Senator's petition, infra.
423. See; *Senate Petitions Finance Ministry Over Udoma's 'conflict of interst'* in http://odili.net/news/source/2010/feb/11/810.html (06/2010)

entity, for all the troubles and tribulations that beset Nigeria capital market. The ex-Director General and Chief Executive of Nigeria Stock Exchange (NSE) was in that capacity the official head of Nigeria's Self Regulatory Organizations (SROs). In reality, she is '*the goddess*' of Nigeria capital market, in office or out of office. While holding office as D-G, she also held office as the executive Chairman of Central Securities Clearing Systems Plc (CSCS), a money-spinning monopoly that exclusively *clears* and *settles* every single unit of securities transaction that is executed in Nigeria capital market.[424]She decides her company's commissions and reaps obscene profit from each unit of transaction. As part of the successes of her maneuverings, her majority-owned[425] Central Securities Clearing Services Plc (CSCS) steadily reaps humongous profits even when the stock market crashed with a colossal loss of N8 trillion ($60 billion), and counting.

Contrary to the ill-fated capital market, CSCS, paradoxically, continues to reap exponential windfalls in obscene profits. The DG ostensibly used her conflicted positions to enhance the fortunes of her vast financial empire. In its 2009 annual report released in 2010,[426] CSCS recorded a turnover of N11.15 billion ($78 million), a staggering 35% increase from the previous year's performance, at the

424. Note; DG NSE owns CSCS Plc which has absolute monopoly for clearing and settlement of all securities traded in Nigeria.
425. Note; ex-DG NSE owns majority shares in CSCS Plc and Transcorp, dominates and controls Nigeria capital market.
426. Note; CSCS Plc reported phenomenal increases in profits, in its 2009 annual report, amidst the stock market's ghastly crash.

same time Nigeria stock market suffered cataclysmic implosion. Profit after tax rose to N4.2 billion ($29.4 million), a 15% increase from the previous year's N3.58 billion ($25.08 million). CSCS shareholders' fund rose from N6.88 billion in 2007 to N10.61 billion in 2008, while its total assets rose to N15.49 billion from N10 billion in the previous year.[427]CSCS Plc's Annual Financial Report presented at the company's Annual General Meeting held in Lagos, contain details of the above figures. It bears to repeat that CSCS's stellar performance and increased profits occurred in the midst of Nigeria stock market crisis. Consider these stellar earnings along the fact that CSCS does no other business except clearing transactions in the crisis-ridden capital market.

Moreover, the DG NSE is also the Chairman and CEO of Transnational Corporation of Nigeria Plc (Transcorp), an infamous ***shell corporation***[428]that was falsely advertised during its IPO to be the greatest business venture ever to happen in Nigeria.[429]Transcorp was subsequently used to swindle numerous innocent investors misled by the false hypes.[430] The ex-DG represents the unhappy face of Nigeria capital market, and all the market's many troubles and failings.

427. See; ***See also*** page 56 of ThisDay newspaper, Vol. 14, No. 5254 of Thursday September 10, 2009, which reported news of CSCS Plc AGM, quoting one Dr. Ndii Okereke-Onyiuke (the then D-G, NSE, reveling on the profits of one of her companies).
428. Note; Shell Corporations are 'brief-case corporations'generally used to acquire other corporations or to commit frauds.
429. Note; Transcorp was hyped to have profitable business interests in 'everything under the sun', which turned out to be false.
430. Note; In the case of Transcorp, it was used to commit massive securities and financial frauds in Nigeria.

Yet, another semblance of impropriety that deserves mention is the past Chairman of Nigeria Stock Exchange who left office and immediately assumed the leadership mantle as Chairman of board of directors of First Bank of Nigeria Plc, the largest bank in Nigeria. It is improbable that, without a prior arrangement and *quid pro quo* while in office, a top market regulator will step down as Chairman of Nigeria Stock Exchange and walk straight into the plum position of Chairman of Nigeria's largest bank. The arrangement must have been concluded when he was in office.

Numerous instances of conflict of interest situations abound in Nigeria capital market. The situation trigger serious problems that pollute Nigeria capital market, and have far-reaching consequences on market integrity, transparency, orderliness, and fair and equitable principles of trade. The above occurrences are possible in Nigeria because the universal standard and international best practices of proscribing direct and indirect conflict of interest dealings in the capital market were eliminated from Nigerian securities statutes. Rather, provisions that encourage carders of regulators to abuse their offices and engage in corruptions were dramatically infused into Nigerian Investments and Securities Acts. ***S.11 (1) (a) and (b)*** of the 2007 Act merely require any member of SEC board who has interest in affairs of any public company being deliberated upon by the board, or interested in any proposed contracts, to disclose the nature of his/her interest to the

Commission during their meeting.[431] ***Subsection (2) (a) and (b)*** simply prescribes that such disclosure shall be recorded in the minute, and that the member shall not participate in deliberations on the subject of the disclosure.[432] Also, that the member shall be excluded for purposes of counting the quorum on the subject matter.[433] Disclosure of interest and prohibition from voting on self-interested matters do not eliminate other methods of peddling influence inside the board-room. Implicit in the provisions is that members of the board of commission of SEC enjoy unrestrained rights to engage in conflict of interest activities, provided they disclosed their interests in the corporations or contracts to each other during SEC deliberations. No limits or guidelines are set to monitor the conflicts. This is another loophole created to tarnish Nigeria capital market. Abuse of conflict of interest rules constitutes one nagging matter that destroys Nigeria capital market.

5.6 **Power of Nigeria's SEC to Accept Monetary Gifts and Donations.**

S.22 (1), ISA 2007 empowers Nigeria's SEC to accept gifts, which may include money, from the public. This provision replicates for Nigeria's SEC a similar mandate given to the Investments and Securities Tribunal. The only limitation placed on Nigeria's SEC power to accept gifts is a vague requirement that the

431. See; S.11,(1), (a), and (b), ISA.
432. See; S.11,(2), (a), and (b), ISA.
433. Ibid.

donors shall not attach conditions that are inconsistent with the functions and objectives of the Commission.[434] The Act conveniently avoided to define what it meant by conditions that are inconsistent *"...with the functions and objectives of the Commission."* No agency or independent body is designated to determine when this imprecise condition is met or breached. There is no rational basis for empowering SEC to receive monetary and other gifts from the public especially in the notoriously corrupt environment of the capital market. This gift mandate opens the door to official bribery and corruption. Giving Nigeria's SEC the power to accept money from the public is an official endorsement of bribery and corruption. The mandate opens an avenue for market operators and corporate executives who are in trouble with the law to easily reach out and offer bribe to SEC staff and Commissioners. The mandate does not come with any benefit. It rather breeds fraud and corruption, and further pollutes the already befouled market.

5.7 **Absence of *Private Rights of Action*; A Grave Loophole in Nigerian Law.**

Private right of action is an important remedy that augments securities market regulation. Importance of private right of action as a remedy for regulating securities market was recognized two centuries ago. Early in the evolution of securities market regulation, English Parliament developed the *concept of civil*

434. See; S.22,(1), ISA

liabilities of corporate executives, and included *private rights of action* as core component.[435] English Parliament passed the 1890 ***Directors Liability Act***[436] (later incorporated into the Companies Act), whose purpose it was ***to modify the common law of deceit***, as it had been applied by the House of Lords the previous year in ***Derry v. Peek***,[437] so as to subject corporate directors and promoters to ***civil liability*** for untrue statements in the prospectus *without proof of* ***scienter***.[438]

Also, in recognition of the importance of private right of action in regulation of securities market, U.S. Securities Act of 1933 contains a number of ***private remedies*** for investors who are injured due to violations of the Act.[439] (See: sections 11, 15 U.S.C.A. s.77k, for *material misstatements and omissions in registration statements*; section 12 (a)(1), 15 U.S.C.A. s.77(a)(1), for *securities sold in violation of the registration requirements*, and section 12(a)(2), 15 U.S.C.A. s.77l(a)(2), *creating an action by purchasers against their sellers for material misstatements or omissions*.[440]

435. See; Bloomenthal, Harold S. (2008), Securities Law Handbook (2008-2009 ed.), Vol.1, 8.
436. See; (1890), 53&54 Vict., ch.64
437. See; (1889), 11 App. Cas. 337
438. See; Bloomenthal (2008), supra.
439. See; (1933) Securities Act, s.11, 15 U.S.C.A. s.77k, s.12 (a)(1), 15 U.S.C.A. s.77(a)(1), s.12(a)(2), 15U.S.C.A. s.77l(a0(2), See also Hazen, Thomas L. (2006), The Law of Securities Regulation, 2.
440. Hazen, Thomas L. (2006), ibid.

In addition to the express statutory provisions, United States Supreme Court also recognizes ***implied right of private remedy*** (private right of action) in provisions of the U.S. Securities Exchange Act 1934 that do not expressly provide so. The provisions include s.14 (a), s.10 (b), s.17 (a) (2) and (3) of the Securities Exchange Act 1934, and Rule 10b-5. See ***J.I. Case Co v. Borak,***[441] ***Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Curran,***[442] and ***Bateman Eichler, Hill Richards, Inc. v. Berner,***[443]

Moreover, United States ***Private Securities Litigation Reform Act of 1995*** established a ***separate set of "rules" of civil procedure for private actions*** initiated under the Securities acts so that, thenceforth, the rules of procedure that govern a private action for securities fraud in the federal court will be found in large part in the PSLRA, whereas in all other civil actions, in the Federal Rules of Civil Procedure.[444] The PSLRA, in an effort to keep plaintiffs from unduly exploiting deep pocket defendants, redefines how liability is to be apportioned among defendants and prospective defendants if liability is found under the Exchange Act (and in a limited area under s.11 of the Securities Act).[445]

441. See; (1964),377 U.S. 426.
442. See; (1982),456 U.S. 353.
443.See; (1985), 472 U.S. 299. ***See also***, Cox, Hillman, Langevoort, (2006), Securities Regulation Cases and Materials, 1066-69.
444. See; Bloomenthal and Wolff, Securities and Federal Corporate Law, (2d ed.), s.16:40.
445. Ibid.

Again, separate but identical provisions are applicable to private actions under the Securities Act and under the Exchange Act (Pub. L. No. 104-67 s.102, adding s.27A to the Securities Act and s.21E to the Securities Exchange Act).[446]

Furthermore, United States also added other layers of fences against securities frauds and corruption in its array of laws. One such notable additional defense is the ***Racketeer Influenced and Corrupt Organizations Act (RICO), 1970,***[447] as a means of curbing organized crime's infiltration and corruption of legitimate businesses as well as the use of certain so-called racketeering activities in the conduct of business.[448] RICO quickly became a potent weapon because among the violations included within RICO's definition of racketeering activity is securities fraud.[449] ***S.1962*** of RICO, in sum, has four distinct prohibitions: It prohibits using or investing income obtained from "a pattern of racketeering activity" to acquire an interest in an "enterprise," engaged in or affecting commerce (s.1962(a) ;acquiring or maintaining an interest in such an "enterprise" through "a pattern of racketeering activity" (s.1962(b); conducting the affairs of an "enterprise" through "a pattern of racketeering activity" (s.1962(c); or conspiring to commit any of the

446. See; Bloomenthal, H. (2008),10, supra at page 219.
447. See; (1970),18 U.S.C. ss1961-1968.
448. See; Cox, Hillman, Langevoort, (2006), 873, supra, at page 220.
449. Ibid.

first three prohibitions (s.1962(d).[450] Most RICO claims based on securities law violations arise under s.1962(c).[451] See generally U.S. Supreme Court decision in ***H.J. Inc. v. Northwestern Bell Telephone Co.,***.[452]

Despite the rich history and documented importance of private rights of action in the jurisprudence of securities regulation, private right of action is completely removed from Nigeria securities statutes. Private right of action is not recognized under Nigeria securities law. Rather in a twist consistent with the many tricks played on Nigerian investors in the Investments and Securities Act, ***s.107*** (prohibition of false or misleading statements),[453] ***s.108*** (fraudulently inducing persons to deal in securities),[454] ***s.109*** (dissemination of illegal information),[455] ***s.110*** (prohibition of fraudulent means),[456] and ***s.111*** (prohibition of insider-trading)[457] are all written in ways that, ironically, slacken the stipulated prohibitions, and also make their violations impossible to prove in court.

450. See; Cox, Hillman, Longevoort, (2008), 873, supra at 220.
451. Ibid.
452. See; (1989),492 U.S. 299
453. See; S.107, ISA.
454. See; S.108, ibid.
455. See; S.109, ibid.
456. See; S.110, ibid
457. See; S.111, ibid

However, ***s.114*** did the most damage to private rights of action in Nigeria. Rather than vest victims of frauds and other violations with the rights to take civil actions against violators of ss.107 to 112, as under the English law (above),[458] and under the U.S. laws (above),[459] s.114 instead vests in Nigeria's SEC only a limited right of action. S.114 provides that "*[a]ny transaction done in contravention of section 111 or 112 of this Act is* ***avoidable*** *at the* ***instance of the Commission.***"[460] S.114 vests narrow right of action on SEC to *void* transactions involving violations of *only* ss. 111 and 112. SEC can only sue to void the fraudulent transactions. SEC cannot sue on behalf of the victims for compensation. ***Victims of securities frauds and violations under ss.111 and 112 can neither sue to void the transactions nor claim damages of any kind.*** Indeed, there is no right of action vested on the victims of any one of the violations prohibited in the entire gamut of ss.107 to 112.

In particular, no person or entity (not even the SEC) is invested with the right to *void* the transaction or claim any type of damages for serious violations contained in ss.107 to 110, i.e., prohibitions that are not covered by s.114. The effect is that most cases of frauds and willful violations (big and small) go unpunished and remain without remedy. See for instance ***Nova Securities and Finance and Anenih v. SEC***[461] AP Plc (the victim) whose stocks was willfully manipulated

458. See; Pages 218-219 supra
459. See; Pages 219-222 supra.
460. See; S.114, ISA.
461. See; ; ***(Unreported)*** (2009), Case No. IST/APP/02/09. Judgment delivered on Wednesday, 9th September, 2009.

32 times within two weeks, occasioning N117.2 billion ($820.4 million) in losses, has no legal right to sue Nova Securities and Finance for recision, restitution, or damages, or to recover its actual losses, even if SEC had won the case on appeal. Never mind that the tribunal eventually reversed SEC on appeal, under questionable circumstances. Similarly, multitude of Nigerian investors, individual and corporate, who were wantonly defrauded in Nigeria capital market also do not have any rights of action under the law against even identified fraudsters. This is the nature of the extraordinary legal protections fraudulent market operators enjoy at the detriment of investors under Nigerian securities law. That is the state of the law under which business goes on in Nigeria capital market, till date.

5.8 ***Treble Damages*** **Principle; Deterrent Rule against Securities Fraud.**

In a real securities regulatory system where private rights of action exist, award of treble damages to victims of securities frauds and violations is one important method of instilling discipline and ensuring transparency and integrity in the capital market. Treble damages deter and discourage potential securities cheats from wanton acts of frauds in the market place. It is a veritable tool for fraud disincentive in the capital market.

5.8.1 Treble Damages under Old English Law.

History of *treble damages* awards for securities frauds and violations dates back to the infamous ***English Bubble Act of 1720***[462] described in its recital as *"[a]n act to restrain the number and ill practice of brokers and stock jobbers."*[463] Notorious for its many ills, the Bubble Act had its origin in the political power of the ***South Sea Company*** itself and the company's desire to suppress less favorable rivals without royal charters.[464] Amongst other provisions, Bubble Act prohibited the use of false charters and the taking of subscriptions for such enterprises.[465] Bubble Act declared such matters to be public nuisance subject to penalties and forfeitures.[466] Brokers trading in such unlawful shares were rendered liable to lose their licenses.[467] *Merchants and traders whose business was injured by such unlawful organizations were given the right to sue for treble damages.*[468]Though Bubble Act was gradually whittled away and eventually repealed in 1825,[469] treble damages doctrine survived subsequent enactments including the 1844 Joint Companies Registration Act,[470] Companies Act of 1867, and the 1890 Directors Liability Act,[471] amongst others.

462. See; (1720) , 6 Geo. 1,ch.18. s.18
463. See; S.18, ibid.
464. Ibid.
465. Ibid.
466. Ibid.
467. Ibid.
468. Ibid. ***See also*** Bloomenthal, Harold S. (2008), supra at 219.
469. See; (1825), 6. Geo. 4, ch.91. ***See also*** Bloomenthal, Harold (2008), ibid.
470. See; (1844), 7 & 8 Vict., ch.110.
471. See; (1890), 53 & 54 Vict., ch.64. ***See also*** Bloomenthal, Harold (2008), ibid.

5.8.2 **Treble Damages under U.S. Law:** In U.S., damages awarded in private civil actions for securities frauds and other violations are ample and varied. According to Professor Cox and his co-authors, the most significant attributes of the civil liability scheme established under the Securities Act of 1933 are ***recision*** pursuant to s. 12 (a) (1) ***at the option of any purchaser*** for any *violation of s.5* and the ***extensive damage liability*** imposed by *s.11 upon the issuer* and – absent due diligence—those associated with a *public distribution* when there is a *material falsity or omission in a registration statement.*[472]Additional liability provisions of the '33 Act are found in the antifraud provisions of s.12 (a) (2) and s.17.[473]

5.8.3 **Treble Damages in India:** Under the Securities Exchange Board of India Act 1992,[474] penalties for violations in Indian capital market are in most cases *three times* the amount involved, (i.e. treble),[475] and in some other cases penalties prescribed are as high as *five times* the amount involved in the violations.[476]

5.8.4 **Treble Damages under Nigerian Law**: In Nigerian, the story is totally different. Treble damages and its immense benefits to market regulation are completely wiped off from the securities statutes. Instead of adhering to the

472. See; Cox, Hillman, and Langevoort, (2006), 481, supra, at 220.
473. See; 1933 Securities Act, s.12, (a), (2), and s.17 ***See also*** Cox, Hillman, and Langevoort (2008), ibid.
474. See; (1992), SEBI Act No.15 of 1992
475. See; Chapter VIA, ss. 15G and 15H, ibid.
476. See; S.15F(c).

international best practices, s.116, ISA 2007, conversely, limits the amount of compensation payable to victims of willful securities frauds to '***difference in price***'[477] and ***actual losses***.[478] S. 116 provides in subsection (1) that;

"(1) A person who is liable under this part of this Act ***shall pay compensation*** *at the order of the Commission or the Tribunal, as the case may be, to any aggrieved person who,* ***in a transaction for the purchase or sale of securities entered into*** *with the first-mentioned person or with a person acting for or on his behalf, suffers* ***a loss by reason of the difference between the price at which the securities would have likely been dealt in such a transaction at the time when the first-mentioned transaction took place if the contravention had not occurred.***"[479]

In a convoluted provision reminiscent of IMF and World Bank's legislative styles, subsection (1) of s.116, above, allows compensation only ***when a person suffers a loss in a transaction for the 'purchase or sale of securities'*** *by reason of* '***the difference between the prices at which the securities would have likely been dealt'*** *in similar transaction at the time the violation occurred*, if the contravention had not occurred. In other words, s.116 (1) recognizes ***price disparity*** that occurs in a transaction for the purchase or sale of securities as the only compensable loss.

477. See; Subsection (1) of s.116, ISA.
478. See; Subsection (2) of s.116, ibid.
479. See; Subsection (1), s.116, ibid.

Note that the prescribed *'price disparity'* quantum of compensation cannot be claimed by the victim of the fraud because the Act does not give right of action to victims, and gives only a right of *voidance* to SEC. Hence, s.116 (1) is a complete hoax. S.116 (2) recognizes *actual loss* quantum of compensation, thus;

*"(2) The **amount of compensation** for which a person is liable under subsection (1) of this section is the **amount of the loss sustained by the person claiming the compensation** or any **other amount as may be determined by the Commission or the Tribunal.**"*[480]

Implicit in subsection (2), s.116, is that compensation for other forms of losses and damages not amounting to *actual* losses are not recognized under the Nigerian securities law. For example loss profit, anticipatory damages, consequential damages, punitive damages, costs, and attorney's fees, etc., are, by implications, excluded under the Nigerian law. Add the fact that neither the victim of a violation nor SEC has right under Nigerian law to claim for damages. It becomes clear that provisions of s.116 (1) and (2) do not create any *legally enforceable* rights.

Moreover, in the same IMF and World Bank writing fashions, s.115, ISA 2007, which is the only predatory-crime *'criminal punishment'* provision in the entire

480. Subsection (2), s.116, ISA 2007.

ISA 2007, ties criminal culpability *exclusively* to violations involving '*use of information*', under Part XI of the Act, and limits criminal punishment to maximum of *double* the amount involved in the fraud or violation.[481]

However, by design, many violations prohibited under Part XI of ISA 2007 do not involve the '*use of information*'. Examples include s.105 (false trading and market rigging transactions),[482] s.106 (securities market manipulation.),[483] ss.107, 108, and 110. Some other violations under Part XI only implicate minimal use of information, but their violations do not *per se* involve the use of information to make *profit* or to inflict *loss*. Hence, violations under those sections do not fall within the purview of s.115. It also means that under Nigerian securities law, victims of losses resulting from violations of sections 105, 106, 107, 108, and 110 cannot successfully claim any compensation given that violations prohibited under those sections do not carry the essential ingredients of '*using information*' to make '*profit*' or cause '*losses*'. This is another statutory deceit under Nigerian securities laws that effectively shortchanged defrauded investors while shielding securities fraudsters. The deterrent benefit of treble damages award is totally lost in Nigeria to deceptive statutory intrigues.

481. See; S.115 (a) and (b), ISA
482. See; S.105, ISA
483. See; S.106, ISA

5.9 *Margin Loan*: The Achilles Heel that threatens many Nigerian Investors and Banks.

An investor who wishes to purchase securities, but does not have available cash, or enough cash at hand, may rely on broker-dealers (and others) to borrow such money,[484] if the customer meets the conditions for the lending. Margin loan is the money an investor borrows from broker-dealers to invest on securities.[485] Borrowing to invest (borrowing on "margin") is a direct form of *leveraging*.[486] It increases the return on the initial investment if the investment is successful (i.e., if the income or price appreciation exceeds the debt plus the transaction costs), but it also increases the loss if the investment does not succeed.[487] That is to say, both the level of risk and the expected return may be increased, perhaps substantially, by the borrowing.[488]

When broker-dealers encourage their customers to invest on margin—an appealing strategy to the customer anxious to make lots of money—potential *suitability* problems arise.[489]Beside dealing with the problem as a suitability issue, courts in U.S. have held that broker-dealers violate Rule 10b-5 directly by not providing

484. See; Cox, Hillman, and Langevoort, (2006), 1072, supra, at 220
485. Ibid
486. Ibid
487. Ibid
488. Ibid
489. Ibid

their customers with *all information necessary to evaluate the nature and risks* of margin borrowing, whether *in connection with a specific securities transaction*,[490] or *at the time the account is established*,[491] see ***Angelastro v. Prudential Bache Securities Corp.***[492]

Margin lending is an important but high-risk hot button issue in securities trading. Abuse and misuse of margin loan is known to have ruined many investors, securities markets, investment and commercial banks, and national economies. Comprehensive rules are conventionally put in place to regulate margin lending, and to protect investors from abuses, broker-dealers and banks from credit-lending problems, which margin lending is fraught with.

In Nigeria, margin lending suffers extreme abuse and neglect, with no regulation in place to stymie the damages margin lending does to investors, traders, and banks. Nigerian commercial banks mistakenly crashed into margin lending business by enticing their customers with margin loans to purchase the very banks' own shares.

490.See; Cox, Hillman, and Langevoort(2006), supra at 220. ***See also*** *Arrington v. Merrill Lynch, Pierce, Fenner and Smith,* (1981), 651(9th Cir.),
491. See; Cox etal, ibid.
492. See; (1984) *Angelastro v. Prudential Bache Securities Corp.,* (1984), 764 F.2d 939 (3d Cir.)

Commercial banks are not supposed to make margin lending.[493] Most Nigerian banks and customers are currently mired in huge debts from margin loans and accumulated interests. According to NSE, a total of N1tr ($7bn) bank money is trapped in stocks.[494]Nigerian Central Bank is also credited with a report that 11 Nigerian banks groan under N422bn ($3billion) share loans.[495]The loans referred to in the above two reports are mostly margin loans banks forced on their customers.

Notwithstanding the foregoing, Nigeria ISA 2007 still failed to make regulations for margin loans, or set guidelines for subsidiary legislations and rules. ***S.104*** merely gave a nod to margin loan, and passed the regulatory buck to Nigeria's SEC without setting the requisite blueprints with which SEC will make regulations for margin requirements.[496] S.104 and its inadequacies has existed in Nigeria's statute books since 1999 (similar provisions exist in the repealed 1999 ISA), yet no single rule has been put in place by SEC to regulate margin loan. This is a willful omission that misled many investors into accepting margin loans when there are no guidelines regulating the perilous venture. Nigerian Banks seized upon the loophole and feasted on unwary and ignorant customers.

493. See, U.S. Glass-Steagall Act 1933 which, *inter alia*, separated commercial banking and investment banking businesses.
494. See, "*Banks' N1tr loans trapped in stocks, says NSE*," at http;//odili.net/news/source/2009/jul/8/214.html. (04/2010)
495. See; '*11 Nigerian banks groan under N422bn ($3billion) share loans*'; http;//odili.net/news/source/2009/jun/15/312.html (04/2010).
496. See; S.104, ISA

5.10 ***Insider-Trading*; Broker-Dealers and Inside Information.**

Trading on inside information, or insider-trading, is another hot button issue in securities trading. Within the insider trading principles, there is the tipper and tippee dichotomy of duties and liabilities.[497]The rules are elaborate, and the applications are intricate. Failure to provide adequate and enforceable rules to regulate insider-trading in Nigerian securities law is a loophole the exploitation of which caused great havoc to Nigeria stock market, and Nigerian investors.

The foregoing is a cursory examination of few examples of the smaller but potent plots that are willfully designed into Nigerian market frameworks. They combined with the bigger plots to traumatize Nigeria capital market, and pave way for the N8.1tn ($60 billion) securities *'hot money cycle'* swindle that occurred in Nigeria stock market. Similar scheme is currently going on in Nigeria's bond market, and in the banking and insurance sectors, uninterrupted. Time and space do not permit the exhaustion of all the smaller plots. Some of the smaller plots that also pack punches, but which time and space did not permit their discussion include;

497. See; Cox etal, 1066, supra, at 220. ***See also;*** Bateman Eichler, Hill Richards, Inc. v. Berner, (1985), 472 U.S. 299.

(a).Absence of *legally enforceable* Code of Corporate Governance.

(b).Integrity/Accuracy of Annual/Periodic Reports/Returns, and need for Certifications by CEOs/CFOs to be in affidavits.(Ss.60,61,62,63,64,65,66 of ISA.)

(c).Integrity in Calibration of ***ticker movements*** and Electronics Trading Infrastructures (s.55(1) ISA). (Need for transparency and statutory regulation).

(d).Crooked Stock Pools; need for statutory proscription — s s.105, 106 ISA.

(e).Separation of Commercial Banks and Investment Banks.

(f).Importance of Special Jurisprudence for Securities Proceedings; U.S. PSLRA.

(g).Private property rights of investors versus abuse and control by market operators.

5.11 **IMF and World Bank's Roles in Nigeria Market Crash:** The hermetic secrecy under which IMF and World Bank operate would not make it easy to establish the culpable nexus of the two institutions to Nigeria market crash. Only a full-scale official inquiry and expert investigation will fully fill that gap. However, thanks to Professor Joseph Stiglitz, an insider, the role IMF and World Bank play in the kind of Nigeria's stock market crash has become public knowledge. World Bank and IMF's link to Nigeria market crisis could also be deduced from the ties principal local actors in Nigeria financial crisis share with IMF and World Bank, and from conducts of the two global financial institutions. Then Governor of Central Bank of Nigeria is a famous World Bank protégée, and the then Nigeria

Minister for Finance was seconded from the World Bank, to which she returned and was promoted to the post of Managing Director after after being relieved from her duties by Nigerian government.

Also, as the cataclysmic crash of Nigeria stock market sent the nation's economy into a tail spin, labor organizations, many concerned citizens, and agencies began to raise alarms. Nigerian bank workers Association called on government to probe unethical practices in the banks.[498]Nigerian Labor Congress demanded that government probe banks and stock market with dispatch.[499]Other trade unions joined to urge Nigerian government to take immediate action.[500]Even the usually reticent and hardly conspicuous PricewaterhouseCoopers raised public alarm on the state of the nation's banks.[501]All the alarms fell on deaf ears. The high point was that while concerned voices saw danger and raised alarms, IMF and World Bank saw differently. In an orchestrated but separate news releases syndicated on April 28, 2009, IMF announced that Nigeria has sound fiscal policies.[502]On the same day, World Bank concurred with IMF and proclaimed that Nigeria's business

498. See; *'Bank workers petition Senate over unethical practices'*. http://odili.net/news/source/2009/feb/26/307.html (04/2010)
499. See; *'Financial Crisis—Probe banks, stock market now-NLC'*. http://odili.net/news/source/2009/feb/27/300.html (04/2010)
500. See; *'Trade Union Warns Yar'Adua Over Collapsing Economy'*. http://odili.net/news/source/2009/jun/28/310.html (4/2010)
501. See; *'PricewaterhouseCoopers (PWC) — Auditors Raise Alarm On Nigerian Banks'* http://www.sunnewsonline.com/webpages/news/national/2009/feb/25/national-25-02-2009-02.htm (04/2010)
502. See; *'Meltdown: Nigeria has sound fiscal policies, says IMF...'*.http://odili.net/news/source/2009/apr/23/210.html(04/2010)

environment was sound.[503]In apparent reaction to World Bank's proclamations, Speaker of Nigeria's House of Representatives, in a move that is very rare in Nigeria, shot back and publicly questioned World Bank's assistance to Nigeria.[504]

An interesting event that revealed IMF's dishonesty in praising Nigeria's fiscal policies, in the face of national financial calamity that arose from bad fiscal policies, happened many miles away from Nigeria. In a contemporaneous interview with the London Economist, an IMF top official struggled to wriggle out of accusations that IMF policies created global imbalance that caused then ongoing global financial crisis. The IMF top official retorted forcefully that poor regulations, not global imbalances, caused the global financial crisis.[505]From the Economist's interview manifested IMF's acceptance that poor regulation is a catalyst to financial crisis. IMF knew that Nigeria is in a financial crisis but chose to proclaim Nigeria's poor financial sector policies as sound. Law and regulation are road maps to policies, whether fiscal or otherwise. Nigeria's financial sector laws are inanely poor, pointing to abysmal fiscal policies. IMF is very aware of that. But, instead, IMF chose to publicly proclaim them as sound, while at the same

503. **See;** *'Nigeria good for doing business—World Bank'*. http://odili.net/news/source/2009/apr/23/604.html (04/2010)
504. **See;** *'World Bank's assistance questionable, says Bankole'*. http://odili.net/news/source/2009/apr/28/13.html (04/2010)
505. **See;** *'The IMF blames poor regulation, not global imbalances, for the global financial crisis'* http://www.economist.com/finance/displaystory.cfm? (02/2011)

time telling the honest truth back home. IMF's double speak is open to different interpretations, but one undeniable conclusion is that IMF willfully lied to the Nigerian public. IMF is hiding something when it chose to publicly ridicule itself by praising horrible Nigerian financial-sector fiscal policies. Understandably, IMF is privy to Nigerian dysfunctional financial laws and policies. IMF and World Bank hijacked Nigeria's financial sectors and the economy, formulate policies, and write laws at the national and state levels.[506]IMF and World Bank are strongly believed to have authored Nigeria's Investments and Securities Acts 1999 and 2007. Images of Joseph Stiglitz's accusations that IMF and World Bank induce weak countries to prematurely liberalize their capital markets, relax financial regulations, *'corrupt local officials'*, and orchestrate '*hot money cycle'* schemes suddenly come alive in Nigeria market's many conundrums.

5.12 **Conclusion.**

N8.1tn ($60bn) crash of Nigeria stock market was not, and could not have been, an accident, or an inauspicious misfortune. Neither did Nigeria stock market crash result from global financial crisis as alleged. Iraqi stock market (ISX) and other similarly situated emerging stock markets conclusively laid the global financial

506. See one familiar example; FG, World Bank to train four states on fiscal governance. http://odili.net/news/source/2009/jul/24/303.html (09/2009)

meltdown claim to rest.[507] Rather, as discussed in this paper, evidence show beyond doubt that the cataclysmic implosion of Nigeria stock market resulted from a well organized and ruthlessly executed securities swindle.

The methodical distortion of Nigeria capital market's structural and legal frameworks, sabotage of Nigeria's SEC, expurgation of safety-nets and systems of internal control, positioning of securities tribunal, and the tribunal's power to accept monetary gifts which coincides with the tribunal's routine exculpation of securities fraudsters bear the culpable signs. Also, Nigeria's SEC power to accept monetary gifts from the public, precision in the coordination of the rise and crash of Nigeria stock market, magnitude of the losses that resulted from the crash, acts of omissions and commissions by Nigerian officials during and after the crash, and the numerous other plots that exist in the market – all point unequivocally to premeditation. Legislative infidelity is used to accomplish the grand scheme.

Never in the history of securities regulation has any nation's statute been as converse and distorted in content and intendment as the Nigerian Investments and Securities Act 2007. Damages the Act did, and still does, to Nigeria capital market

507. See; Chapter 1, pp. 10 and 11 of this paper for full discussion.

is phenomenal, incalculable, and unprecedented. Nigerian Investments and Securities Act 2007 is by far worse than the English "Bubble Act" of 1720[508]previously deemed the world's worst in the art of using legislation to commit securities fraud. Nigeria's 2007 ISA merits Maitland's apt derision of the Bubble Act, that; *"[a] panic-stricken Parliament issued a law, which, even when we now read it, seems to scream at us from the statute book."*[509] The difference is that Nigerian National Assembly (Senate and House of Representatives) was not panic-stricken when it passed the 2007 Act into law. Rather, the National Assembly appears to have passed a bad legislation written and handed to it by some *interest groups*, without proper deliberation and scrutiny.

If Nigeria capital market's arrangement is analyzed with the purpose of matching it to a desired outcome, the only rational conclusion a reasonable person would come to is that the market is designed for an organized fraud. There can be no other reason for throwing Nigeria capital market into so much dysfunction and distortion. Professor Joseph Stiglitz's revelation[510] that '*hot money cycle*' scheme is second of the four-step method IMF and World Bank use to destroy economies

508. See; (1720); 6 Geo.1, ch.18, s.18
509. See; Maitland, F. (1911), Collected Papers, 390
510. See; ***The Observer***, Sunday 29 April 2001, at http://www.guardian.co.uk./business/2001/apr/29/business.mbas (01/2011). ***See also*** Chapter 1, pp.33-41 of this paper for full discussion.

of poorer and weaker nations solved the remainder of the byzantine puzzle in Nigeria stock market crash. The N8.1tn ($60bn) losses in Nigeria stock market crash represent only the initial harvest. The scheme continues. The biggest concern is that both Nigeria stock and bond markets still run on the same perilous securities laws, and on the sinister structural and regulatory arrangements discussed in this paper. Nigerian banking and insurance frameworks are also yoked in similar chaos and corruption. And, Nigeria's national economy, and the fate of her 150 million citizens, hinge on this endless sequence of financial-sector racketeering schemes.

5.13 **Recommendations.**

Nigeria capital market is in a quagmire of frauds and deceit. The situation is dire and needs to be addressed with the fierce urgency of now. Nigeria is in a desperate situation, and the country has very few options. Any solutions must be quick, drastic, sweeping, and resolute. Federal government of Nigeria must muster the courage to do all that is required. Suggestions for solving the serious challenges facing Nigeria capital market include;

(a). Halt trading immediately in Nigeria stock market, suspend operations in all the exchanges. Also, suspend all operations in the bond market.

(b). Order expert audit and investigations of all activities in the capital market, with terms of reference that will include determination of the remote and immediate causes of the cataclysmic crash of Nigeria stock market in 2008 - 2009.

(c). Set up high caliber public inquiry to investigate and establish the roles played by any individuals, agencies, organizations, institutions and other entities in the collapse and current state of Nigeria capital market. Hold accountable any persons or entities found to have engaged in any serious frauds and unlawful activities that contributed to the crisis in Nigeria capital market. Ban the persons and entities found culpable from participating directly or indirectly in the capital market for minimum of ten years. Make them face the law, regurgitate all money stolen from investors, and make victimized investors whole.

(d). Disband and reconstitute the Investments and Securities Tribunal, SEC, and all the committees set up under the current ISA 2007.

(e). Study and review the structural and regulatory frameworks of Nigeria capital market. Determine the areas of systemic failures. Verify and confirm areas of distortions in the structural and regulatory frameworks of Nigeria capital market. Compare safety features and antifraud provisions in Nigeria market with similar features in other viable markets, and match the features with international best practices.

(f). Repeal the Investments and Securities Act 2007. Repeal also the rules and subsidiary legislations made pursuant to the Act. Enact a new Securities Act that will contain the appropriate provisions. The new Act will include the following provisions;

i. Adequately bolster and empower SEC to be the true apex regulatory agency for Nigeria capital market. But, knowledgeable securities regulators will be incharge.

ii. Subject the Investment and Securities Tribunal to the authority of SEC so that the tribunal acts as internal adjudicatory agency of SEC like in the U.S., with non-exclusive limited jurisdiction. Or set up the model of Indian Securities Appellate Tribunal with only retired or serving Supreme Court Justices, Court of Appeal Judges, and Chief Judges of State High Courts as the tribunal judges. Increase the number of the tribunal judges, and locate at least two panels of the tribunal in every state and federal capital territory. In ***alternative***, eliminate the tribunal and invest jurisdiction over securities matters in the Nigerian Federal High Courts.

iii. Abolish the money gift mandates of both the tribunal and SEC. In its place, enact stringent anti-corruption provisions that will bind the tribunal judges and SEC Commissioners to be of good conduct.

iv. Make the position and tenure of office of all SEC Commissioners to be fulltime and executive, pay them equal salary and allowance, and ban them from directly or indirectly holding any other office or carousing in any way with publicly traded corporations. Vest the leadership of SEC on the Chairman.

v. Abolish the office and position of Director General of both the SEC and NSE.

vi. Ban stock traders and dealers, investment analysts, investment advisers, floor traders, and every regulator and official, etc., from directly or indirectly holding any position in publicly traded corporations, as in Ghana. Also, ban even their relatives from holding such offices, as in Greece.

vii. Provide enhanced private rights of action to investors, with all the rights and appurtenances attached.

viii. Introduce treble damages as standard civil compensation payable to victims of any willful securities violations or frauds.

ix. Prescribe severe criminal punishments for any acts of willful or reckless frauds that occur in the capital market, willful or reckless violation of the provisions of the Act, and other similar serious infractions.

x. Promulgate comprehensive Code of Corporate Governance and make them statutorily compulsory and legally enforceable. Provide private rights of civil action to any person or entities whose rights or interests are violated or threatened by any violations or threatened violation of the Code.

xi. Provide for independent and robust shareholders associations consistent with s.40 of Nigerian 1999 Constitution. Invest shareholders associations with full rights and powers under the law, in accordance with international best practices.

xii. Enact strict disclosure provisions that would ensure integrity and accuracy of Annual and Periodic filings/Returns. Make CEOs/CFOs to personally certify the accuracy of annual and periodic returns, as well as financial statements in *affidavits*.

xiii. Make strict provisions for the regulation of trading gadgets and infrastructures to ensure accuracy and integrity in ***ticker*** calibrations and movements, and in all the electronics trading infrastructures.

xiv. Ban the practice of crooked stock pools, and make it serious criminal offence.

xv. Enact comprehensive rules for regulation of the 'front and back offices' of stock brokers and dealers, and regulate hedge funds.

xvi. Totally separate commercial banks and investment banks so that commercial banks will concentrate on traditional commercial banking business while investment banks engage only in investment banking.

xvii. Margin lending is not for commercial banks. Make adequate provisions for regulating margin loans, margin credit lending, and securities lending activities.

xviii. Incorporate prohibitions contained in U.S.-*Corrupt Influence and Racketeer Organizations Act* (RICO),1970, 18 U.S.C. s. 1961-1968, the *Federal Mail Fraud Act* of 1872, 18 U.S.C. s.1341 (Supp.2003), and the *Wire Fraud Statute* of 1952, 18 U.S.C. s.1343 (Supp. 2003), into the new Nigerian Investments and Securities Act.

g. Also, incorporate into Nigerian securities laws the provisions of United States core securities enactments contained in;

i. Trust Indenture Act of 1939.

ii. Investment Company Act of 1940.

iii.Investment Advisers Act of 1940.

iv.Securities Investor Protection Act of 1970.

v.The Williams Act of 1968.

vi.The Insider Trading Sanctions Act of 1984.

vii.The Private Litigation Reform Act of 1995.

viii.The Securities Litigation Uniform Standards Act of 1998.

ix. National Securities Markets Improvement Act of 1966.

x.The Glass-Steagall Act (or the Banking Act) of 1933.

xi.The Sarbanese-Oxley Act of 2002. (Also, create Public Company Accounting Oversight Board).

xii. The 2010 U.S. Securities Market Act and amendments.

The foregoing suggestions are not exhaustive, but can be a good starting point for addressing the pandemic maladies that plague Nigeria capital market. Each of the above enactments contains critical provisions that address specific areas of maladies in securities transactions and regulation.

BIBLIOGRAPHY.

Books and Articles.

AVELLANET, (2007), Internal Control Compliance Desk Book: The 2007 PCAOB Standard and SEC Guidance.

BEAVER, (1981) Market Efficiency, Acct. Rev. 23

BLOOMENTHAL, Harold (2008), Securities Law Handbook (2008-2009 ed.), Vol. 1,7. 2007

BLOOMENTHAL, (2008-2009), Securities Law Handbook, Securities Law Handbook Series, Vols1 and 2.

BLOOMENTHAL and WOLFF, Securities and Federal Corporate Law, (2d ed.), s.16:40.

BRANDEIS L.D. (1914), Other People's Money, 16.

BUTTERTON, Glenn *(1996)*, 38 Ariz. L. Rev. 1081.

CAMPBELL, Rutherford B., Jr., (1998), The Impact of NSMIA on Small Issuers, 53 Bus. Law. 575, 582-583. Copyright 1998 by the American Bar Association.

CARNEY, William, (1989), Limits on the Fraud on the Market Doctrine, 44 Bus. Law.1259.

COFFEE, John C., Jr., (1999), Privatization and Corporate Governance: The Lessons From Securities Market Failures, 25 J. Corp. L. 9-10.

COFFEE, Jr., SELIGMAN, and SALE (2007), Federal Securities Laws. Selected Statutes, Rules, and Forms. (Corrective Supplement).

COFFEE, Jr., SELIGMAN, and SALE, (2008), Federal Securities Law, Selected Statutes, Rules and Forms (Including Amendments Through March 15, 2008).

COHN, Stuart R., Securities Markets for Small Issuers: The Barrier of Federal Solicitation and Advertising Prohibitions, 38 U. Fla. L. Rev. 1, 4-7.

COWLESS, Virginia (1960), '*The Great Swindle: The Story of the South Sea Bubble*' ***cited in*** 1 Cox, Haze, & O'Neal) (2000), Corporation

COX, James, (1986), Insider Trading Regulation and the Production of Information: Theory and Evidence, 64. Wash. U. L. Q. 473, 493-495.

COX, James D., (1999), Regulatory Duopoly in U.S. Securities Markets, 99 Colum. L. Rev. 1200.

1 COX, HAZEN, & O'NEAL (2000), Corporation,

1COX, HILLMAN, and LANGEVOORT, (2006), Securities Regulation, Cases and Materials, 5th.

COX, HILLMAN, and LANGEVOORT, (2007), Securities Regulation, Selected Statutes, Rules, and Forms.

EASTERBROOK, Frank and Daniel FISCHEL, (1984), Mandatory Disclosure and the Protection of Investors, 70 Va. L. Rev. 669, 682-684.

EISENBERG, Melvin Aron, (2007), Corporations and Other Business Organizations. Statutes, Rules, Materials, and Forms.

GELLIS, Ann, (1987), Mandatory Disclosure for Municipal Securities: A Reevaluation, 36 Buff. L. Rev. 21-24.

GEVURTZ, (2000), Corporation Law.

COX, Hillman, and Langevoort, (2006), Securities Regulation Cases and Materials, 5th Ed.

GORDON, James D.,(1990), Interplanetary Intelligence about Promissory Notes as Securities, 69 Tex. L. Rev. 383-404.

HAMILTON, Marcia A. (1996), The TRIPS Agreement: Imperialistic, Outdated, and Overprotective, 29 *Vand. J. Transnat'l* L. 613.

HAZEN, (2006), The Law of Securities Regulation, Revised 5th.

HAZEN, (2005), Treatise on the Law of Securities Regulation, (Practitioner Treatise Series) 5th, Vols. 1, 2, 3, 4, 5, and 6.

HENN and ALEXANDER, (1983), Law of Corporations and Other Business Enterprises, 3rd.

HUBER, KELLER, STANLEY, TSAGNOS, and WOLFMAN, (2004), The Practitioner's Guide to the Sarbanese-Oxley Act, Vols. 1, 2, and 3.

IDRIS, Mohammed S.M. What Protection is Available Under International Intellectual Property Law for Flora, Fauna, and Medical Cures? Doublespeak and the New Biological Colonialism. "Third World Network Features." ***Reproduced in*** Long, Doris Estelle and D'Amato, Anthony, (2000), A Casebook In International Intellectual Property pp. 1052 – 1053.

IP, Greg, (2000), Stock Prices Switch to Decimals from Fractions, Raising Concern About 'Front Running' by Pros, Wall St. J., Aug. 28 at SC-1.

KADISH, Sanford, (1963), Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations, 30 U. Chi. L. Rev. 423, 436-437.

KARJALA, Dennis S., (1986), Federalism, Full Disclosure, and the National Markets in the Interpretation of Federal Securities Law, 80 Nw. L. Rev.1508, 1511-1512

KRAAKMAN, (1988), *'Taking Discounts Seriously; The Implications of ''Discounted'' Share Prices as an Acquisition Motive'*. 88 Colum. L. Rev. 891, 898-901.

LONG, Doris Estelle (1998), The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective. 23 North Carol. J. Int'l and Comm. Reg. 229.

LONG, Doris E. (1994). Copyright and the Uruguay Round Agreements; A New Era of Protection or an Illusory Promise? AIPLA Q.J. 531

LONG and D'AMATO, (2000), a Coursebook in International Intellectual Property

LOSS, LOUIS, and SELIGMAN, (2004), Fundamentals of Securities Regulation, 5th

LOSS, LOUIS, and SELIGMAN, (2009 Supplement), Fundamentals of Securities Regulations, 5th.

LOWENSTEIN, LOUIS, (1989), Shareholder Voting Rights: A Response to SEC Rule 19c-4 and to Professor Gibson, 89 Colum. L. Rev. 979-1014.

MAITLAND, F. (1911), Collected Papers, 390

OESTERLE, (2002), The Law of Mergers and Acquisitions, 3rd.

OKEKE, Christian (Professor Dr.) (2008), The Law of International Investments, Course Syllabus,

OKO, Okechukwu (2009) *'Lawyers in Fragile Democracies and the Challenges of Democratic Consolidation: The Nigerian Experience'*. Fordham Law Review, vol.77,

OPUTA, Chukwudifu (2002), *'Judicial Ethics and Cannons of Judicial Conduct'*, ***published in*** *'JUSTICE IN THE JUDICIAL PROCESS: ESSAYS IN HONOR OF JUSTICE EUGENE UBAEZUONU,'* 193, 201 (C.C. Nweze ed.).

OPUTA JSC (Justice of the Supreme Court), (1985), LPDC v. Fawehinmi, 2 NWLR (Pt.7) 300

PITTMAN, Edward L. (1989), Economic and Regulatory Development Affecting Mortgage Related Securities, 64 Notre Dame L. Rev. 501-502.

POLIAKOFF, Abba, (1987), SEC Review: Comfort or Illusion, 17 U. Balt. L. Rev. 40, 43-47.

POSER, Norman, (1981), Restructuring the Stock Market: A Critical Look at the SEC National Market System, 56 N.Y.U.L. Rev. 884, 886-896.

PRINCIPLES of Corporate Governance: Analysis and Recommendations (1994), Vol. 1, Parts I-VI (As Adopted and Promulgated by The American Law Institute).

PRINCIPLES of Corporate Governance: Analysis and Recommendations (1994), Vol. 2, Part VII (As Adopted and Promulgated by The American Law Institute).

ROHT-ARRIAZA, Naomi, (1996),'*The Biotech Controversy of Seeds and Shamans; The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities.*'17 Mich. J. Int'l L. 919.

RUTLEDGE, G. Philip, NSIMIA... One Year Later: The States' Response, 53 Bus. Law 563, 571-72.

SCHNEIDER, MANKO, and KANT, (1999), Going Public: Practice, Procedure and Consequences. 22-23.

SMITH, LAVENSKI R. (2008), '*Judicial Selection: Its' More About the Choices than Who Does the Chosing'*. 30 U.Ark. LITTLE ROCK L. Rev. 799, 801.

STIGLITZ, J., (2002), Globalization and its Discontents, (W.W. Norton and Company, Inc., Publishers).

TOBI, Niki (2004), '*Code of Conduct and Professional Ethics for Judicial Officers in Nigeria'*, ***published in*** '*JUDICIAL EXCELLENCE: ESSAYS IN HONOR OF HON. JUSTICE ANTHONY I. IGUH,*' 37, 82-83 (J.O. Irukwu and A.I. Umezulike eds.).

VERNON, Catherine M., (1994), Common Cultural Property: The Search for Rights of Protective Intervention, 26 Case.W.Res.J.Int'l. 435.

WESTON, FALKE, etal, (2006), Supplement of Basic Documents to International Law and World Order, 4th

1 WESTON & CARLSON I.H.2

3 WESTON and CARLSON

4 WESTON and CARLSON

WILLIAM P. Alford, *(1992),'Pressuring the Pirate'*, L.A. Times, Jan. 12, 1992, at M5,

WILLIAMS, Cynthia, (1999), The Securities and Exchange Commission and Corporate Social Transparency, 112 Harv. Rev. 1197, 1294-1296.

Additional Bibliography; Sundry Resource Materials

AllAfrica.com

Associated Press (AP)

Bellagio Declaration, 1993

Bloomberg Financial News, Official Website

Economist.com

Fsa.gov.uk, Official website of Financial Services Agency of Britain

Globalissues.org

Guardian.co.uk

IMF Articles of Agreement

IMF.org, IMF Official website

MSNBC.com, World Business, U.S.

Observer Newspaper, London

Odili.net

Punch Newspaper, Nigeria

Report of the Committee of Regulatory Agencies in financial sector, ***(Unpublished),*** Nigeria

Saharareporters.com

Sec.gov, official website of U.S. Securities and Exchange Commission

Shareskool.com

Simon, Timothy A. (2008), Classroom lecture in *Securities Regulation* at Golden Gate University, Spring Semester.

State.gov., U.S. Department of State official website.

Sunnewsonline.com

ThisDay Newspaper, Nigeria

UN.org, UN Official website

Vanguard Newspaper, Nigeria

World Bank Guideline on Treatment of Foreign Direct Investments

Worldbank.org, World Bank Official website

(2004), 1 (Nigerian Investments and Securities Law Report) NISLR

(2007)2 NISLR 137 at 170-171

(2007) NISLR 175