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Cross-Border Mergers and Acquisitions as a Channel for Foreign Direct Investment into Nigeria: The Regulatory Challenges

Submitted in partial fulfilment of the requirement for the Degree of Master of Laws

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DECLARATION

I, Marie-Louise Fehun Aren, declare that **Cross-Border Mergers and Acquisitions as a Channel for Foreign Direct Investment into Nigeria: The Regulatory Challenges** is my work. All references to sources and any quotations cited have been indicated and acknowledged herein.

Signed: **Marie-Louise Fehun Aren**
September 2019.

CERTIFICATION

I declare that this mini-dissertation which is hereby submitted for the award of Legum Magister (LL.M) in International Trade and Investment Law in Africa at International Development Law Unit, Centre for Human Rights, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

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"No one who achieves success does so without the help of others. The wise and confident acknowledge this help with gratitude." – Alfred North Whitehead

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DEDICATION

This work is dedicated to my loving father, Mr Louis Diatacheko Aren. You gave me the greatest gift anyone could ever give to another- you believed in me even when I did not always believe in myself. For this and more, I remain eternally grateful pa.

LIST OF ACRONYMS

ADR	Alternative Dispute Resolution
AfCFTA	African Continental Free Trade Area
BOP	Balance of Payments
CAMA	Companies and Allied Matters Act
Cap	Chapter
CBM&A	Cross-border Mergers and Acquisitions
ECOWAS	Economic Community of West African States
FCCPA	Federal Competition and Consumer Protection Act
FCCPC	Federal Competition and Consumer Protection Commission
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
IMF	International Monetary Fund
ISA	Investment and Securities Act
LFN	Laws of the Federation of Nigeria
M&A	Mergers and Acquisitions
NIPC	Nigerian Investment and Promotion Commission
NSE	Nigerian Stock Exchange
OECD	Organisation for Economic Co-operation and Development
OHADA	(Organisation pour l'harmonisation en Afrique du droit des affaires)
SEC	Securities and Exchange Commission
UNCTAD	United Nations Conference on Trade and Development
VAT	Value Added Tax
WAEMU	West African Economic and Monetary Union

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ABSTRACT

Cross-Border Mergers and Acquisitions are a viable yet overlooked source of FDI into Nigeria. This is because FDI is mostly considered as green-field investments with little consideration for other sources of investment opportunities. To diversify Nigeria's monolithic economy, the Federal Government introduced the Economic Diversification Policy focusing mainly on attracting Foreign Direct Investment as a tool for poverty alleviation, sustainable economic growth and development.

Although recent economic forecasts strongly indicate a rise in Cross-Border Mergers and Acquisitions activities in Africa as an emerging continent, the reality of this remains to be seen in Nigeria where Cross- Border Mergers and Acquisitions is still at its infancy with quite inadequate legislation and regulatory framework. This research work aims to discover regulatory inadequacies responsible for Nigeria's limited share in CBM&A investments as an untapped source of FDI by reviewing its presently inadequate and overly simplistic regulatory framework that undermines investor confidence through legal uncertainty. Also, this research work examines the scope, types, and the essence of CBM&A and FDI. Furthermore, this research paper examines the current CBM&A legal framework to identify its inconsistency with the Economic Diversification and FDI attraction policy direction of the Nigerian Government. Finally, the advanced CBM&A regulatory framework of South Africa would be reviewed and analysed to draw up solutions and recommendations tailored to suit the Nigerian reality.

Keywords: CBM&As; Challenges; Regulatory reforms; Recommendations

CHAPTER 1 – INTRODUCTION

1.1 Background to the research

Cross-Border Mergers and acquisitions have resulted in symbiotic value creation between its parties in developing and emerging markets globally[1] especially for countries with good corporate governance structures. This study presents an overview and analysis of Cross-Border mergers and acquisitions as an overlooked source of Foreign Direct Investment in Nigeria in light of the adequacy of the extant legislative and regulatory framework dealing with CBM&As.

CBM&As exploded exponentially from around US$500 billion per annum in the latter part of the nineties to about US$5000 billion within 2007-2017[2] by companies in emerging and developing economies within this period, thus creating a proliferation of multinationals. It is the aim of this study to investigate the regulatory framework of countries that have successfully attracted cross border mergers and acquisitions investments and apply their regulatory solutions to address Nigeria's policy objective for foreign investment.

Nigeria is a developing country located in West Africa uniquely characterised by its diversity in resources, culture and religion. It is also the largest economy in Africa with a nominal GDP of about US$ 397 billion[3] with an annual percentage projection in real GDP term of 2.1% and 2.5 % respectively for 2019 and 2020. While these seem like good projections and offer a sense of comfort, Nigeria still lags in economic development owing majorly to its crude oil-reliant economy. Crude oil provides about 90% of Nigeria's foreign exchange earnings and over 70% of its budgetary revenue. Other industries such as financial services, entertainment, agriculture, telecommunications and so on show potential for growth if supported.

The global economic recession of 2008 created an internal crisis for Nigeria owing to the decrease in oil prices in the international market, leading to a currency devaluation against stronger currencies. Since this occurred, Nigeria has been routinely exposed to the vulnerabilities of the world crude oil market price fluctuations which has had an adverse effect

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[1] C Anusha, P Ouimet & LL Tesai 'Cross Border Mergers and Acquisitions in Emerging Markets: The Stock Market Valuation of Corporate Control- EFA' (2004) 3479 *Maastricht Meetings Paper* 51

[2] M Babic, J Fichtner & E M Heemskerk 'State vs Corporations: Rethinking the Power of Business in International Politics' (2017) 52 *Italian Journal of International Affairs* 20

[3] 'Global Prospects and Policies' in *International Monetary Fund World Economic Outlook* (2018) 52

on Nigeria's crude oil earnings and consequently has created a negative economic impact. This negative impact has triggered a call for economic restructuring to reduce the systemic shocks that Nigeria's mono-product economy is bound to undergo through tax increment financing measures and increased tax activism by the revenue bodies[4]. Tax increment financing at best offers a short-term solution to a long-term problem. In addition, Nigeria's discovery of crude oil in 1956 lead to the abandonment of development initiatives in other viable sectors which has resulted in high rates of poverty and unemployment, low level of personal income for Nigerian citizens, absence of industries to meet local demands and an over-reliance on imported goods creating economic recession and balance of payment deficits[5].

The world is seeing a consistent rise in environmental concern awareness and sustainability movements through the advocacy for a movement from fossil fuel energy sources to alternative renewable energy sources. This trend has a strong propensity to adversely affect Nigeria capacity to remain competitive with its crude oil in the global energy markets in the long run. Even though fossil fuels may still be relevant for a short while because of the energy demands of nations like India and China, there remains, lurking at the background, the supplementation of biofuels[6] for electrical sources and greatly reducing their relevance by 2050.

Nigeria has great human and natural resources with unrealised potentials. On a positive note, Nigeria's huge population creates a large consumer market which provides a big and varied economic demand and opportunities for FDI inflows, especially into the non-oil sectors. Foreign investment into Nigeria can be done by Nigerians in the diaspora who already account for US$25 billion remittances representing a 6.1%[7] to Nigeria's GDP regardless of the recession. This provides a golden opportunity for a massive developmental impact CBM&As inflows promises to bring into Nigeria by Nigerians in diaspora alone if only the proper legislative structures are in place.

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[4] A Olaleyi, J Bamfo & O Isiadinso 'Nigeria: Nigerian Tax and Fiscal Outlook' 11 February 2019 *Andersen Tax LLP*. http://www.mondaq.com/Nigeria/x/779526/tax+authorities (accessed 30 April 2019)

[5] E Oluwagbemiga 'International Trade and Nigeria's mono-product oil-based economy. A study of the African Catfish Aquaculture Industry' (2017) *Ihre Studentischen Arbeiten Publizieren und Geld Verdienen* 104 https://m.grin.com/document/374054. (accessed 1 May 2019)

[6] S Nyquist 'Energy 2050: Insights from the ground up' November 2016 *McKinsey& Company Oil & Gas* https://www.mckinsey.com/industries/oil-and-gas/our-insights/energy-2050-insights-from-the-ground-up (accessed 1 May 2019)

[7] 'Nigeria Economic Outlook: Top 10 Themes for 2019' (2018) *PricewaterhouseCoopers Report 2018*

Economic opportunities remain inaccessible despite Nigeria's local content policy[8] as a step to economic transformation, which has not been able to fully and adequately meet these demands and opportunities. This is evidenced, by the policy decision and incentives of the Federal government of Nigeria to encourage the inflow of FDIs through tax reductions, trade barrier reduction, regulatory simplification[9] and so on to encourage the ease of doing business.

Other African countries like Egypt and South Africa provide a shining example for Nigeria on the development benefits of encouraging FDI through CBM&As by adopting a liberal yet responsive legislative and regulatory structures, transparency and accountability measures, reform of extant foreign investment controls while balancing public interests[10].

Therefore, CBM&As from the ongoing points raised provides a very viable and alternate means through which foreign capital can flows into a country especially in target specific sectors by increasing shareholders' and host country's wealth and developing its local capacity. CBM&As investment can provide a win-win solution to Nigeria's current economic trials provided it is adequately and responsibly regulated by proper corporate governance policies and Federal investment legislations. Currently, Nigeria does not have very adequate and comprehensive CBM&As regulation laws. Mergers and acquisitions regulations are mostly aimed at domestic mergers and acquisitions with CBM&A mentioned in passing. As globalisation continues to make its stride, Nigeria's CBM&A regulations must be addressed if Nigeria is to achieve its vision of economic diversification and transformation agenda.

1.2 Problem statement

Nigeria's economic diversification and transformation agenda cannot be realised on green and brownfield investments alone. CBM&A provides a viable but overlooked source of the FDI Nigeria needs. However, the extant regulatory and legislative structure does not provide the requisite motivation for investors. This creates the need for the government to review and reform legislations regulating the flow of CBM&A investments into Nigeria as a way to

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8 Nigerian Oil and Gas Industry Content Development Act 2010

9 'CAC New Registration Portal, an Initiative for Service Excellence' *CAC New registration portal* http://new.cac.gov.ng/home/cac-new-registration-portal-an-initiative-for-service-excellence/ (accessed 2 May 2019)

10 'A review framework for cross-border direct investment in South Africa' Discussion document (2011) National Treasury Republic of South Africa

provide FDI inflows for economic development strategies. Therefore, this study identifies, analyses and provides solutions to the inadequacies present in the current legislative frameworks stagnating CBM&A investments into Nigeria.

1.3 Research questions

The major question this research work seeks to address is whether the current legislative framework on CBM&A is effective and adequate in attracting FDI into Nigeria. Examining this pertinent question, naturally gives rise to these ancillary questions for extensive consideration:

i. What are FDI and CBM&A?
ii. Why is CBM&A as an overlooked investment source important to Nigeria's economic development?
iii. What legislations currently regulate CBM&A in Nigeria? How effective are these legislations?
iv. What are the lacunas and difficulties present in the extant legislations?
v. How can the lacuna present be addressed?

1.4 Thesis statement

This study focuses on the current regulations and some of its institutions regarding CBM&A in Nigeria. The thesis examines the inadequacies of the Laws to attract and sustain FDI into Nigeria through the CBM&A route and proffers remedies to counterbalance the inadequacies of the legislative and regulatory structure.

1.5 Objectives of the study

Internationally, the current literature on the adequacy of legislative and regulatory frameworks in attracting CBM&A a source of FDI especially for Africa is quite difficult to obtain save for some generic texts on mergers and acquisitions. This difficulty is more pronounced in sourcing for legislative framework area of cross-border mergers and acquisitions in Nigeria. It is the aim therefore of this research work to provide an up to date information on the subject by-

i. Establishing CBM&As as a potential source of FDI.
ii. The resultant benefits of FDI inflow into Nigeria.
iii. The importance of having an attractive M&As entry regime
iv. The regional spillover effects of the CBM&As for the rest of West-Africa.

CBM&As investments provide a solution to the economic diversification policy agenda of Nigeria with the objective of reducing dependence on oil revenue for the nation which causes systemic shocks of the threats of fluctuating oil prices and the looming presence of alternative energy technology. This study rises to this challenge by identifying gaps in the current CBM&As Legislative frameworks and by providing supporting legislations for CBM&As.

This study, therefore, is relevant for all persons interested in the CBM&As legislative framework of Nigeria and aims to provide information to investors, policy developers, students and the general public.

1.6 Literature review

Diverse schools of thought exist on the benefits and effects of FDI to a country, however, one of the most dominant views is that CBM&As provides some long-term economic benefits to a host country[11], especially with proper regulatory structures in place to take advantage of its benefits. It is safe to opine that literature on the economics of FDI is massive, creating a constraint in making choices on the most relevant literature.

Mergers and acquisitions are a multi-disciplinary field of study as various economic, strategic management, legal and political trends continue to shape the arguments. Sadly, there is not much empirical literature on CBM&A form a developing country perspective as most of the research on this area is focused on the developed countries.

Sornarajah[12] in tracing the historical development of foreign direct investment posits that the laws regulating foreign investment especially for developing countries since its inception have been quite controversial. The end of colonialism led to states exercising greater independence in managing their economies and having access to global markets while recognising national growth opportunities therein. The developed countries under the Thatcher and Reagan

[11] 'Corporate performance of M&A' in *World Investment Report (*2000) 137
[12] M Sornarajah '*The International Law on Foreign Investment'* (2010) 17

administration in the United Kingdom (UK) and the United States of America (USA) respectively began to promote a free market economy by liberalising foreign investments. The dissolution of the Union of Soviet Specialist Republics (USSR) aided this investment and trade liberalisation agenda. This affected China and other Asian countries who adopted liberalisation to benefit from the trend. The pressure from the World Bank and the IMF led to other developing states competing for the influx of FDI by liberalising their domestic regulations. This widespread liberalisation led to the development of the WTO and the emergence of various treaties on investment. However, there has been resistance by countries to enter into a single binding multi-lateral treaty on investments owing to the national differences on what FDI is.

On the economics of FDI, Caves[13]through his case and industrial cross-sectional studies concludes there exists a positive correlation between the productivity and the average value domestic firm employee creates within the same sector. Years later in 1996, Caves observed several positive effects such as positivity gains, technological and managerial know-how transfers of FDI creating policy moves by countries to attract more of it. Moosa[14] argues that FDI is the least volatile source of investment capital inflow which provides huge economic and social benefits for host countries. However, Moosa recognises in his work the challenging concern and consequence that foreign ownership of key factors of production poses for the host countries regarding the gradual loss of national sovereignty and breaches of national security. Blomstrom[15], Lipsey, and Zejan like Moosa, agree that FDI provides stable investment funding for developing countries with accompanying technology transfer, management skills efficiency spill over to the host countries and an increase in wages in absolute terms and industry relative terms but only within certain limits of an income threshold. Below that limit, it stops having a positive effect. They argue that only those favourable threshold income countries could benefit greatly from technology transfers to enjoy the "contagion" effect of FDI and the extra advantages that FDI could offer. Others analysts like Blomstrom before them have given conditionalities to be met to reap on the positive impact of FDI such as trade[16], acceptably developed financial markets and trade liberalization support measures. Alfraro[17] emphasises

[13] R Caves 'Multinational Firms, Competition and Productivity in the Host Country.' (1974) 41 *Economica* 176
[14] IA Moosa *'Foreign Direct Investment: Theory, Evidence and Practice'* (2002) 6
[15] M Blomstrom, R.E Lipsey |& M Zejan 'What Explains Growth in Developing countries?' (1994) 4132 *National Bureau of Economic Research Discussion Paper* 1
[16]L Alfaro & A Rodriguez-Clare 'Multinationals and Linkages: Evidence from Latin America' (2004). 4 *Economia* 113
[17] L Alfaro 'Gains from Foreign Direct Investment: Macro and Micro Approaches.' (2017) 30 *World Bank Economic Review* 2

the importance of macro-economic studies in addition to the firm-level micro-economic positive impact of FDI.

Wisniewski and Pathan[18] provide an institutional and political structure view on the impact of institutional and governance certainties of host countries as critical in addition to economic considerations in attracting FDI and reaping its benefits. Interestingly, an attempt on the regulatory impact on FDI by Harms and Wacker[19] in analysing the forthcoming work of Onur Koska's forthcoming paper on the impact of government regulation through minimum output requirement affects foreign companies' choice of market entry either through company acquisition or alternative means. Koska establishes that appropriate use of the regulatory tool tilts foreign companies' decision towards acquisition which in turn has a positive effect on domestic welfare of a country in the long-run[20]. Despite Koska's work on regulatory impact, the findings are on an aspect of regulatory impact (i.e. minimum output production in regulating investment entry). He does not provide a holistic assessment of the legislative and regulatory impact of CBM&A and FDI, leaving a huge gap to be filled in this area.

UNCTAD attributes an increase CBM&As in developing countries from the early to late 90s due to the creation of an investment-friendly framework. M&A evolved from the short-term finance supply lifeline for distressed companies to long-term economically strategic moves. Morrisset[21] argued that some African countries such as Namibia and Senegal in the late 90s could attract from enhanced government policies from FDI multilateral/bilateral ratification, domestic investment code ratification, general transparency measures. Morresi and Pezzi[22] adopt similar views of investment liberalisation regimes but further attributes the growth in CBM&As to advanced technology, transportation and communication, development of local financial markets, access to developed capital markets systems that have helped tremendously. They further argue that the benefit of CBMA does not end with the developed countries acquiring the firms of emerging or developing countries multinationals but that developing

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[18] TP Wisniewski & SK Pathan 'Political environment and foreign direct investment: Evidence from OECD countries' (2014) 36 *European Journal of Political Economy* 13 23

[19] P Harms & KM Wacker 'The special issue on FDI and multinational corporations: an introduction' *Economics: The Open-Access,*13 *Open-Assessment E-Journal*, (2019): 1-7

[20] Gains from multinational competition for cross-border firm acquisition. Economics: The Open-Access, Open-Assessment E-Journal, 13. Koska recognises the short-term regulatory negative impact of domestic competition reduction through foreign acquisitions investments, but presents the long-term benefit of steady market supply of a minimum output requirement as against an unregulated market entry or domestic investment protectionism.

[21] J Morisset 'Foreign Direct Investment in Africa: Policies Also Matter' (2000) 2481 *Policy Research Working Paper* 1 https://openknowledge.worldbank.org/handle/10986/19748 (accessed 4 May 2019)

[22] O Morresi & A Pezzi '*Cross Border Mergers and Acquisitions: Theory and Empirical Evidence'* (2014) 8

country firms benefit especially at the infant stage acquiring stakes in developed countries companies motivated by the desire for fast entry into foreign markets. CBMA is a symbiotic phenomenon for countries.

Gaughan[23] writes on the emergence of a new crop of cross-border emerging market acquirers in the 2000s through the 5th merger wave, who acquiring cross-border companies mostly in developed countries to take advantage of regional and global business opportunities.

Scola[24] argues on the legal aspect of CBMA from a cautionary perspective of a developed country investor, where the impact of corporate and taxation regulations is described as critical to the investors' success in cross-border M &A. Investors consider, Scola argues, host country regulations on three core areas of CBMA legislations- the deal structure and legal entities, competition and competition authorities, and sector-specific regulations.

Neelam[25] argues that cross-border acquisitions are not dissimilar from domestic mergers and acquisitions because they are both motivated by strategic initiatives with the aim of supervising. However, due to the global nature of CBM&As, certain factors influence its presence such as favourable changes in the economic and regulatory environment in foreign countries, low foreign tax rates, exchange rates and client base abroad. Also, cultural and attitudinal differences and geo-governance differences.

Given these works of literature on FDI and CBM&A, it is evident that none of these scholars has touched extensively on the African situation neither have these scholars touched specifically on the legislative and regulatory peculiarities of CBM&As in Nigeria. Investors are mostly concerned with the safety of their investments which regulatory uncertainties from inadequacy can exacerbate.

1.7 Proposed research methodology

This is a desk and library-based qualitative research work. It relies on primary and secondary source materials from renowned authors of domestic and international texts, electronic media

[23] P Gaughan '*Mergers, Acquisitions and Corporate Restructurings'* (2018) 64
[24] A Scola 'Legal, Financial, Social and Political Interdependencies with Cross Border Integration' In S Whitaker (eds) *Cross-Border Mergers and Acquisitions* (2018) 65 75
[25] N Rani, SS Yadav & PK Jain '*Mergers and Acquisitions: A study of Financial Performance, Motives and Corporate Governance'* (2016) 52

sources, legislation, reports, policy guides and plans, unpublished sources, journals, articles and other sources.

The primary aim of the research work is a critical analysis of the present legislative framework, identification of inadequacies in the extant legislations vis-a-vis the South African CBM&As investment regime. South Africa is chosen because of its well-developed CBM&As structure in Africa, its advanced, responsive and dynamic legal and regulatory framework, and its good trading relationship with Nigeria through liberal investment policies. Lessons from the South-African CBM&As regime will be reviewed and tweaked to cater to the Nigerian developmental goals. The research work applies a descriptive, narrative, critical, comparative, analytical and prescriptive approach.

1.8 Limitations of the study

This research work focuses on the introductory aspects of CBM&A and FDI as a foundation for delving into the legislative regulations surrounding CBM&As in Nigeria. It restricts itself to the extant regulations that have a bearing on CBM&As as a source of FDI generally and does not undertake deeply specialised industry and sector research efforts owing to the constraints on the limits of this work.

1.9 Structure of chapters

This research work is divided contains five chapters, set out in the following order and themes:

Chapter one

This chapter provides a foundational overview of the research work. It explores the challenges and questions that prompt the research and the relevant literature on the research subject. Chapter one also addresses the significance & aims, methodology and limitations of the research in response to the answers research topic pursues.

Chapter two

This chapter provides an overview of the concept, theories, motivations, types of mergers and acquisitions and foreign direct investments. It also includes the relevance of CBM&As as an FDI to the Nigerian economy.

Chapter three

This chapter examines generally the extant legislative framework for cross-border mergers and acquisitions governing CBM&As in Nigeria, going further to analyse the CBM&As regulations in the ECOWAS region and the effect of the newly signed AfCFTA on cross-border mergers and acquisitions on Nigeria, if Nigeria accedes to it.

Chapter four

This chapter provides a critical and comparative analysis on the inadequacies of the Nigerian legislative framework vis-a-viz of South Africa framework suited to the Nigerian reality.

Chapter five

This chapter provides a recapitulation of the research agenda, summary of the research key points and a conclusion of the study with legislative and policy recommendations on the reformation of the regulatory framework to create an enabling environment for CBM&As to thrive.

CHAPTER 2 - GENERAL OUTLINE OF MERGERS & ACQUISITIONS AND FOREIGN DIRECT INVESTMENT (FDI)

2.1 Introduction

The purpose of this chapter is to provide a foundational understanding of M&As and FDI which are vital constituents of CBM&As. Accordingly, this chapter is divided into three main sections. Section 1- deals with the theories, types and purposes of M&As, types of M&As briefly touching on CBM&As. Section 2- deals with theories, rationale and the economic relevance of FDI to emerging economies and lastly Section 3- deals with the importance of CBMA in spurring economic growth in a country.

The rise of business globalisation has inadvertently created an increase in the inter-dependence of markets for different goods and services, resulting in market competition and specialization. Companies across the globe realise the opportunities and aim to maximise the benefits this brings, resulting in the need to extend their reach into new territories to have access to assets and provide better returns to their shareholders[26]. Global companies looking to expand into new territories employ different modes of entry, however, three main channels of entry stand out. These are greenfield investments, joint ventures and mergers and acquisitions[27]. Greenfield investment occurs when foreign companies originally establish their business equipment and operation base in a host country. Mergers and acquisitions, on the other hand, involve the coming together of pre-existing companies for the purposes of acquiring or merging their assets into a whole new entity. Mergers and acquisitions provide an easy mode of entry and are often a preferred mode of investment options for companies. However, it has the propensity to adversely affect healthy competition in a host economy leading to a need for stronger mutual engagement between companies and a host economy and its regulators.

Even though FDI is agreed to lead to the economic development of countries, there is still contention between scholars on the direct positive correlation between FDI and development. Despite this contention, countries like India and Brazil are glaring testaments to the positive

[26]MR Surugiua, & C Surugiub 'International Trade, Globalization and Economic Interdependence between European Countries: Implications for Businesses and Marketing Framework' (2015) 32 *Procedia Economics and Finance* 131. https://core.ac.uk/download/pdf/82694989.pdf (accessed 7 August 2019)
[27] H Raff M Ryan F Stahler 'The choice of market entry mode: Greenfield investment, M&A and joint venture' 2009 18 *International Review of Economics and Finance* 3

impact of FDI to economic development, if properly managed and regulated. This inspires confidence that developing countries like Nigeria can reap the benefit of FDI through M&A activities if a regulatory balance geared towards economic prosperity and health protectionism is achieved.

It has been noted in the first chapter the relevance of a country's legal regime in FDI attraction. The various theories, types of M&A and FDI will be examined to understand these concepts for creating some balanced regulations for a friendly investment environment while safeguarding local industry and preventing oligarchic disruption.

2.2 Mergers and Acquisitions (M&A)

Mergers and acquisitions are an important channel for increasing corporate growth and competence. Even though used interchangeably, it is still important to distinguish between mergers and acquisitions due to the dichotomy of their economic implication. A merger is seen as a combination of two or more businesses in which only one of the businesses survive[28]. This view of mergers is dependent on the negotiation made between the merging parties, ideally agreeing on a balanced power-sharing between the merging firms, creating a new enterprise or conglomerates. Acquisition/Takeovers, on the other hand, is seen as activities by which acquiring firms take and control over 50% of the equity of the acquiring firm[29].

Mergers and Acquisitions can further be seen by observing the motives and hypothesis for mergers and acquisitions, though no single motive can satisfy the rationale for mergers and acquisitions owing to its highly complex nature. These motives and hypothesis at best provide a framework of sorts to explain mergers and acquisitions activities.

2.2.1 Definition of mergers & acquisitions (M&A)

In principle, mergers and acquisitions can be defined as the purchase of companies or specific assets in a company by another company creating the combination of existing assets into a new asset in the best possible productive way[30]. A merger is also defined as a combination of two

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[28] JJ Hampton *Financial Decision Making: Concepts, Problems, and Cases,* (1989) 394

[29] J Piesse CF Lee L Lin &HC Kuo 'Mergers and acquisitions: Definitions, motives, and market responses'. In: CF Lee A Lee (eds) *Encyclopaedia of Finance* (2006) 542.

[30] O Morresi & A Pezzi (n22 above) 1

or more companies to form a new company while acquisitions(takeovers) of a company is the takeover of a company by another company.

A merger is also defined as a process, where two or more companies combine their operations and company to create a new company leading to the automatic creation of the other companies. On the other hand, an acquisition is a process whereby a company takes over the operations of another company, making the company taken over a part of the acquiring company[31]. The Organisation for Economic Co-operation and Development (OECD) defines a merger, “two (or more) companies agree to merge into a new single company rather than remain separated for creating business synergies"[32]. Despite the slight differences and semantic style of definition, a common denominator is that mergers and acquisitions are created for a common goal- the creation of synergies- where the new whole is greater than the sum of the parts.

2.2.2 Types of merger

M&As are can be classified using an industry sector or business model index. To this end, four types of merger exist, namely-

i. Horizontal merger

This form of merger involves the combination of two or more companies that sell the same product located in the same market geographically[33]. From a competition protection stance, this type of M&A is counter-intuitive owing to its resistance by regulatory authorities, however, companies strategically use it to increase market share, create economies of scale, pursue cost efficiencies and eliminate unproductive resources. Its long-term advantage is the creation of cheaper products and services for customer and clients through increased economies of scale. On the other hand, it can create monopolistic tendencies is left unregulated. An example of this kind of merger is the acquisition of Schweppes by Nigerian Breweries Plc.

ii. Vertical merger

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[31] A Bertrand, ‘Mergers and Acquisitions, Greenfield Investment and Extension of Capacity’ (2004) 4 *International Monetary Fund Issue paper 28*

[32] OECD ‘Benchmark Definition of Foreign Direct Investment’ (2008) 197

[33] BR Kumar *Wealth Creation in the World’s Largest Mergers and Acquisitions Integrated Case Studies,* (2019) 7

This type of merger occurs between companies at a different level of production within an industry/sector supply chain. The merger of these differently positioned companies results in the production of a final finished product or service. An example of a vertical merger includes the notable vertical merger of Time Warner Inc., a major cable company, and the Turner Corporation, a major media company responsible for CNN, TNT, Cartoon Network, and TBS in 1996[34] in the United States. Vertical Mergers are credited with reduced cost and increased efficiency, however, on the reverse end, they potentially stifle competition

iii. Conglomerate merger

These are mergers between companies having completely different and unrelated business activities. These types of mergers are strategically applied to create financial and managerial synergy to reduce specific risk and capital cost reduction. A glowing example is the merger of the Walt Disney Company and American Broadcasting Company. Conglomerate mergers utilize the financial strength of the acquirer firm[35].

iv. Congeneric merger

Same-industry companies with mutual buyer-supplier relationship engage in this type of merger intending to expand product lines and markets. An example is the acquisition of Intercontinental Bank Plc by Access Bank plc in Nigeria.

v. Concentric/reverse merger

Mergers of this nature involve the acquisition of a bigger company by a weaker or smaller company. This type of merger true to its chameleonic nature can take the form merger of a parent company into its subsidiary, the merger of a profitable company a company making losses, the private company acquiring the shares of a public company. Mergers of this nature are boldly done for revenue enhancement purposes. Ted Turner's merger with Rice Broadcasting to form Turner Broadcasting is an example of reverse mergers

2.2.3 Types of acquisitions

[34] (n33 above) 7

[35] As above

Unlike mergers, acquisitions can take two simple forms:

i. Asset acquisition

Acquisitions of this type involves an acquiring company buying the assets and liabilities of the target company instead of the stocks. The acquiring company only acquires and assumes the assets and liabilities of the target company it identifies and agrees to acquire. This kind of acquisition is usually used to acquire bankrupt target companies where the acquiring company intends to acquire attractive and viable assets that the whole operations of the company[36]

ii. Stock acquisition

In this type of acquisition, the acquiring company acquires the stocks of the company directly from its shareholders with the right to participate in the target company's board meetings and ultimately contribute to the business decision making. The acquiring company by Law consequently also assumes ownership of the target company's assets and liabilities, even including potential liabilities from previous business transactions before the acquisition continuing the business as usual[37].

iii. Management buyout acquisition

A management buyout (MBO) is where a company's management team buy the assets and operations of the business they manage[38] and take over the business. MBOs are done to restructure the target company's operation to increase profit. In this type of acquisition, the management team is familiar with the business owners[39], financial status and possible future potential[40]. An advantage of MBO the relative flexibility it affords the acquiring company value the business at a fair price.

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[36] P Pignataro *Mergers, Acquisitions and Other Restructurings: A Practical Guide to Investment Banking and Private Equity* (2015) 4 73

[37] (n36 above) 72

[38] As above

[39] SD Miller *Buyouts: Success for Owners, Management, PEGs, ESOPs and Mergers and Acquisitions* (2012) 127 129

[40] T Naughter 'A Look at Management Buyout Acquisition(MBO)' 6 June 2017 *Secure docs* https://www.securedocs.com/blog/a-look-at-management-buyout-acquisition-mbo (accessed on 8 September 2019)

2.2.4 Theories of mergers & acquisitions (M&A)

Various theories founded on the strategic rationale for mergers and acquisitions have emerged over the years. However, extant literature broadly classifies them into the Neoclassical and Behavioural theories[41].

Neo-classical economic theory assumes that company management engages in M &A activities to maximize the wealth of shareholders. Behavioural hypothesis, on the other hand, assumes that companies employ M&A for their motives of empire building and growth maximisation, with little consideration for wealth maximisation or the overall negative impact of the mergers and acquisitions. It is safe to conclude that other theories are offshoots of the neo-classical theory or the behavioural theory.

i. Synergy Theory

This theory falls mainly under the neo-classical theory of mergers and acquisitions. This theory focuses on synergistic value creation ranging from management synergy to taxation synergy, making the value of the combined sum greater than the sum of the values of the company[42]. This theory further postulates that companies get involved in M&A activities to generate mutual benefits and positive returns. Forms of synergistic merger under this theory include:

a) Cost-based synergy is achieved through the reduction of cost from combined asset culminating in enhanced economies of scale specifically for sales, operating, and/or research and development costs.

b) Revenue-based synergy combines complementary competencies. Revenue synergy is achieved when organisations through product innovation combine their competencies to command competitive prices for their goods and services through product cross-selling, higher.

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[41] AS Omoye& SJ Aniefor 'Mergers and Acquisitions, The Trend in Business Environment in Nigeria' (2016) 5 *Accounting and Finance Research* 10

[42] Kumar (n33 above) 9

c) Modular synergy is created when firms manage operations independently but gather together the results of their individually managed operations for greater profit. For example, both an airline and hotel chain gain from their collaboration when they club their consumer choices. Hotel guests earn frequent flyer miles through the association with airline companies.

d) Sequential synergy result from companies merging their work in sequences. For instance, when one company completes its share of operations and forwards it the other company to commence its work share. One example of this kind of merger is an aeroplane design company and an airline merger construction company.

e) Reciprocal synergy is realized through horizontal merging in which corporations execute projects through a reciprocal knowledge sharing process between merging companies.

f) Manufacturing synergy is created by combining the core manufacturing aspects at different levels between merging and acquiring companies. These capabilities include designs, research and development, equipment leading to lower production costs and enhanced production efficiency.

g) Operations synergy is synergy achieved by a combination of the respective company's operational competencies. Merged operations can range from include company services such as legal, human resources and administration to transportation service delivery. Operations synergy offer competitive advantages which can lead to a company better pricing power and market share.

h) Marketing synergy is created from the use of similar or the same market techniques, supply channels or marketing points of the merging companies. An example of this type of synergy is the synergy where a start-up FMCG company merges with an established and well-known departmental store for its sterling marketing techniques and reach.

i) Financial synergy is synergy achieved by the combination of the capital of merging entities with the effect of reducing their combined cost of capital, thus improving financial economies of scale and reduce financial risk. Synergies of this nature can best be analysed from the angle of investment opportunities and internal cash flows. A firm in a declining

industry (hardcopy publishing) with fewer investment opportunities but high working capital and cash flow may merge with a growing entity with better investment opportunities but limited cash flow. It has been observed that financial is advantageous because merged firms can increase their financial leverage without increasing the premerger level of risk propensity[43] from an increase in debt capacity from the merger.

j) Management synergy occurs where the best part of both the company's management competencies and styles are merged to leverage differing management styles for optimal corporate outcomes

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ii. Corporate control theory

The theory of corporate control assumes a 'predatory management survival of the fittest' rationale for M&A between corporate entities. The crux of the theory is that management teams in companies seek to acquire under-performing companies resulting from management incompetence, in order to utilise the assets and potentials to enhance performance for the purposes of maximising the wealth of shareholders of the acquiring firm[44] It explains the rationale for hostile takeovers in very competitive industry as an attempt to weed off underachievers.

iii. Valuation theory

This theory founded on the influence of insider information to merger success. based on insider. It assumes that mergers are undertaken by companies because the acquiring company has useful information about the value of the target company than the stock market.

iv. Process theory

The process theory of M&A assumes that M&A transactions contrary to common belief are not based on the corporate strategic policies and decision making but are based on tactical processes influenced by limited information usage capacities and organisational routines that

[43] W.G Lewellen 'A pure financial rationale for the conglomerate merger' (1971) 26 *Journal of Finance* 521 525

influence the corporate and political culture between company management and external stakeholders.

v. Managerial theory

The management theory that explains M&A transactions from the role of managerial decision making through managerial hubris, discretion and retrenchment. Under managerial hubris, acquiring company management in attempting to increase the value of their company may over-evaluate the benefits of synergies that may be created by acquisition resulting in the acquiring company suffering heavy financial losses and ultimately, failure.

Under managerial discretion, management erroneous under-values the potential of a target company from having excess liquidity coupled with poor research and analysis management team who may wrongly undertake a well-intentioned acquisition because they are not enduring the financial pressure to correctly analyse every aspect of the proposed acquisition[45].

Managerial entrenchment lastly, assumes that M&A transactions are made not with the altruistic aim of benefiting shareholders per se nor adding value to the acquiring company but rather to protect and further management tenure and best interest.

vi. Empire-building theory

Empire theory considers that management teams are driven to undertake an M&A to grow the company by increasing the asset or revenue base to secure their managerial position and presence through their effectiveness and not necessarily for company wealth considerations. In practice, it is difficult to see this theory in action, what seems obtainable is a mutual interest-based empire building. The increase in the wealth of shareholders naturally gets management rewarded.

vii. Disturbance theory

The disturbance assumes M&A waves occur as a result of the changes in expectation of different business players premised on economic disturbances. The effect of these disturbances

creates shifting expectations and opportunities for companies to seize and maximise to their advantage

viii. Market power theory

The theory of market power suggests that companies engage in M&A activities to increase the allocative synergistic gains of growing market power will exponentially increase profits through the reduction of suppliers enabling the merged company to increase market prices of products.

ix. Monopoly theory

This theory posits that a M&A is pursued to increase greater market power. Monopolistic theory can occur horizontally which assumes a transfer of wealth from customers to the owners of the company occupying the monopoly position through the limitation of customer choices. A monopolistic acquisition can also occur in conglomerates which offers an acquiring company the unique advantage of collusive synergy through cross-subsidization of products and ploughed back profits for expansion, gradual competition elimination and monopolistic new entry barriers[46].

2.2.5 Historical development of mergers & acquisitions (M&A)

The historical antecedent of M&A is vital to discussions on M&A to highlight the role of government intervention through regulations in the development of M&A. M&A occurred in waves (concentrated merger activities) with its earlier forms dating to the early 1800s in the United States.

The tail end of the 19th century is characterized by extreme deprivation brought by the economic depression, leading to the first wave of M&A. The abolition of slavery and the growth of the industrial revolution from increased demand following a population explosion created the desire to benefit from the revolution and mitigate business risk exposure resulting

[46] TM Kumwenda 'Cross-border Mergers and Acquisitions in Malawi: The imperative for a foreign investment enabling legal environment to catalyse economic development' unpublished LLM Thesis University of Pretoria 2017 22.

in horizontal monopolistic M&As. The formation of monopolies was encouraged by the lax enforcement of anti-trust law by the Sherman Act of 1890[47]

The second wave happened during World War I which provided the perfect opportunity to increase industrial and technological developments to enable the attainment of superiority and victory over enemy countries. This desire leads to the support of and eventual vertical merger of war technological and allied companies. The world war created an economic boom and expansion leading to cheaper and better access to capital. The Clayton Act of 1914 emerged to make the government's anti-monopoly agenda stronger[48].

The third wave occurred between 1965 and 1969 and was mostly witnessed the rise of conglomerates encouraged by the Celler-Kefauver Act of 1950[49]. This Act emerged to encourage a rise in conglomerate mergers and discourage industrial dominance through horizontal mergers. Conglomerates were encouraged to merge which protected companies by reducing their risk exposure and equipping them with resources and fortitude to expand into other countries for business.

The fourth wave is regarded as the wave of hostile acquisitions and Management Buyouts which were undoing the conglomerates created during the third wave. Factors that lead to intense M&A activities were the sustained economic growth between the early eighties to the early 90s, increased international competition prompted by deregulation in many industries, new technologies and corporate governance innovations and legislative changes such as Economic Recovery Tax Act of 1981 in the United States that encouraged the value of old assets to be magnified upon purchase and the Tax Reform Act of 1986 which provided for a waiver of capitals gain tax payment for assets under liquidation process sale at corporate level. This wave suddenly came to an end due to rising interest rates from prolonged expansions, oil price shock of 1990 and an avalanche of debts incurred in the eighties amongst others[50].

The fifth mergers and acquisitions wave occurred from the early nineties to early two thousand. This is one of the largest merger waves in history resulting from the unprecedented growth of

[47] Morresi & Pezzi (n22 above) 3
[48] As above
[49] As above
[50] (n22 above) 8

and globalisation of the capital market, the liberalisation of trade and investments through the creation of the WTO with its liberalised treaties and the information technology explosion. The fifth wave is deemed the real global M&A because of M&A activity extending to Europe, Latin America and Asia. Companies merged mostly for advancing and surviving the opportunistic uncertainties ushered in by globalisation[51].

The sixth wave happened from 2004 to 2008, driven by the desires of companies to gain a greater competitive edge precipitated by excess liquidity in the markets because of low interest from low rates on credit. This wave is also characterised by the emergence of the BRICS group in trade and industry. This wave came to a gradual end due to increased corporate governance awareness and compliance worldwide, precipitated by the Sarbanes-Oxley Act of 2002 which deterred serial acquirers and corporate raiders[52]. Also, the financial crisis that began in 2008 brought the sixth wave to an end as credit became expensive because of the diminished liquidity from the global banking crisis[53]

2.2.6 Merger rationale

Companies engage in mergers for differing reasons, chief among them is profit maximization and growth. From the theories in Section 2.2.4, it is quite clear the reasons that drive companies to merge. Others include:

i. Improve operating efficiency through economies of scale
ii. Lower cost of capital through enhanced merged cash flow
iii. Diversification from higher growth markets
iv. Market power increases market share
v. Hubris (managerial pride) from managerial valuations of targets are more
vi. Agency problems and mismanagement issues of target companies
vii. Managerialism by increasing the size of a company to increase the power and pay of managers[54]
viii. Tax considerations obtain tax credits and advantages.

[51] (n22 above) 9.
[52] (n22 above)10.
[53] Kumwenda (n 46 above) 28
[54] N Rani, SS Yadav & PK Jain (n25 above) 3

2.2.7 Due diligence in mergers & acquisitions (M&A)

Due diligence is the process of reviewing the important aspects of a target company which include manufacturing, financial, legal, tax, information technology systems, labour, regulatory, and intellectual property issues. Due diligence is done to evaluate a potential target company for acquisition which helps in negotiating and valuation of the company. Due diligence includes examines the financial resources, organisational culture, organizational structure, management style, operational aspects which include production technology, processes and systems, human resources, legal aspects, and information systems. The basic aim of due diligence is to assess the benefits and liabilities of the proposed acquisition. Failure to engage in due diligence can lead to an M&A fiasco.

2.3 Foreign Direct Investment (FDI)

Having reviewed mergers and acquisitions in detail, its theories and motivations, the next component of this research work is Foreign Direct Investment. In engaging this component, it is necessary to understand its definition, its motives and benefits to a host country and possible challenges and its significance within the legal framework of a country.

2.3.1 Definition of Foreign Direct Investment (FDI)

In the World Investment Report produced by the United Nations Conference on Trade and Development (UNCTAD), FDI is defined as,

> An investment involving a long-term relationship and reflecting a lasting interest and control by a resident entity in one economy (foreign direct investor or parent enterprise) in an enterprise resident in an economy other than that of the foreign direct investor (FDI enterprise or affiliate enterprise or foreign affiliate)[55].

FDI implies that the investor exerts a significant degree of influence on the management of the enterprise resident in the other economy. Such investment involves both the initial transaction between the two entities and all subsequent transactions between them and among

[55] UNCTAD World Investment Report 2012, Methodological note http://unctad.org/en/PublicationChapters/WIR2012MethodologicalNote_en.pdf (accessed 3 September 2019)

foreign affiliates, both incorporated and unincorporated. FDI may be undertaken by individuals as well as business entities.

Moosa defines foreign direct investment as,

> the process whereby residents of one country (the source country) acquire ownership of assets to control the production, distribution and other activities of a firm in another country (the host country)[56].

The International Monetary Fund's Balance of Payments Manual defines FDI as,

> An investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of the investor, the investor's purpose is to have an effective voice in the management of the enterprise[57].

Sornarajah defines foreign investment as

> Investments which involve the transfer of tangible or intangible assets from one country to another for their use in that country to generate wealth under the total or partial control of the owner of the assets[58].

There can be no doubt that the transfer of physical property such as equipment, or physical property that is bought or constructed such as plantations or manufacturing plants, constitute foreign direct investment". Interesting, foreign investment treaties also define the nature of the foreign investment that is protected through their provisions[59].

The OECD considers foreign direct investment as,

> An investment that reflects the investors objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor. The

[56] Moosa (n14 above) 1

[57] 6 *International Monetary Fund's Manual* (1993) 86

[58] Sornarajah (n12 above) 25

[59] Notably the United States Bi-Lateral investment treaty defines investments to mean every asset that an investo r owns or controls, directly or indirectly the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk

> lasting interest implies the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise[60].

The OECD defines a foreign direct investor to be,

> An entity (an institutional unit) resident in one economy that has acquired, either directly or indirectly, at least 10% of the voting power of a corporation (enterprise), or equivalent for an unincorporated enterprise, resident in another economy[61].

From the definition above, one common thread appears to distinguish FDI from other forms of foreign investment including portfolio investment. This common thread is control and controlling interests. Control is implied to mean some degree of discretionary decision-making by the investor is present in management policies and strategy[62]. For example, this control may occur through the ability of the investor to elect or select one or more members on the board of directors of the foreign while controlling interest implies some degree of ownership in the shareholding structure or voting share rights from 10% and above.

2.3.2 Types of Foreign Direct Investment (FDI)

FDI can be classified from the perspective of the investor (the source country) and the perspective of the host country. From the perspective of the investor, FDI can be classified into horizontal, vertical and conglomerate FDI[63]. From the perspective of the host country, FDI falls into import substitution FDI, Export- Increasing FDI and Government initiated FDI.

i. Horizontal FDI

This is undertaken for horizontal expansion to produce the same or similar kinds of goods abroad (in the host country) as in the investor's country. Product differentiation is a critical element of this type of FDI. Horizontal FDI is undertaken by an investor to take advantage of

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[60] OECD Benchmark Definition of Foreign Direct Investment (2008) 49-50.

[61] (n12 above)12

[62] As above

[63] R Caves International Corporations: The Industrial Economics of Foreign Investment (1971) 38 *Economica* 149

monopolistic or oligopolistic benefits such as intellectual property advantages, particularly if expansion at home would violate competition laws.

ii. Vertical FDI

These are investments undertaken either to exploit raw materials (backward vertical FDI) or for close market proximity through the acquisition of distribution outlets (forward vertical FDI).

iii. Conglomerate FDI

This FDI is a mix of both horizontal and vertical FDI and occurs where a business acquires a dissimilar business in a foreign country. This is a rare FDI type because investors have to overcome the barriers of entry to a foreign country and a new industry/market to succeed.

iv. Import-substituting FDI

This type of FDI is carried out to substitute goods imported by the host country for production of the same goods within the host country by the investor. The effect creates a decline in the imports by the host country and exports by the investing country to the host country. Investments of this nature are usually determined by the size of the host country's market, transportation costs and trade barriers.

v. Export Increasing FDI

These are investments motivated by foreign investors' desire to seek new sources of input, such as raw materials and intermediate goods. This kind of FDI is so-called because of the economic effect on the host country, resulting in the host country's increase in exports of raw materials and middle-positioned beneficiated products to the investing country.

vi. Government-initiated FDI

These are investments triggered by the offer of government incentives to foreign investors usually to attract foreign investments to eliminate a balance of payments deficit. Similarly, FDI has been classified based on its trade effects as either trade-orientated FDI because of the effect

of generating an excess demand for imports and excess supply of exports at the original terms of trade or anti-trade-orientated FDI[64] which has an adverse effect on trade.

2.3.3 Mode of Entry of Foreign Direct Investment (FDI)

There can be different mode through which an investor invests in a host country.

i. Greenfield investment

Foreign Investors set up a new foreign branch or subsidiary and plant in the host country to produce goods locally. In greenfield investment, a parent company starts a new venture in a host country by constructing new operational facilities obtaining new fixed asset, financial transfers-equity or loan financing. Example of this type of investment is the creation of Nestle Nigeria Limited a branch of the Global Nestle Company.

ii. Mergers and acquisitions (M&A)

One of the most preferred modes of entry globally, companies looking to expand merge or acquire a local company and its production capacity. In cross-border mergers, the assets and operations of two or more entities from the investing country and the host country from different countries are combined to establish a new legal entity in the host country. For example, the merger of Glaxo Wellcome and SmithKline Beecham in 1999 to become GlaxoSmithKline.

iii. Joint venture agreement and partnerships

Companies set up an operation with a local firm by forming a joint venture where each retains their distinct identities. Joint ventures are set up to execute a business undertaking/project, with the aim of profit-sharing, risk or expertise and control of the joint enterprise. Joint Ventures are for a limited time. An example is the joint venture between NNPC (60%), Chevron (40%) for the exploration of fields in the Warri region west of the River Niger and its offshore shallow waters in Nigeria.

[64] K Kojima 'A Macroeconomic Approach to Foreign Direct Investment' (1973) 14 *Hitotsubashi Journal of Economics* 2

2.3.4 Theories of Foreign Direct Investment (FDI)[65]

Global interest and the recurring importance of the causes and effects of FDI has encouraged the development of theories that attempt to justify investor's indulgence in FDI and the factors that influence their investment and locational choices. These theories are described below-

i. Neo-classical economic theory

It is quite unclear what major concept characterise this theory. Some scholars assume it to mean the subjective marginal utility theory of the 1870s and beyond; the economics of Alfred Marshall and resource allocation theory with Keynesian macroeconomics[66]. Despite the difficulty of agreeing on what economic theory best fits the neo-classic school, its leading proponents espouse the view that FDI contributes positively to the economic development of the host country[67], supported by the injection of capital by foreign investments which increases total saving, increased revenue through taxation, reduced balance of payment difficulties, increased economic activities which translates into the general wellbeing of the host country. The neo-classical theory is however criticised as representing a rose-tinted view of FDIs without consideration of its adverse effect such as environmental damage to a host country, particularly if loosely regulated. An example is the destruction of the Ogoniland by SPDC which regressed the community than benefit it[68].

ii. Dependency theory

This theory is a result of the convergence of the adverse effect of FDI rooted in the Marxist traditional disdain for the exploitative nature of capitalism and the Latin American structural discussion on development[69]. Generally, these converged schools view FDI as tools of developed countries economic manipulation of third world countries owing to the dependence of these developed countries on the resources from the third world. FDI essentially cause underdevelopment than the touted praise of development. One the chief feature of the dependency school is the assumption that development and underdevelopment is not an internal

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[65] Moosa (n14 above) 23
[66] SH Seid *Global Regulation of Foreign Direct Investment* (2002) 9
[67] CF Bergten et al *American Multinationals and American Interests (*1978) 355
[68] E Keates 'After Decades of Death and Destruction, Shell Pays Just $83 Million for Recent Oil Spills' 11 January 2015 *Greenpeace* https://www.greenpeace.org/usa/shell-oil-settlement-ogoniland/ (accessed 26 August 2019)
[69] B Hettne Development *Theory and the Three Worlds.* (1990) 82

problem but a problem of the forced economic position of developing countries in the structure of the international system. Dependency theory is strongly opposed to neoclassical theory, taking the view that foreign investment suppresses economic growth and increases income inequality in the host country[70]. FDI is viewed as serving the interest of multinationals from developed investing countries and depletes the resources of host countries by creating peripheral economies of host countries, which empowers foreign investors to further misuse local resources without concern for its host country needs.

iii. Differential rates of return theory

This theory postulates that capital flows from countries with low rates of return to countries with high rates of return move in a process that leads eventually to the equality to real rates of return on investment. The rationale for this theory justifies equality of marginal returns on marginal cost of capital for investment. One the criticism of this theory is its inconsistency with differential inflows and outflows of FDI simultaneously experienced by countries.

iv. Portfolio diversification theory

This theory explains FDI from an investor's desire to guard against investment risk or at best assume risk neutrality by resorting to portfolio diversified investments.

v. Market size theory

This theory assumes that the volume of FDI in a host country depends on its market size, which is measured by the sales value previous global companies hosted, or by the host country's GDP. This theory also assumes that a country will experience an influx of FDI by the explosion of its market size. A major critic of this theory is the unpleasant reality that FDI influx can be guided by different considerations which may not be mainly market size considerations.

vi. Industrial organization theory

[70] JM Rothgeb (Jr) 'Investment Dependence and Political Conflict in Developing Countries: A Comparative Regional Analysis' in S. Chan (eds) '*FDI in a Changing Global Political Economy'* (1995) 189

Hymer[71] developed the industrial organization theory. This theory assumes that foreign companies investing in a host country experience certain disadvantageous differences such from the outset such as language, culture, the legal system and other inter-country differences, yet invest because of certain comparative advantages that outweigh these obvious disadvantages. These investor comparative advantages include intangible assets such as a well-known brand name, patent-protected technology, managerial skills, and other firm-specific factors. The advantages to be derived from the investment must be firm-specific, transferable to other foreign subsidiaries[72] and sufficient enough to outdo the obvious disadvantages to encourage foreign investment. It is these firm-specific advantages that embolden foreign investors to compete successfully in a foreign market. This approach has been lauded as realistic, however, it has been criticised as being too generic as it fails to explain why investors choose a certain country over another.

vii. Internalization theory

This theory suggests that FDI arises from efforts by companies to replace market transactions with internal transactions[73]. The theory addresses market challenges especially in the goods and production factors market that arise from failures that may have a negative influence on a company's investment. These failures include human capital, knowledge, marketing expertise. The advantages of internalization in the control of externalities. The theory has been aptly criticised as too general with an absence of empirical evidence which cannot be directly tested[74].

viii. Location theory

This theory posits that FDI is based on location advantages to be derived from the investment in a host country vis-a-viz the locational disadvantages and global immobility of production resources scare in the investing home country. These factors include competitive labour, natural resources etc., which have a direct bearing on the cost. This theory offers an account

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[71] SH Hymer *The International Operation of National Firms: A study of Direct Foreign Investment* (1976) 12

[72] CP Kindleberger *American Business Abroad: Six Lessons on Direct Investment* (1969) 1

[74] Moosa n 14 above 23

for the labour-intensive production investment in Asian countries such as India and China by high wage country.

ix. Eclectic theory

This theory is also known as the Dunning Theory[75], attempts to explain FDI inflows by lightly combining the ownership, internalisation and locational advantages derived from the industrial organization hypothesis, the internalization hypothesis and the location hypothesis. For example, a foreign company choosing to respond to a demand for a particular product say the latest smartphone innovation under the eclectic theory, will first consider the following

a) If there are no internalization gains, the firm will license its internal advantage to another firm, particularly if locational factors aid foreign expansion.
b) If there are internalization gains and locational factors favour home expansion, the firm expands at home and exports.
c) If internal gains and if locational factors aid foreign expansion, FDI will take place and a new global company emerges.

x. Oligopolistic reactions theory

FDI sometimes are a reaction to movements[76] in an oligopolistic environment. FDI is by oligopolistic companies will trigger a similar move by a rival company to maintain their market shares. This theory is also called the market share securing theory.

xi. Currency and exchange rate theory

This theory by Aliber[77] postulates that FDI is determined and based on currency and exchange rate strength. Countries with stronger currencies invest in countries with weaker currencies while weaker currency countries can rarely make such bold moves, but remain relevant as the recipient of the stronger currency FDI. This is based on capital market relationships, foreign exchange risk, and global market preference for a stronger currency. The theory assumes that

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[75] JH Dunning 'Trade, Location of Economic Activity and The MNE: A Search for an Eclectic Approach in B Ohlin *et al* (eds) *The International Allocation of Economic Activity* (1977) 1

[76] FT Knickerbocker *Oligopolistic Reaction and Multinational Enterprise* (1973) 1

[77] RZ Aliber 'A Theory of Direct Foreign Investment', in C. P. Kindleberger (ed.) *The International Corporation: A Symposium* (1970) 1

FDI is made by stronger currency countries because of its ability to hedge again currency and exchange rate risks.

xii. Risk theory

This theory assumes that FDI is made based on the risk perception and appetite of the investor in the host country. These risks include political risk, legal risk, country risk, tax policy, trade barriers, government regulations, and strategic and long-term factors. The lower and certain the risk, the greater the possibility of FDI inflow and vice versa. For example, a decision by the host government to impose restrictions on capital repatriation to the investor's home country will have an adverse effect on the cash flows received by the parent company, which will, in turn, affect investment.

2.3.5 Historical developmental perspectives of Foreign Direct Investment (FDI)

There are various historical perspectives to the origin and growth of FDI as its known. There is the American, European and Developing economy perspective of FDI. One account state that FDI is erroneously described as originating from the Anglo-Saxon world without due credit[78] given to other nations. However, attention to its antecedents far back in history. "…in 2500 B.C[79], merchants from Sumer and …the East India Company, chartered in London in 1600, established branches oversea for purpose of storing, transportation and ease in marketing and trading their merchandise''. In the mid-seventeenth century, English, French, and Dutch mercantile families sent representatives to Africa and the American West Indies to represent their investment interests. The focal point of FDI history will, however, be on the colonial spread from the British Empire to the general blend of FDI.

Modern Foreign investment is seen as originating from 19th century from British lending to finance economic development in other countries and the ownership of financial asset in these countries particularly by the colonialists, continuing till the world wars of the twentieth century witnessing the decline of Foreign Investment with Britain losing its status as global creditor and the emergence of the United States as the major financial and economic power. The United

[78] RE Lipsey 'Foreign Direct Investment and the Operations of Multinational Firms: Concepts, History, and Data' 8665 *National Bureau of Economic Research Working Paper* (2001) 17

[79] M Wilkins '*The Emergence of Multinational Enterprise: American Business Abroad from the Colonial Era to 1914*' (1970) 1

States emerged for two major reasons- technological advancements and the dependence of post-war Japan and Europe on US capital to finance and economic reconstruction caused by the war, further triggered by favourable American tax laws that aided the spread of FDI. This continued till the tail end of the 1960s where the power of American FDI declined to arise from the economic recovery of host countries which led to a resistance to American ownership and control of local resources. The 1970s saw the re-emergence of Britain as a major player as a result of North Sea oil surpluses and the abolition of foreign exchange controls in 1979, ushering the foreign trade and liberalisation agenda. The 1980s witnessed a surge in FDI globally owing to a reversal of US status as a major recipient of FDI with a net negative investment position mainly from its now restrictive trade policy, the emergence of Japan as a major supplier of FDI and the globalisation of businesses.

The early 1990s witnessed FDI flows decline but later rebounded strongly owing to the emergence of smaller firms growing into global companies and investing abroad, broadening of FDI into other sectors such as technology and the increasing recognisable benefits of FDI which lead to improvements in the investment regime if countries leading to a removal of investment obstacles to aid the flow of investments through deregulation and privatisation. The late 1990s were uniquely characterized cross-border M&As (which were motivated by deregulation and enhanced competition policy) as the driving force behind FDI and increased liberalisation of regulatory regimes. Towards the reach of the new millennium, numerous investment treaties to promote FDI and stall double taxation were reached. The liberalisation of regulatory regimes encouraged the growth of FDI which continues but currently is facing challenges owing to the newly developed world shift towards populism and protectionism as witnessed in the United States and Britain[80], which on the bright side provides an opportunity for emerging and developing economies[81].

2.3.6 Motivations for Foreign Direct Investment (FDI)

[80] C Taylor 'Brexit could cause 'serious damage' for foreign investment into the UK, new study say' 1 November 2018 CNBC https://www.cnbc.com/2018/11/01/brexit-could-cause-serious-damage-for-foreign-investment-into-the-uk-new-study-says.html (accessed 3 September 2019).

[81] PA. Laudicina, ER. Peterson, & CR McCaffrey 'Facing a Growing Paradox the 2019 *A.T. Kearney Foreign Direct Investment Confidence Index®'* (2019) *AT Kearney FDI Confidence Index Research Report* 2.

The motives of foreign investors are important to determine the rationale for foreign investment irrespective of the chosen entry mode. There are five major motives for foreign investment which are:

i. Efficiency and Enhanced Economies of Scale through increased efficiency of operation or greater entrepreneurial propensity to take risks, especially where a greater level of efficiency in business activities in the value and supply chain would be achieved in a host country better than in the investing home country.

ii. Technology Superior technology through the translation of research and development scientific knowledge into commercial use based on the discovering of new processes and products, product differentiation and technological support activities especially where a host country is more technologically advanced.

iii. Market Potential and Entry through market research, promotion and distribution to enter and secure market presence in locations where there is high demand and need for a global company's products or services.

iv. Access to raw materials and natural resources in a host country, especially where this is unavailable or comparatively disadvantageous to extracting in the investing home country.

v. Bargaining and political power the ability to extract concessions and favourable terms from the host government encourage investment. For example, host countries tend to give edge technology.

Nigeria as a middle-income economy has vast mineral and human resources characterised by a large population. It is the largest economy in Africa and enjoys foreign investment. However, in the last two years, it suffered from an economic recession. The Government came up with a plan to recover the economy. However, the recovery of the economy is dependent on the pace of implementing the Economic Recovery and Growth Plan[82], which anchors Nigeria's

[82] African Economic Outlook (2019) African Development Bank https://www.afdb.org/en/countries/west-africa/nigeria/nigeria-economic-outlook
(accessed 3 September 2019)

industrialization through competitive access to raw materials, skilled labour, technology, and materials. At this stage, the climate is conducive for a review and re-creation of the foreign investment legislative framework to channel investment through CBM&A particularly from Africa and then beyond. Legislative review thus must be given the high priority it deserves.

2.3.7 Foreign Direct Investment (FDI) and developing countries

FDI constitutes an important resource tool which is particularly useful for providing long-term finance, technology, management expertise and know-how for the industrial and economic development of developing countries like Nigeria. It can also be used in rectifying a balance of payment deficit. Owing to the awareness of the benefit of FDI, investors have a plethora of choice on countries to invest in leading to the competition among developing countries to attract foreign investment.

Incentives are offered by various host countries however investment incentives into the less developed countries can hardly be a substitute for economic fundamentals such as attractive regulatory regimes, political security and profit opportunities. Developing countries despite its incentives are overweighed on the other end by legal and investment policies inconsistencies, obsolete and unsupportive infrastructure, skilled labour shortages which an adversely affect investment decision-making. Developing countries which have successfully attracted direct investment like China and Brazil are countries with clear and cohesive legal regimes,
financial and economic policies, a disciplined labour force and at time of transaction and strong international credit standing, clear and stability of investment conditions, free capital movements[83] Developing countries would gather more investment flows by working on the fundamentals than on incentives.

On the other hand, FDI by its very nature allows a degree of control to the investor in the host country economic activities which may create a feeling of insecurity in the host government and lead to the adoption of protectionist stances. While it is agreed that the investor and the host countries have legitimate needs and concerns- security of investment and protection of sovereignty, the best legal regime for developing countries is the regime that carefully balances

[83] TH Moran *Foreign Direct investment and Development: A New Policy Agenda for Developing Countries and Economies in Transition* (1998) 20

these legitimate but conflicting interest, for both investors and host state to reap the rewards of FDI which this paper seeks to achieve.

The rationale for FDI in emerging economies[84]

Types of International Production	Ownership advantages (they 'why' of MNE activity	Location advantages (the 'Where' of production)	Internalisation advantages (the 'how' of involvement
Natural Resource Seeking	Capital, technology, access to markets; complementary assets; size and bargaining strengths	Possession of natural resources, and related transport and communications infrastructure; tax and other incentives	To ensure stability of suppliers at right price; to control markets
Market Seeking	Capital, technology, information, management and organisation skills; surplus R&D and other capacity; economies of scale; ability to generate brand loyalty	Material and labour cost; market size and characteristics; government policy (e.g. with respect to regulations and to import controls, investment incentives, etc.)	A desire to reduce transaction or information costs, buyer ignorance or uncertainty; to protect property rights
Efficiency Seeking (a) of products (b) of processes	As above, but also access to markets; economies of scope, geographical diversification and/or clustering, and international sourcing of inputs	(a) Economies of product or process specialisation and concentration (b) Low Labour cost; incentive to local production by host governments; a favourable business environment	(a) As foe second category, plus gains from economies of common governance (b) The economies of vertical integration and horizontal diversification
Strategic asset seeking	Any of first three that offer opportunities for synergy with existing assets	Any of first three that offer technology, organisational, and other assets in which firm is deficient	Economies of common governance; improved competitive or strategic advantages; to reduce or spread risk

Source: Dunning (2008), p.105, Table 4.1

2.3.8 The potential value and adverse effect of FDI to Nigeria

FDI undoubtedly provides employment and incomes, capital formation, market access[85], technology and skills, fiscal revenues and inflows into the economy of a host state. In Nigeria, owing to its high unemployment rate and abundance of excess labour, positive impact foreign investment in Nigeria will generate direct and indirect employment may account of the increased labour demand from CBM&A and allied industry impact. This is consistent with the Federal Governments Policy on youth development and employment.

[84] Foreign Direct Investment in China Manufacturing Industry–Transformation from a Low Tech to High Tech Manufacturing - Scientific Figure on Research Gate. Available from: https://www.researchgate.net/figure/Determinants-of-FDI-in-the-OLI-framework_tbl1_228463060 (accessed 9 September 2019)

[85] World Investment Report (n55 above) 23

FDI to Nigeria plays an important role in Technology Transfer and production efficiency. Nigeria has a lot of untapped resources which will benefit from the transfer of technology, entrepreneurship and management skills that CBM&A FDI can bring with it. Foreign companies come with up-to-date technologies and progressive management styles and are willing to train host country labour force on how to use these technologies, creating positive spill over effect, supportive linkages and advanced human resource development to Nigerians.

FDI is also significant in the area of balance of payments deficit in Nigeria currently caused by over importation and under exportation of Nigerian products owing to the decline of industries. The BOP deficit can be solved through the injection of capital from CBMA, import-substitution through local production of same goods leading to less demand for forex and valuation of the Nigerian Nigeria from less demand of foreign products and influx of Forex into Nigeria through export increasing[86]

FDI provides fiscal revenues into the Nigerian Treasury through taxes and capital gains taxes. This can raise fiscal revenues for the government through the payment of from new economic activities and more VAT taxes coming from consumption.

FDI stimulates healthy competition in the domestic markets which affects positively the production and service delivery efficiencies of Nigerian Companies to stay on top of the game. When a foreign company merges with a domestic company, its foreign advantages can be employed to improve the quality of their goods and services which creates productive creativity in the market.

On the reverse side, poorly monitored FDI influx may adversely affect Nigeria. This is one of the chief postulates of the dependency theory of FDI. firstly, the employment generated may, in the absence of local content requirements generate employment for foreign national than the local workforce which may be doubly jeopardized by further unemployment from technological advancement, retrenchment.

Secondly, though competition may be healthy for the development and improvement of products and industries, the competition also has the potential to force the local companies out

[86] Kumwenda (n46 above) 32

of business. When a CBM&A takes place, the global merging company is operating from a strong position from aa financial, technological and advanced skill perspective than a Nigerian company especially in the small and medium enterprise bracket without having the wealth of the merging company making the Nigerian local company unequally competitive, resulting in its ultimate demise.

Thirdly, the foreign investment may adversely affect the BOP through greater outflows of foreign currencies through unchecked profit repatriation. CBM&A which has little effect on a Nigerian product or services export through increased production reliant on imported components will produce negative results.

FDI may result in unhealthy compromise through a race to the bottom in environmental and human rights considerations in other to keep investors happy to prevent their disinvestment. Poorly regulated CBM&A may bring about adverse effects on the environment. It is argued that the environment may be adversely affected by foreign investment because governmental institutions lack the capacity to properly monitor environmental degradation, omissions, and waste management. This may make unscrupulous global companies looking to cut cost, take advantage of the situation and harm the Nigerian environment.

2.4 Cross-border mergers and acquisitions and the significance of a balanced regulatory framework

Host countries and foreign investors often have legitimate but conflicting regulatory interests in the business of investment. While a host country is interested in its economic development, it also worries about loss of control, especially by big global companies. On the other hand, the foreign investor is worried about the security of investments due to political risk and policy/regulatory consistency. It must be noted that these interests can be balanced through effective and stable regulatory reforms.

Also, divergent legal regimes in the host and home countries can create conflict. A global company with strong regulations and enforcement especially in the human rights area and a host country with porous laws and enforcement mechanisms can affect CBM&A success because the disparity in the regulatory regimes creates an unnecessary risk of operating in the

target country. Host countries on the other hand with stronger regulatory regimes may see investors seeking competing countries with balanced regulations to invest in.

2.5 Conclusion

This chapter has established the relevance of FDI to the economic development of a host country. However, foreign investment without close monitoring and a balanced legislative framework may fail to deliver on the promise economic development. A similar consideration applies to CBM&As as a mode of direct foreign investment.

The extant literature on CBM&A and regulatory frameworks is meagre despite its importance from merger dialogues and discussions to investor country perception. The onus thus is on the Nigerian Government through its regulatory makers and implementers to ensure a balanced and effective legislative and regulatory framework is in place to attract foreign investment of the CBM&A variety.

The following chapter will focus on the present regulatory framework in Nigeria, the implementing institutions, the various industry regulations for CBM&A and the regional regulation for CBM&A in West-Africa where Nigeria is located.

CHAPTER 3 –

LEGISLATIVE AND REGULATORY FRAMEWORK FOR CROSS-BORDER MERGERS AND ACQUISITIONS (M&A) IN NIGERIA

3.1 Introduction

The previous chapter discussed the theories, classifications, motives, benefits and adverse effect for M&As. The role and significance of FDI and CBM&As to a host country were also looked over in detail. This chapter aims to review the general and sectoral legislative framework governing CBM&As in Nigeria, the ECOWAS region and the newly passed Pan-African trade agreement- The African Continental Free Trade Agreement (AfCFTA). The legislative framework analysis will begin with legal provisions within the extant legislative framework having an impact on CBM&As transactions and activities.

CBM&A is an important tool that can enhance private sector business behaviour in Nigeria. Nigeria currently runs on a predominantly mono-product economy (crude oil exports) which is gradually losing relevance in this era of environmental sustainability and clean energy[87] initiatives, coupled with a balance of payment deficit and unemployment. These problems can be addressed by working on the fundamentals that attract investment which include laws and adequate investment-friendly policies. Law and policies of a country play an enormous role in attracting investment because the legal framework provides the parameters within which businesses negotiate and determine the viability of a CBM&As transaction. Policy and Law developers are required to pay particular attention in the framing of the laws and regulations especially industry-specific and macro-economic regulations and policies to upgrade and attract FDI inflow[88]. The law is fundamental in creating an investment enabling environment.

[87] A Vaughn 'BP aims to invest more in renewables and clean energy' 6th February 2018 *The Guardian International Edition* https://www.theguardian.com/business/2018/feb/06/bp-aims-to-invest-more-in-renewables-and-clean-energy (accessed 3rd September 2019).

[88] DW te Velde 'Policies Towards Foreign Direct Investment in Developing Countries: Emerging Best-Practices and Outstanding Issues' (2001) *Overseas Development Institute Paper* 1 14. https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/5543.pdf (accessed 3rd September 2019).

The review of the legislative and regulatory framework will commence by looking into the multidimensional legal implications that a single CBM&As transaction may have. The chapter further discusses the legislative framework of CBM&A and the unique sectorial regulation of mergers and acquisitions in Nigeria. Lastly, the chapter will discuss the regional regulation of CBM&As under the ECOWAS region and Africa through the AfCFTA.

3.2 Relevance of CBM&A regulations in Nigeria

Currently, developing countries are going through slow economic growth, however, the African market appears to be an exception owing to cross-border M&A activity has shown potential for more growth. McKinsey Global Institute records over 4000 individual FDI deals 2010 and 2015 across the continent from pan-African interest MNCs[89]. Global transactions forecast[90] predicts that M&A activity in Nigeria will continue to be on the rise. In 2019, it is expected that deals worth around $2.5 billion will be concluded, dropping slightly to $1.9 billion in 2020. In 2021, M&A deal value in Nigeria is forecast to rise to around $3 billion. In terms of deal volume, the Global Transactions Forecast indicates that 20 M&A deals are expected to be concluded in 2019. In emerging economies, it was forecasted M&A activity to peak in 2019, followed by a cyclical downswing.

CBMA regulations are quite relevant to investments because the merging of businesses from two or more distinct and often divergent legal systems can affect the mergers and acquisitions impact on different industry and service sector, and stakeholders. Another relevance of CBMA regulations is its impact on the degree and quality of investment influx into a country based on investor perception of risk, risk appetite and benefit.

3.2.1 General Legislations on CBM&As in Nigeria

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[89] D Vallabh, & M Mfikoe 'Cross-border mergers and acquisitions – Charting the regulatory landscape' in *Cliffe Dekker Hofmeyr into Africa (2017)* 4 5.

[90] 'Global Transactions Forecast Deal appetite rising' A Baker Mckenzie Report (2018) Baker Mckenzie Oxford Economics.
https://www.bakermckenzie.com//media/files/insight/publications/gtf/global_transactions_forecast_2018.pdf (accessed 3rd September 2019).

The are no specific codes regulating CBM&A in Nigeria, however, regulations affecting CBM&A are found in a multiplicity of codes. Also, general laws are regulating M&A which applies to CBM&A in addition sector-specific regulations. The following sections will be focused on the analysis of these laws as they apply to CBM&As in Nigeria.

i. Companies and Allied Matters Act

The Companies and Allied Matters Act[91]is the corporate 'grundnorm of sorts' regulating companies and other corporate organisations in Nigeria, hence the review of CBMA regulations will commence from this important legislation. The CAMA does not specifically deal with mergers and acquisitions, however, its importance lies in its authoritative definition of companies (including foreign companies) its constituents and their relationship. It is also important because it deals with the foundation and vehicle for M&A which is corporations, its origin and qualification for origin and rights.

There was a bill for the amendment of the CAMA in 2018 which has been passed by the Nigerian Senate but still awaiting assent by the President[92]. Although the amendment does not touch directly on mergers, it does have an indirect positive impact on some Merger activities like establishment of a framework for insolvency, minority shareholder protection, disclosure significant control and beneficial ownership, reduction of compliance conditions for smaller companies and so on[93].

This origin (corporate vehicle) for M&A commences with section 18 providing the right for two or more people to form a company. Section 20 provides for the qualification to form a company while section 204 states that subject to laws regulating aliens, a foreign company or person may join in forming a company in Nigeria. Section 54 states that 'subject to sections

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[91] Cap C20 2018 Laws of the Federation of Nigeria 2004.
[92] O Oyebisi 'CAMA Bill: An important legacy for the 8th Assembly' 3April 2019 *Punch Nigeria* *https://punchng.com/cama-bill-an-important-legacy-for-the-8th-assembly/* (accessed 3 September 2019).

[93] W. Obayomi 'Key highlights of the Companies and Allied Matters Act (Repeal and Re-enactment) Bill, 2018' 9 November 2018 *KPMG* *https://home.kpmg/ng/en/home/insights/2018/11/Key-highlights-of-the-Companies-and-Allied-Matters-Act-Bill-2018.html* (accessed 3 September 2019).

56 to 59 of this Act, every foreign company which before or after the commencement was incorporated outside Nigeria, and having the intention of carrying on business in Nigeria, shall take steps necessary to obtain incorporation as a separate entity in Nigeria for that purpose, but until so incorporated, the foreign company shall not conduct business in Nigeria or exercise any of the powers of a registered company and shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other than the receipt of notices and other documents'. The Nigerian company upon incorporation is a separate legal entity from its overseas parent. The CAMA is divided into four major parts dealing with Companies, Business Names, Incorporated Trustees and Schedules to the Act.

ii. The Investment and Securities Act[94]

Before the passing of Nigeria's Competition Act, this was the major Act regulating mergers in Nigeria. Accordingly, the ISA empowered the Securities and Exchange Commissions as the regulator of Mergers and Acquisitions[95]although this provision has been changed to make the new regulator of M&A the Competition Commission. However, because of the experience of the SEC in handling M&A, not to mention that the new Commission has not still formed their M&A arm, it still necessitates analysing the ISA. Part XXI of the ISA deals with merger, acquisitions and takeovers.

a) Mergers and Acquisitions

A merger is defined by ISA as any amalgamation of the undertakings or any part of the undertakings or interest of two or more companies and one or more corporate bodies[96] while acquisition means the takeover by one company of sufficient shares in another company to give the acquiring company control over that other company. The Act stipulates conditions through which a merger can be approved and when it would be disapproved, particularly if it affects competition and public interest such as employment. The ISA also states the threshold of mergers can be categorised into a small, medium, or large merger[97]. After public interest and

[94] 2007, Laws of the Federation of Nigeria.
[95] s 118(1) of the ISA
[96] s 119
[97] s 120 (2)

competitive factors are considered, the commission further considers if the shareholders particularly the minority shareholders are fairly, equitably, similarly treated and given sufficient information regarding the merger[98].

After the Commission makes its initial determination, it may grant an approval in principle to the merger and direct the merging companies to make an application to the court. The commission may also request separate meetings of shareholders of the merging companies to get their consent to the proposed merger[99]. If a majority representing not less than three quarters in value of the shares of members being present and voting either in person or proxy at each of the separate meetings agree to the merger, the merger scheme would be referred to the Commission for approval.

Furthermore, a distinction is also made to the type of merger and its procedure compliance strictness. Mergers are divided into small, intermediate and large mergers. small merger" means a merger or proposed merger with value at or below the lower threshold, an intermediary merger is a merger or proposed merger with value between the lower and upper thresholds and a large merger is a merger or proposed merger with a value at or above the upper threshold. The lower threshold is fixed at N500,000,000, while the upper threshold is fixed at N5,000,000,000[100], pending when the commission comes up with a threshold. However, with the new competition regulation, these thresholds have changed. A small merger may voluntarily notify the Commission[101] of the merger at any time because parties to a small merger are not required to notify the Commission of unless the Commission requires it to do so. On the other hand, an intermediate or large merger must notify SEC of its merger in the prescribed form manner and parties cannot implement the merger until it been approved by the commission. Small companies merging that within 6 months after a small merger has commenced implementation, the Commission may require the parties to the merger to notify the Commission if, in the opinion of the Commission, the merger may substantially prevent or competition or cannot be justified on public interest grounds. At this point, no further steps can be taken to implement the merger until it has been approved or conditionally approved.

98 s 121 (1) (d)
99 s 121(4)
100 s 120 (2) & (4).
101 s 122

These provisions may present difficulties in practice. For example, it is unclear how the Commission would become aware of the merger if it is not notified. It also gives undue preference to smaller mergers. Intermediate and Large mergers are required to notify the Commission on its desire to merge. Also, they are required to follow certain necessary steps for a successful Merger.

b) Takeover

The Act defines take over as the acquisition by one company of sufficient shares in another company to give the acquiring company control over that other company[102].

iii. Competition Act

The Act[103] is a new development in the merger landscape for Nigeria. The Act helps to minimise market distortions across all sectors are minimized to the bare minimum. The Act repealed the Consumer Protection Council Act and dissolved the Consumer Protection Council, and established the Federal Competition and Consumer Protection Commission ('FCCPC') in its stead. The FCCPC's authority now covers consumer protection issues and mergers across all entities in Nigeria. This Legislation also brought amazing regulatory innovation into the competition sphere.

The Act creates a Competition and Consumer Protection Tribunal to adjudicate over matters which arise from the operation of the Act, to hear appeals from and review any decision from the exercise of the powers of any sector-specific regulatory authority in a regulated industry in respect of competition matters.

[102] s 117
[103] Federal Competition and Consumer Protection Act 2019

The Act prohibits and voids a wide range of restrictive agreements between business entities provided it is capable of restricting competition, prohibits the abuse of a dominant market position by companies, prohibits the emergence of monopolies, The Act gives the Commission oversight powers in every sector, including presently regulated industries such as the communication industry. The Act provides that in the event of any conflict, the Commission would share concurrent oversight with the industry-specific regulator.

Above all, this Legislation, the Act shifts the authority to approve and regulate M|&A form SEC to the FCCPC which include amalgamations, business combinations and joint ventures. The Act also prescribes rules for large mergers. Although the FCCPC has been established, its governing board has not been constituted with no guidelines to regulate the process for implementing mergers.

vi. Securities and Exchange Rules and Regulation[104]

This regulation is made pursuant to the ISA for the purpose order of effectively and efficiently discharging the objectives of securities and investment regulation as embedded in the Act. Since the Act is quite silent on foreign investment, this regulation throws more light on the regulation of foreign investments, cross-border securities and M&A[105] by requiring investors to familiarise themselves with the laws on foreign investment which include the CAMA, ISA and others. However, it does not directly touch on CBM&A. Foreign investment is defined any investment in securities involving foreign capital importation made by a foreign person or by any Nigerian resident outside the country. The regulation categorizes foreign investors to include- foreign institutional investors such as pension funds, unit trust funds, investment trust funds, institutional portfolio managers, nominee companies, asset management companies, or any other corporate body; individual investors who are foreigners and Nigerians resident abroad investing with foreign currency into Nigeria[106]. Investments covered by this regulation include equities, Government stocks, industrial loan stocks, bonds, unit trusts, investment trusts, derivatives or any other securities registered by the SEC. Regulation of Mergers, Take-overs and Acquisition are elaborations of the ISA.

[104] Securities and Exchange Commission Consolidated Rules and Regulations 2013
[105] Part H & I n 105 above
[106] r 405

v. Nigerian Stock Exchange Rule Book

The NSE[107] provides for rules and regulations for merging companies intending to list its shares on the stock exchange. The rules preliminary provide that the mergers must first be approved by SEC before listing on the NSE. Merger compliance provisions[108] include acquiring company's equal treatment of shareholders, equality in information sharing, provision of sufficient and relevant information, stated conditions for acceptance of offers and beneficial interest, disclosure of prior offer agreement, acquiring company's assurance of employees and business continuity after the completion of the merger or acquisition, recommendation by financial advisers of the proposed merger.

vii. Nigerian Investment Promotion Commission Act

The NIPC Act[109] established the Nigerian Investment Promotion Commission ("NIPC") as an agency of the Federal Government, responsible for encouraging and promoting investment in the Nigerian economy by both domestic and foreign investors by enhancing the investment climate of Nigeria. The Act provides for various investment incentives and guarantees applicable to both foreign direct investments and foreign portfolio investments Some of this incentive is that a non-Nigerian may invest and participate in the operation of any enterprise in Nigeria provided the business is registered in Nigeria, empowers a foreign enterprise to buy the shares of any Nigerian enterprise in any convertible foreign currency, unconditional repatriation of capital and profits, guarantees against expropriation[110]. It is the Act that addresses cross-border investment quite directly.

Nigerian companies with foreign equity participation must register with the NIPC and obtain a Certificate of Business Registration before carrying on a business. Without this registration, the company is prohibited from commencing business in Nigeria[111].

[107] Nigerian Stock Exchange Rulebook 2015
[108] Part 2 Chapter 15 r. 15 Nigerian Stock Exchange Rulebook 2015 288
[109] Cap N117 LFN 2004.

[110] s 17-23
[111] s.20

viii. Tax Act

In an M&A transaction, stamp duty is usually the relevant tax. A stamp tax of 0.75 per cent of the value of the newly issued capital is payable to the Stamp Duties Office. Generally, tax considerations will depend on how the combination is structured. If the transaction involves an asset acquisition, the company disposing of the asset would be legally responsible to pay capital gains tax. Other tax laws provide as follows-

a) Companies Income Tax Act

The Act[112] deals with taxes arising from business activities in companies[113]also requires the clearance and direction of the Federal Inland Revenue Service (FIRS) for a proposed merger or acquisition in relation to the capital gains tax payable[114]. The company is required to furnish relevant transaction documents and the tax due diligence report for the FIRS' evaluation. Common law applies to the extent that there is no relevant provision in the statutes. Also, where a newly incorporated company emerges from the merger, the company would be required to file its tax returns and audited accounts with the FIRS within 18 months from the date of its incorporation or not later than 6 months after its first accounting period, whichever is lesser according to the Act. One area of a potential problem is the EDT[115] (excess dividend tax) which is subject to a multiplicity of interpretation due to its ambiguous wording. This would be addressed more in the next chapter.

b) Value Added Tax Act

The Value Added Tax Act[116] imposes 5% value-added tax (VAT) on the supply of goods and services not exempted under the VAT Act. These goods and services often include assets

[112] Companies Income Tax Act CAP. C21 L.F.N. 2004
[113] s 9
[114] s 25(12)
[115] s 19
[116] Value Added Tax Act Cap V1 LFN 2004

transferred pursuant to the transaction and services provided in connection with the merger transaction. VAT is not chargeable on the transfer of shares in Nigeria.

c) Capital Tax Gains Act

The CGTA[117] imposes capital gains tax at the rate of 10% on the gains accruing on the transfer of an asset under an M&A deal structured as a merger, business combination or pure asset acquisition. Where an M&A deal is structured as a share deal, capital gains tax would not be payable on the gains accruing from shares acquired pursuant. However, where shareholders are either wholly or partly paid in cash for their shares in the acquired company, the gains arising from the cash payment will be taxed for capital gain[118].

ix. Labour Act

The Labour Act[119], The Pension Reform Act,[120] and The Personal Income Tax Act[121] are the key legislations on Labour Relations in Nigeria.

The Labour Act provides that the transfer of any contract from one employer to another shall be subject to the consent of the worker and the endorsement of the transfer of the contract by an authorised labour officer. The Pension Act provides for a contributory pension scheme by the employer. The Personal Income Tax Act provides a 'Pay-As-You-Earn' (PAYE) scheme. Employers act as agents of the tax authorities to collect and remit taxes on salaries paid to their employees[122]. In the event of disputes arising from Labour, The National Industrial Court (NIC) is responsible for resolving these disputes.

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[117]Cap C1 LFN 2004
[118] C. Odoemenam 'Tax Implications of Mergers and Acquisitions in Nigeria' 25th June 2019 *LinkedIn* https://www.linkedin.com/pulse/tax-implications-mergers-acquisitions-nigeria-chidi-odoemenam (accessed 4th September 2019)

[119] Cap L1 LFN 2004
[120] Cap P117 LFN 2004
[121] Cap P8 LFN 2004
[122] Banwo & Ighodalo 'Doing Business in Nigeria' Grey Matter 11

x. Foreign Exchange (Monitoring and Miscellaneous Provisions) Act

This is the primary legislation[123] for foreign exchange transactions in Nigeria. The Act establishes an autonomous foreign exchange market where transactions in foreign exchange are conducted, monitored and supervised.[124] Also, the Act provides that the transferability of the proceeds (whether income or capital) of the business from Nigeria in foreign currency is contingent upon having a Certified Capital Importation (CCI) issued by an authorised dealer (i.e. a licensed bank). The CCI assures the unhindered remittance of investment capital and any investment yields such as profits and dividends. The CCI is to be issued electronically within 24 hours of the importation[125]. At the point of exporting investment capital to Nigeria, a foreign investor must specify the Nigerian beneficiary of the investment funds and the purpose. The foreign currency so imported is guaranteed unconditional transferability, convertibility and repatriation through the Authorized Dealer in freely convertible currency.

The Act also permits the operation and maintenance of domiciliary accounts. There is hardly any protectionist restriction to the repatriation of capital in Nigeria which makes it investment-friendly.

xi. Intellectual Property Act

Intellectual property rights are guaranteed to foreign investors in Nigeria through the protection of trademarks, patents, copyrights and industrial designs. Registration of trademarks is governed by the Trade Marks Act[126]. The act protects the owner of a trademark to have exclusive use of the trademark, coupled with the right to exclude others from using that trademark. The Patents and Designs Act[127] governs the law of patents in Nigeria by giving exclusive rights for novel invention capable of industrial application. Section 12 of the PDA defines a design as "an industrial design, which is then further defined as any combination of lines or colours or both, and any three- dimensional form, whether or not associated with colours; and which is intended by the creator to be used as a model or pattern to be multiplied."

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[123] F34, LFN 2004
[124] s 1 FEMMA Act
[125] s 15
[126] Cap T13 LFN 2004
[127] Cap P2 LFN 2004

The Copyright Act[128] governs the law of copyright in Nigeria and makes available the protection, transfer, infringement, remedy and penalty of the copyright in literary works, musical works, artistic works, cinematograph films, sound recordings, broadcast and other ancillary matters. The Nigerian Copyright Commission ("Commission") runs a Copyright Notification scheme to enable creators of certain copyright works or persons who have acquired rights in these works to give notice of their copyright to the Commission or notice of any transfer of such right[129].

xii. Environmental Act

The environmental legislation applies to all entities and persons' resident in Nigeria, fashioned to ensure responsible approaches and behaviours towards the environment. It also serves as an instrument for environmental protection, planning and control. The constitution of Nigeria, National Environmental Standards &Regulations Enforcement Agency (NESREA) Act, Environmental Impact Assessment Act, The Land Use Act amongst others are some of the instruments used in protecting the Nigerian Environment.

Of particular interest to foreign investment in Nigeria is the Environmental Impact Assessment Act[130]. An Environmental Impact Assessment (EIA) is an assessment of the potential impacts whether positive or negative, of a proposed project on the natural environment. The E.I.A Act deals with the considerations of environmental impact in respect of public and private projects. Sections relevant to environmental emergency prevention under the EIA- assessment requirement of public or private projects likely to have a significant (negative) impact on the environment, an application in writing to the Agency before embarking on projects for their environmental assessment to determine approval., establishment of cases where an EIA is required and the creation of legal liability for contravention of any provision[131].

3.2.2 Industry-Specific Legislations on CBM&As in Nigeria

[128] Cap C28 LFN 2004
[129] Banwo & Ighodalo n 126 above, 21.
[130] Cap E12, LFN 2004.
[131] s 2(2) & (4), 13 & 60.

Industry-specific regulations regulate mergers and acquisitions alongside the general legislations for mergers and acquisitions-

i. Banking Industry Legislation

This industry is regulated by the Bank and other Financial Institutions Act, Central Bank of Nigeria Act 2007, The Central Bank of Nigeria Manual 2005 and Procedures Manual for Banks Mergers/Takeovers all require that M&A in the financial sector be subject to the approval of the Central Bank of Nigeria. The CBN manual provides for stages in bank mergers and takeovers from pre-merger consent from the CBN to SEC, conditional and final approval.

ii. Insurance Industry Legislation

The Insurance Act 2003 provides that any acquisition of 25% or more of the shares of an insurer is subject to prior approval from the National Insurance Commission. The commission further provides that conditional to merger approval in this sector is a public advert directed at policyholders.

iii. Telecoms Industry Legislation

The Nigerian Communications Act 2003 provides that prior approval of the Nigerian Communications Commission which has regulatory oversight must be obtained in relation to mergers in the telecoms sector, including the transfer or assignment of a licence and transactions involving the acquisition of 10% or more of the shares of a licensed operator. Also, under its Competition Practices Regulations 2007, the Nigerian Communication Commission review proposed mergers to determine based on the preliminary information provided by a licensee in its initial transaction notification, if the merger transaction may result in a substantial lessening of competition in one or more communication markets, or may result in a licensee or any successor company having a dominant position in one or more communication markets. Where merging companies breach its rules and conditions, the commission has the authority to levy sanction and penalties derived from its Enforcement Process Regulation.

iv. Energy Industry Legislation

The Electric Power Sector Reform Act 2005 requires that merging companies obtain the approval of the Nigerian Electricity Regulatory Commission before any M&A in the sector, in order to prevent the abuse of a dominant market position of companies by ensuring competition[132].

v. Oil and Gas Industry Legislation

This is regulated by the Petroleum Act 2004[133] and the Petroleum Industry Bill. The provisions of this act require the consent of the Minister of Petroleum before a change in the ownership of petroleum licence or asset. Where a license or production sharing or service contract is taken over by another by acquisition, exchange of shares or by a change in control of the parent company outside Nigeria, it is deemed to be an assignment in Nigeria and must be subject to relevant Nigerian Legislations including the approval of the minister[134]. The consent of the Minister is required in the merger, acquisition, takeover and divestment of any transaction that alters the equity or otherwise of oil fields in Nigeria regardless of the business or corporate form of the merging/acquiring entity.

vi. Local Content Legislation

Some industries possess local content regulations that restrict the level of foreign ownership of a Nigerian company. These industries include the oil and gas where to be competitive in the award of contracts at least 51% of the shares of the company must be owned by Nigerians, aviation- where the application for a grant of an aviation licence or permit must satisfy the Nigerian Civil Aviation Authority that the applicant is a Nigerian company or citizen, Shipping- where the Coastal and Inland Shipping (Cabotage) Act restricts the use of foreign-owned or manned vessels for coastal trade in Nigeria and in broadcasting and media where a company applying for a broadcasting licence must demonstrate that it is not representing any foreign interests and that it is substantially owned and operated by Nigerians, pharmaceuticals

[132] s 82(5)
[133] Cap P10 LFN 2004
[134] See para 14-16, Schedule 1 Petroleum Act & s 17 (5) (D) Oils Pipeline Act Cap O7 LFN 2004

– where the Pharmacist Council of Nigeria Act 2004 provides for the registration of non-Nigerian citizens only if the applicant's home country grants reciprocal registration to Nigerians and if the applicant has been resident in Nigeria for at least 12 months before the application, engineering – where a company engaged in engineering services must be registered with the Council for Regulation of Engineering in Nigeria, with Nigerian directors who are registered with the council and who hold at least 53% of the shares in the company and private security business – where a foreigner cannot acquire an equity interest in, or sit on the board of a private security guard company in Nigeria[135].

3.3 Merger under Regional Legislation (ECOWAS)

The Commission of the Economic Community of West African States officially launched its Regional Competition Authority in Banjul, The Gambia. The ECOWAS constitutes a regional economic block of 15 West African member's states, namely Benin, Burkina Faso, Cabo Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. The ECOWAS Regional Competition Authority (ERCA) is established to implement the Regional Competition Rules adopted by the ECOWAS Authority in 2008. These rules promote, maintain and encourage competition while enhancing economic efficiency in production, trade and commerce at the regional level of ECOWAS.

The establishment and function of the ECOWAS Authority are set out in Supplementary Act[136]Article 11(2) of the Supplementary Act empowers the ERCA to approve mergers, acquisitions, or other business combinations prohibited under Article 7 of the Supplementary Act if such transaction is in the public interest of ECOWAS citizens. Article 7 of the Supplementary Act provides that:

> "Every merger, takeover, joint venture, or other acquisition or business combination including interconnected directorships whether of a horizontal, vertical, or conglomerate nature between or among enterprises are prohibited where the resultant market share in the ECOWAS Common Market or any significant part thereof, attributable to any good, service, line of commerce, or activity affecting commerce shall result in abuse of dominant market position resulting in a substantial reduction of competition. Any merger

[135] Fred-Young & LP Evans 'Nigeria: Local Content Requirement in Nigeria' 26February 2018 *Mondaq* http://www.mondaq.com/Nigeria/x/676844/Inward+Foreign+Investment/Local+Content+Participation+in+Nigeria (accessed 5September 2019).
[136] SA.1/06/08

prohibited by paragraph (1) of this Article shall be automatically void and of no effect in any Member State of ECOWAS. Mergers, acquisitions or concentrations of enterprises prohibited by virtue of paragraph 1 of this Article may be authorized or exempted if the transaction concerned is in the public interest[137]"

The Supplementary Act regard 'control in relation to a company' to mean the power of a physical or moral person to secure control of a company by means of shares or the possession of voting power in relation to that company; control by power conferred by the company's constituent or regulatory documents and control by effective exercise of power of decision within the company.

As a specialised agency with adjudicatory and investigative powers, the ERCA also has a core mandate of keeping under review commercial activities in the Community market with a view to determining practice practices which may distort the efficient operations of the market conduct or which may adversely affect the economic interest of consumers. Understanding the legal requirements of mergers in the ECOWAS region is vital for the avoidance of legal sanctions to the merging entities[138].

Worthy of Note is the Economic and Monetary Community of Central Africa (ECCAS) which has a regional competition regime, but an unestablished a regional competition authority. The West African Economic and Monetary Union (WAEMU) has adopted the regional competition legislation with its authority became operational at the beginning of 2003.

3.4. The African Continental Free Trade Agreement (AfCFTA)

The AfCFTA does not specifically provide for mergers and acquisitions, it does provide for competition regulation among its member states owing to the relevance of Competition regulations as an essential component of market and economic governance. The AfCFTA aims

[137] Supplementary Act ECOWAS 2008.

[138] A Burger-Smidt 'ECOWAS Regional Competition Authority launches in the Gambia' 31st May 2019 *Werksmans Attorney Legal Brief* www.werksmans.com/legal-updates-and-opinions/ecowas-regional-competition-authority-launches-in-the-gambia/ (accessed 6 September 2019).

to enhance healthy competition, through stronger integration in Africa by reducing tariff and non-tariff barriers through the encouragement of firms to adopt strategies and engage in business that transcends national borders. Cross-border business linkages are also the foundation for regional value chain development. The Protocol on Competition which is closely related to merger through the reduction of monopolistic mergers and the promotion of competition friendly mergers is important to ensure that the AfCFTA liberalisation and integration benefits are not negated.

The Agreement provides that members shall "cooperate on investment, competition and intellectual property rights[139]. It has also been earmarked that the protocol on competition, investment and intellectual property will enter into force 30 days after the deposit of the 22nd instrument of ratification and will be an integral part of the AfCFTA Agreement[140]. Currently, it is still undetermined whether AfCFTA members will adopt binding commitments on competition or agree to cooperate on specified areas of competition law and policy[141].

3.5 Conclusion

Foreign investors generally consider certain basic factors before investing in a country. The Legislative investment regime and its stability are one of such factors because investors are concerned with the safety and growth of their investments. This chapter espouses for the use of CBM&As legislative regime as a tool for attracting and ensuring economic development through the use of law and policy in creating an investment-friendly climate particularly, CBMA friendly laws and policies. While laws regulating CBM&A are quite adequate for a domestic merger, they are not fully developed as some gaps in the laws have been identified that if left untreated may affect the perception of investment friendliness. In the ECOWAS and AfCFTA, the laws do not directly touch on mergers but touch on competition regulations as a cornerstone of mergers. This is laudable at the same time problematic because competition is not the only consideration in determining the health of mergers and acquisitions.

[139] Art 4 (c) AfCFTA 2019.
[140] Art 23 (3) AfCFTA 2019.
[141] T Hartzenberg 'Cooperation on Competition in the AfCFTA' 31st May 2019 https://www.tralac.org/blog/article/14078 (accessed 6th September 2019).

The next chapter analyses the challenges present in the extant CBM&A regulatory framework. An analysis of the CBM&A regulatory framework of South Africa will be done with the aim of drawing lessons from the South-Africa framework. These lessons will then be used to address the challenges existing in the Nigerian regulatory framework.

CHAPTER 4 - A CRITIQUE OF THE LEGISLATIVE AND REGULATORY FRAMEWORK & LESSONS LEARNED FROM SOUTH AFRICA

4.1 Introduction

The previous chapter focused on the overview of the extant legislative framework governing and impacting CBM&As in Nigeria, the ECOWAS region and the AfCFTA. It was established that a host country's legislative and institutional system framework is a viable and foundational tool to support its policy and economic willingness toward FDI attraction. It was also established that a legislative framework in the investment context describes a set of commercial laws and regulations, as well as the institutions established for the enforcement FDI related legislations. The legislative framework provides an overall function of regulating investment market transactions and provides a platform for dispute settlement.

Nigeria though blessed with an abundance of natural resources such as petroleum resources is still mostly dependent on revenue from its petroleum resource. This is quite worrisome given the global environmental concern of reducing global carbon footprints and emissions. The fluctuations of global oil prices are a glaring testament to this fact. Furthermore, the Nigerian government has intensified its effort to attract FDI through the vision 2025 SEZ zones[142], tax holidays and suchlike but has not considered the potential of M&A flows from other countries. This creates a paucity of legislation and gaps in the present legislations to attract FDI.

There is a dearth of information on the influence of a sound CBM&A regulatory framework in attracting foreign investment in a lot of African countries including Nigeria. Accessible information so far focuses mainly on domestic M&A leaving behind CBM&A. This difficulty in accessing information on CBM&A regulatory information on Nigeria may discourage investment in the face of investment attraction competition from other countries. In addition, it has been aptly noted that investors' confidence to invest in a country is inspired by the positive perception of security and stability conditions in a host country. Stability and security

[142] K Muzoriwa 'Nigeria plans special economic zones to double manufacturing by 2025' 11 April 2019 *Banker Africa*https://www.bankerafrica.net/en/home/articles/nigeria-plans-special-economic-zones-to-double-manufacturing-by-2025 (accessed 7 September 2019).

easily can be inferred from the quality and consistency of a host country's regulatory framework.

This chapter thus aims at identifying and assessing the challenges and vagaries in the extant regulatory framework that are averse to creating an enabling environment for CBM&As by focusing on the key investment legislations. An assessment of the South African CBM&A framework will be done to glean lessons that can be useful to Nigeria in attracting and sustaining CBM&A FDI.

4.2 Legal analysis of key Nigerian investment legislation

i. The Companies Act

The Nigerian Companies and Allied Matters Act regulates all corporations in Nigeria including companies. This makes it the first law of importance on all provisions regarding companies including incorporation, management, voting and mergers and acquisitions. Previously editions of the CAMA touched on mergers and acquisition. However, the part relating to mergers and acquisitions have been transferred to the Investments and Securities Act, thus no mention or provision is dedicated to mergers and acquisitions even briefly, neither is a reference made to its new place in the ISA and currently FCCPA. This creates difficulty in accessing the main law on mergers, especially for persons not familiar with Nigerian laws.

There is a bill to amend the CAMA. Unfortunately, the bill does not provide for the inclusion or reference to the mergers and acquisitions provisions in other laws. This referential untidiness begs the question as to why mergers and acquisitions- a form of corporate restructuring is excluded from the CAMA. Also, sections 155-162 of the CAMA provides for the company's acquisition of its own shares. This sparks curiosity as to why the CAMA provides for acquisition of company shares by itself without mention of external acquisitions with no logical consideration provided for this stance. Needless to say, the exclusion of M&A provisions/reference creates regulatory inconvenience and inaccessibility for the public and other stakeholders in accessing company merger matters regulation.

Secondly, in this age of trade liberalisation and governmental agenda to attract foreign investment, it is surprising that the definition of 'company' has not been extended to include

foreign companies. Section 20(4) subjects the right for foreign companies to participate in business in Nigeria to the legislation regulating the rights of foreign companies. Meanwhile, other laws such as the NIPC that promote investment and is at variance with the intent of other laws protectively regulating foreign companies. This variance in legislative provisions creates uncertainty which may affect investors perception. This should be reviewed and corrected. It is noted that at the time the CAMA was promulgated, globalisation was not as widespread as it is now. One of the hallmarks of legislative drafting is clarity and simplicity as well as easy access to the Law. The CAMA does not provide easy access for the purpose of attracting CBM&A investment as it stands.

ii. The Investment and Securities Act

The section of this Act regulating M&A approvals and regulation has been transferred to the new Competition Act in Nigeria since May 2019. Still, it is worth analysing because it may still be referred to for its guidance value in merger matters by the new Competition Commission. The ISA was the go-to Act in all mergers and acquisitions affairs. It made the regulation of M&A transactions on the SEC which was established by the Act and given functions of the management of investment and securities in Nigeria[143]. Part 7 was dedicated to mergers, take-over and acquisitions which also applied to foreign companies and CBM&A transactions because of section 20(4) & section 53-59 and the interpretation section of the CAMA, applied to foreign companies and cross-border MA. The definition section of the ISA of a company is without prejudice to the CAMA definition.

The ISA 2007 was commended for introducing merger threshold, providing shared responsibility between the commission and merging companies in reviewing merger application and providing room for a company to prove its competition position before approval without fully shifting this responsibility on the company. It was also lauded for the inclusion of partnership mergers as falling within its supervisory authority, the consideration of public interests and shareholder consent as merger approval criteria.

[143] s 13 ISA 2007.

Despite the improvement of the ISA 2007, it was criticised for its glaring omissions and lacuna. One of this omission is the failure to expressly provide for of foreign companies and cross-border arrangement which may create ambiguity in interpretation particularly in dispute settlement. Though implied, it may have been satisfying to see this included to signify a commitment to foreign investment attraction. The ISA, however, defined mergers[144] quite satisfactorily. In reviewing the ISA, these lacunas come to light.

a) Inelegant and unclear drafting

The aim of Part 7 of the ISA was to simplify the merger process. The ISA is filled with very ambiguous provisions with poor logical flow making understanding quite tasking for the reader or user of the legislation. One of its ambiguity and conflict is in the definition of a company for merger purposes. Section 117 of the ISA considers partnership as a coming under the purview of the Act which conflicts with the provision of the CAMA. The CAMA does not consider partnerships as companies as they fall distinctly under business names, yet section 118(2) of the ISA applies to partnerships which it did not define. This creates confusion as to which definition should apply. If the ISA was still applicable to mergers, this section should have been amended to include the definition of partnership. Also, section 122(10) contained a definition of terms that would have been well suited for the interpretation section of 117. Under section 122 of the ISA, a small company was not required to notify the commission of its merger unless the commission required it to do so which made it strongly ambiguous. The commission cannot state it is not mandatory for small companies to notify then require notification through the backdoor. Section 123 empowers the commission to appoint inspectors to inspect mergers. It was unclear if the inspection would have included small merging companies who may voluntary notify SEC yet may be required to notify the SEC. Section 129 is verbose with words meant for section 117 included which impedes understanding and makes the sections very inelegant.

b) Determination of merger thresholds

[144] s 118 ISA.

Small companies merging were not required to notify the Commission of the merger unless the Commission specifically required it to do so. Also, the merger may be implemented without approval unless required to notify the Commission. Section 121(1)(a) provided that small mergers need not notify. The SEC Rules (r 230) affirmed this by providing that parties to small mergers shall not be obliged to notify the Commission of the transaction but shall only be bound to inform the Commission after the conclusion of the merger. By not being obliged to notify, it could be inferred that two or three companies whose combined assets and turnover are "small" within the threshold definition of the ISA can merge without reference to any other regulatory institution.

c) Merger procedure

The merger procedure contained in the ISA had the unintended consequence of creating confusion. Some example of this confusion is found in section 121(4) which provided for an application for a court-ordered meeting of shareholders to be made by the merging entities on the direction of SEC with no direct provision for an application for a court-ordered meeting of shareholders made independently of SEC. Another area of absurdity was that the time frame for a larger merger was shorter at 40 working days than small and intermediate merger which took about 60 days. It is logical to assume that the investigation processes of large mergers would have been more rigorous leading to a longer approval time frame of about 70 days instead of the 40-day limit.

d) An overabundance of the SEC's authority

Section 118(4) extends the operation of SEC's merger authority to mergers done by any Federal Government-owned agencies such as the National Communications Commission, who approval mergers in the communication sector. Mergers approved by these agencies in effect did not oust the regulatory oversight of SEC. This in hindsight gave too much power to SEC with the unintended effect of creating competition between two regulatory organisations for supremacy of approval which may not have been the intendment of the drafter in drafting the provision of section 118(4). Furthermore, industry regulators are more familiar with the technicalities of their industry than SEC would have been. In addition to this double approval

situation, unnecessary bureaucratic and compliance burden may have been experienced by companies who may have to deal with two or more regulatory bodies over the same issue.

Under section 128, the commission was empowered to break up a company into separate entities where it suspects that the practice of a merged company substantially prevents or lessens competition in the industry the business is situated. This provision implied compulsory divestiture by the SEC on mere suspicion without a determination criteria or determination process to administer the company's right to fair hearing which made SEC an adjudicator instead of the courts. This created an opportunity for a lack of transparency on the part of SEC with potential for lawsuits which impedes the ease of the merger process. It would have been suggested if the SEC was still in control of merger approvals that in enforcing section 128, it creates a list of practices that could be considered as restraining competition and measures to be taken against such practices so merging companies can be guided.

e) Inconsistency of third-party notification in the merger process[145]

The ISA 2007 provided that intermediate mergers are to notify relevant stakeholders such as trade union representing employees or other employee representation in the absence of trade union interests in the merger process[146]. However, it is quite noticeable that the provision of large mergers is silent on this provision. This provisional silence may have been an innocent omission but this does not derogate from the gravity of that omission especially for large mergers.

f) Defeatist purpose of approval in principle and formal approval

From s 121 (4) and (5) of the ISA 2007, there was a requirement on SEC approve merges twice-approval in principle and formal approval which has the uncanny effect of delaying the merger

[145] N Dimgba 'Merger control by Securities and Exchange Commission: A Comparative analysis of Investments and Securities Acts 1999 and 2007'30 September 2009 *The Guardian Business* https://m.guardian.ng/business-services/industry/merger-control-by-securities-and-exchange-commission-a-comparative-analysis-of-investments-and-securities-acts-1999-and-2007/ (accessed 7 September 2019)

[146] s 123 ISA 2007.

process, defeating the general intendment of the entire merger process envisaged by the Act. For example, section 125 stated that SEC had 20 working days within which to approve the merger or otherwise. The 20 days to 40 days after which the merger will be deemed approved if nothing is heard from SEC. Small mergers and for large mergers have a similar provision. With these two necessary approvals, it is quite unclear when the 20 days' period will commence- either with the approval in principle or the formal approval.

g) Possible abuse of section 118(3) of the ISA 2007

> "Nothing in this section shall apply to holding companies acquiring shares solely for the purpose of investment and not using same by voting or otherwise to cause or attempt to cause a substantial restraint of competition or tend to create a monopoly in any line of business enterprise[147]"

This section applied to holding companies and their acquisitions. Ordinarily, the above provision can be interpreted to allow for self-assessment whereby acquiring parties can review their own transaction. In other words, even if the commission reviewed the merger/acquisition application and identified the competition impeding nature of the acquisition, it cannot do anything about it because of the exemption of section 118(3). This exemption provides a fine opportunity for the acquiring company to slip under SEC's radar by arguing that the acquisition was for investment purpose and not for the purpose of exercising monopolistic corporate control over the acquired holding company, hence not required to notify the SEC of the transaction. While M&A is necessary as a source of FDI, this provision created a loophole for companies to take advantage by failing to notify potentially harmful transactions on the guise that the essence of the acquisition is just for investment purposes and not for corporate control or creating monopolistic advantages.

iii. Federal Competition and Consumer Protection Act 2019 (Competition Act)

This Act is the new merger law on the block replacing the ISA 2007. It establishes a Competition Commission and Competition Tribunal saddled with the responsibility of approving mergers and protecting competition in Nigeria, thus taking over this function from

[147] s 118 (3) ISA 2007.

SED. The Act repeals the Consumer Protection Act, which did not contain stand-alone antitrust provisions. The Competition Act applies across the board to all commercial undertakings within and outside of Nigeria even to business entities with Nigerian residents, incorporated in Nigeria or has its products or services are traded into Nigeria. What is more, any acquisition or change of control of a business or asset outside of Nigeria which results in the change of control of an asset or business in Nigeria will also fall within the purview of the Competition Act.

The Competition Commission is empowered to approve mergers, declare business practices as monopolistic, prohibit price discrimination[148] and declare unlawful any agreement which is in contravention of the Act. The Commission may also subpoena witnesses and conduct dawn raids consistent with international best practices. At this point in time, consultations on merger threshold are still being done and have not been concluded.

The Act overrules the provisions of any other law in all matters relating to competition and consumer protection except the Constitution. While the Act repeals the Consumer Protection Act, it does not explicitly repeal the merger-related provisions of the ISA making it unclear if the notification obligations contained in ISA will be sustained pending when the Commission publishes its own merger thresholds. Upon reviewing the Act, the following gaps come to light-

a). Untried nature of the Commission in M&A matters

While it is laudable the improvement in Nigeria's competition regime via new legislation and commission, it is quite worrisome the huge responsibility placed on the new commission with little to no experience in handling mergers, unlike the SEC. The repeal of the sections of the Investment and Securities Act and (SEC rules on mergers by implication) which ousts the regulatory expertise of the SEC is quite premature and ambitious. The FCCP Act does not provide a transitory period for SEC's oversight of the M&A. This gap may portend the validity of on-going M&A transactions before the SEC until the Commission is set up and wholly functioning. It is recommended that SEC be empowered to work with the new commission till it finds its feet given skill-set of the SEC in regulating mergers.

[148] The new Nigerian Law Competition Regime https://www.bowmanslaw.com/insights/competition/the-new-nigerian-competition-law-regime/ (accessed 7 September 2019).

b). The relevance of the Federal High Court regulatory capacity

The FCCP Tribunal has some M&A expertise given the calibre of its members. The Act stipulates that in merger process several court orders should be obtained from the Federal High Court in ensuring adherence with the court's quasi-regulatory capacity in mergers. It must be mentioned that members of the bench are not experts in M&A administrative matters and it is quite impossible to imagine the quality of their evaluation of the business consequences of orders made. This challenge is compounded by the ousting of SEC from the merger operation which may have helped in providing checks through objections to prayers sought from the court. It is recommended that the FCCP Tribunal be made to take over the regulatory function of the FHC or a new department be created in the commission to deal with regulatory acquiescence and objection in the court be created.

c). Overambitious cross- border M&A regulation

The Act gives the commission regulatory control over all indirectly governed Nigerian situated businesses acquired through indirect transfers of shares and asset (foreign holdings in Nigeria). While this is laudable, it is quite glaring that the procedure for how this regulatory control is to be exercised remains unseen. It is suggested that the Act be amended to include the procedural steps to be employed while being mindful of preventing bureaucratic bottlenecks in the process which affects investment.

d). Regulatory supremacy conflict with co-regulators

While the commission is a co-regulator with other regulators in competition matters, the extent of its co-regulation is not clearly defined which can raise problems of conflict and a multiplicity of regulatory compliance obligations not envisaged by this Act. This problem is further compounded by approvals from highly specialised and technical industries such as electricity or financial services and the confusion arising from conflicts with approval from a generalist FCCP and which of these approvals would prevail. The Act is clear that save the Constitution, the provisions of the Act is supreme. The question, however, is does the FCCP possess the requisite expertise to deal with technical sectors which gives it undeserved superiority of approval? Unless it has a department of with experts in technical industries, the commission is not equipped for the superiority of approvals for technical sectors.

The Commission is also empowered to define rules for the regulation of professional bodies such as the Institute of Chartered Accountants of Nigeria (ICAN) which makes the commission a determiner of the expertise criteria in professional bodies it regulates which is just beyond its ability as it is unequipped to handle this function making it supremely unfeasible.

e). The necessity of joint venture coverage

Joint ventures are a temporary and expedient arrangement of independent businesses joined for a business goal. Unlike mergers, they do not alter the corporate structure of the business entities and should not be part of merger regulation attempts. While the intention for the inclusion of joint ventures in the commission's regulatory ambit may be understood, it is inappropriate because it is hypothetically disruptive to the ease of doing business in Nigeria. Joint ventures are already regulated especially in the oil and gas sector where they are used mostly through obtaining the Minister's approval which is quite laborious. The statutory obligation to seek approval for Unincorporated Joint Ventures which qualify as large mergers are quite unnecessary and a hindrance to foreign investment.

f). Risk of abuse by tribunal review of industry-specific regulators

The FCCP tribunal is empowered by the Act to review the competition and consumer protection decisions of industry-specific regulators which may interfere with the effectiveness of the prohibitions of these regulators. In addition, the regulatory powers of these industry-specific regulators are constitutionally and statutorily protected. The tribunal reviewing these decisions act as a supreme court of sorts and may get corrupted by its abundance of regulatory powers without proper checks placed on it. It is suggested that safeguards are placed on its regulatory powers to prevent abuse by power-hungry tribunal members.

4.3 Analysis of other sectors related to CBM&A regulatory framework

Investors when considering investing in a host country consider other sectoral regulations with regards to incentives for the purpose of taking advantage of these incentives and protecting their investments. A negative perception of other sectors particularly the tax regulations may be discouraging. A host country while encouraged to review and update its regulatory

framework to encourage both domestic and foreign investment, is advised to be cautious and aim for a balanced interest review in order to prevent creating very lax regulatory regimes whereby predatory investors may abuse. Some other sectors worthy of review for attracting and retaining foreign investment are:

i. Anti-Graft

Foreign investors are concerned about reducing entry and transaction cost associated with investing. One index considered is the corruption index of a host country. This is because corruption undeniably increases transaction cost of businesses and impedes smooth entry and disinvestment. Accordingly, Nigeria is the 144 least corrupt nation out of 180 countries, according to the 2018 Corruption Perceptions Index reported by Transparency International[149], with an average of 121.48 from 1996 until 2018, reaching an all-time high of 152 in 2005 and a record low of 52 in 1996. This is an extremely high figure which affects investors perception very negatively. In response to this corruption challenge which hinders Nigeria's economic prosperity, a plethora of regulations have been enacted over the years to address this embarrassing issue. They include the Economic and Financial Crime Commission (Establishment) Act 2004, Independent Corrupt Practices & Other Related Offences Act 2000, Advance Fee Fraud and Other Related Offences Act 2006, Laundering (Prohibition) (Amendment) Act 2012, Criminal Code Law of Federation of Nigeria 2004, Banks and Other Financial Institutions (Amendment) Act 1991. The presence of these laws has not reduced the problem of corruption especially of high-profile cases due to lack of diligent prosecutions by the relevant prosecution authority. The Nigerian Financial Intelligence Unit Act of 2018, the most recent Act on corruption is charged with analysing financial disclosure of currency transactions and suspicious transaction reports in line with the anti-money laundering regulations as well as fighting financial corruption[150].

[149] Corruption Perception Index 2018 https://www.transparency.org/country/NGA# (accessed 7 September 2019)

[150] D Adu *et al* 'Bribery and Corruption 2019/ Nigeria' 4 April 2018 *Global Legal Insight* https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/nigeria (accessed 7 September 2019).

In addition, Nigerian laws hold corporations criminally liable for acts of the corporations[151]. This is also in addition to the ECOWAS regional treaty on exchange of information on criminal matters and the AU Convention on preventing and combating corruption which Nigeria is a signatory to. While having these laws in place is praiseworthy, it requires political will and consistency to fight corruption from the top to the bottom which Nigeria currently lacks. It is highly recommended that if Nigeria wants to attract foreign investment and improve investor perception, it is absolutely vital it addresses its corruption problem.

ii. Taxation

Taxation is another component that investors consider when investing which affects the profitability of investments and transaction cost. The issue of taxation is quite dicey because while the host government's desire to generate revenue and protect infant industries through taxes, corporations desire to reduce their expenditure and enlarge profits through lower taxes. At the moment, the taxation regime of Nigeria does not incentivise CBM&A activities unlike the others such as agricultural. CBM&A as such would fall under the regular corporate taxes and capital gain tax for shares acquired. Nigeria is country rich in other mineral resources and growing in the exportation of services such as entertainment, financial services and so on which have no tax holidays or incentives to encourage investments especially through CBMA. Another challenge in the tax regime in dire need of reform is the plethora of corporate taxes paid and the effect of double taxation as a result of impeding investments and growth. Nigeria's corporate tax stands at 30% which is over the OECD tax rate of about 25%. This is in addition to other levies and taxes such as the Tertiary Education Fund (Tetfund). This rate is suicidal for cross-border investment attraction in addition to the lack of basic infrastructure which is not provided adequately such as electricity increasing business costs[152].

It is absolutely important for the legislation on corporate taxation to be reviewed to reduce the high tax rate and ensure certainty to prevent the challenge of double taxation.

[151] CI Enugu 'Analysis of the Effect of High Corporate Tax Rate on the Profitability of Corporate Organisations in Nigeria – A Study of Some Selected Corporate Organisations' *Mediterranean Journal of Social Sciences* (201 4)1 6

[152] As above

iii. Environment

Nigeria in the name of foreign investment and development has seen the abuse of its waterways and land especially in the oil-rich field of the Niger-Delta. Environment sustainability is a vital consideration for a host country in protecting its environment from foreign investments that are potentially harmful. One of the ways Nigeria protects its environment is through environmental impact assessment whose principles and regulatory process are quite adequate for its purpose. However, one area of concern is the presence of too many regulators with similar and identical responsibilities. It is recommended that a harmonization and clear designation of roles and responsibilities in the EIA process be commenced with FEPA being the main regulator and others working with is to forestall rivalry among sister agencies and bureaucratic bottlenecks.

iv. Labour

Investors while considering investment options consider the quality of the labour force and the skill grade of the host country's labour force. Consideration is also given to the labour laws of the country and its enforcement mechanisms. The principal legislation governing. The principal regulation for labour in Nigeria is the Labour Act 2004. Other Acts include the Trade Dispute Act 2004, the Pension Act 2014 amongst others. The Labour Act provides for the conditions of work and employment for the Nigerian worker to prevent abuse by the employer. Despite its adequate provisions, it has been abused by employers including the government with lengthy recourse mechanisms for affected workers. The trade dispute Act which provides for settlement of industrial actions by workers is inundated by obsolete and rigid trade dispute settlement mechanisms that violate the rights of workers in temporarily suspending the right of workers to strike. Poor implementation by the administering institutions of Nigerian labour laws also impedes the effectiveness of labour law implementation. It is very crucial to address the problems of labour rights enforcement and protection in other to prevent foreign investors from taking advantage from the porous implementation system to abuse the labour of the Nigerian worker for the financial benefit.

v. Intellectual Property

Currently, Nigeria has adequate intellectual property laws and treaties it is a signatory to protect intellectual property. The challenge is the implementation of these provisions which

compounded by the lack of infrastructure and manpower to enforce these rights. Investors will consider the IP regimes of the country and its health before investing especially into industries where the relevance of patents is extremely vital like information technology. If Nigeria is to attract investments especially in this era of the 4th industrial revolution, the importance of investing in technical manpower training and enforcement capacity cannot be overemphasised.

vi. Investor dispute resolution

The CAMA provides that a foreign company carrying business in Nigeria must first be incorporated in Nigeria unless given exemption. This provision brings the said company under Nigerian Laws. Investors, however, are not very confident in the settlement of business disputes by Nigerian courts which may take a long time to finalise especially in the enforcement of disputes. This lack of confidence led to Nigeria adopting the United Nations Commission on International Trade Law model laws on arbitration as its Arbitration and Conciliation Act[153]. ADR especially arbitration is the choice of most investors in their contract for dispute settlement. Nigeria is currently challenged in its arbitration process especially in relation to the courts which retain supervisory functions over arbitral tribunals and also to manage and support arbitration references to them. The courts however now descend into the arena of outright intervention. This enables parties who have certain obligations on them to turn around to use the intervention of the court to evade responsibility. Section 2 of the Act provides that an arbitral agreement, unless contrary intention is expressed by the parties, shall be irrevocable. Nigeria must ensure that to attract investment to attain the desired level of economic growth development it desires must ensure that an effective dispute resolution framework is put in place to inspire investor confidence and knowledge that in event of a dispute arising, it will be fairly and speedily resolved according to agreements.

4.4 Regional regulation under ECOWAS and the AfCFTA

Foreign Investment is not limited to investment from outside Africa. African countries especially big economy African countries like South Africa, Kenya, Ethiopia are sufficiently wealthy to trade with each other. The proliferation of regional trade and investment blocs such as the Trans-Pacific Partnership has compelled the need for African countries trading among themselves.

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[153] Cap A18 LFN 2004.

The ECOWAS Supplementary Act on Investment promotes the free movement protocol and programmes. Article 3.2(d) of the 1993 ECOWAS Treaty stipulates the establishment of a common market through the removal of obstacles to the free movement of persons, goods, services and capital, and the right of residence and establishment. The Supplementary Act to the ECOWAS Treaty Adopting Community Rules on Investment and the Modalities for its Implementation within ECOWAS (Articles 5 and 6) provide for general national treatment and most-favoured-nation treatment of investors within ECOWAS. Article 23 of the Act provides that member states avoid competition for the attraction of investments through incentives or other means that distort regional competition for investments[154]. Other provisions concern liberalization of intra-regional payments and transfer of funds, removal of nationality restrictions, and the simplification of visa regulations within the region which has been achieved through the ECOWAS passport. West Africa is coming on board to achieve regional integration, especially from African MNCs. The ECOWAS and WAEMU commissions have investment policies that define clear objectives for improving the investment climate in addition to the investment framework mandating the non-discriminatory treatment of intra-regional investors. The challenge as always remains consistency of implementation and little provision on other CBM&A components save on its competition.

The AfCFTA Agreement contains a protocol on investment while awaiting the negotiation process of its technical aspects for adoption in the next 2 years. Article 4(c) of the AfCFTA Agreement prescribes that State parties shall cooperate on investment. Investment Protocol aims to facilitate the general objectives of the AfCFTA, particularly the movement of capital and natural persons; facilitate investments building on the initiatives and developments in the member countries and the regions. For now, it is unclear how states will cooperate to facilitate interstate investments and the type of interstate state investment to be given priority. Since the protocol is still in its negotiation process, it is expected and recommended that discussions be made to establish, increase the quality of FDI and aim to incentivise investments that will contribute to the development of African countries especially through CBM&A.

[154]'Improved business and investment climate in West Africa 2015' World Bank public document https://wwwurl?sa=t&source=web&rct=j&url=http://pubdocs.worldbank.org/en/407421496747739287/ECOWAS-IP-Brochure-June2015.pdf (accessed 7 September 2019).

Also, an investment governance framework that will facilitate intra-Africa investment, promote sustainable socio-economic and industrial development and enhance the competitiveness of the African countries is strongly encouraged. It is further recommended that since African countries have different regulatory regimes, some leeway be afforded to members to determine the right kind of FDI to suit its developmental goals[155]. This leeway should also be extended to providing effective yet flexible dispute resolution mechanisms to protect the business interest of African states and its investors.

Finally, these regulations do not contain much direct CBM&A investment provisions. Though competition/investment protocols and treaties are vital, it is also important to discuss or provide policy directions that will enhance CBM&As across Africa from African multinationals and promote the synchronisation of laws despite the different legal regimes.

4.5 Lessons from South African CBM&As regulatory framework

South Africa has one of the most advanced legal systems in Africa. This is no different when it comes to CBM&A matters. Nigeria's competition law was hugely inspired by the South African Competition Act which regulates its M&A activities. Section 12 of the Competition Amendment Act No 18 of 2018 states that in considering a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, in addition to public interest considerations such as small businesses that have been historically disadvantaged, specific industry peculiarities and ability of its national industry to compete in global markets. This implies that it considers the international positioning and impact of its merger competitiveness globally. This international impact consideration and protection of historically disadvantaged businesses are innovative and should be applied to Nigeria. Furthermore, the attitude of South Africa to mergers is supportive and slightly protectionist at the same time indicating a proper regulatory balance.

[155] T Chidede 'How can the AfCFTA Investment Protocol advance the realisation of the AfCFTA objectives?' 17 May 2019 *tralac Blog* https://www.tralac.org/blog/article/14065-how-can-the-afcfta-investment-protocol-advance-the-realisation-of-the-afcfta-objectives.html (accessed 8 September 2019).

Secondly, the South African Companies Act No 71 of 2008 provides for takeover regulations that regulate M&A activities in regulated companies in affected transactions which are fundamental transaction such as disposal of substantial shares and assets through mergers and arrangement schemes. This provision in addition to other legislation in mergers allows for easy referencing and access to merger provisions. Nigeria can learn from this by including in its CAMA, provisions that provide first reference and access to merger regulatory information before moving into other legislation since the CAMA is the main law for Companies in Nigeria.

Thirdly, section 12(6) of the Competition Act provides that when an investor makes an application for the authorisation of an M&A and the time period required for the authorisation of an M&A lapses whilst the investor is still waiting to obtain an approval from the Commission, the merger shall be deemed as approved which makes investment very easy.

Nigerian M&A regime, especially with the passage of the Competition Act, has incorporated some innovations such as the inclusion of JVs, an extension of indirect merger impact in Nigeria and such like which is quite impressive. However, the challenge may be ineffective implementation. The lessons learnt from South Africa is worth consideration to make the CBM&A regulatory landscape in Nigeria appealing.

4.6 Conclusion

The gaps in Nigeria's key legislations and sectoral frameworks have been identified for review and improvement. These yawning gaps if unaddressed may affect the quantity and quality of FDI especially CBM&A inflows into Nigeria which may delay Nigeria's journey to increased economic and developmental prosperity. Also, since countries do not function in isolation, the economic prosperity of a country can positively affect the region it operates in provided proper regional regulations are in place. The ECOWAS and AfCFTA treaties and protocols were additionally reviewed to identify gaps that may affect FDI inflow into West-Africa and Africa respectively.

The ensuing chapter will recapitulate the research agenda of this study, summarise the main point from each chapter and conclude the study by making recommendations for enhancing the gaps in the extant regulatory framework.

CHAPTER 5 – CONCLUSION AND RECOMMENDATIONS

5.1 A recapitulation of research agenda

CBM&A is a great yet overlooked source of FDI inflow to a country. The benefits of this FDI source can be best accessed through a balanced regulatory framework that incorporates the interest of the host government and investors. This study has provided an up to date information on the subject by establishing the importance of CBM&A as a great source of FDI, its resultant benefits, the significance in devising an attractive CBM&As entry framework and the spill-over effects of the CBM&As for West-Africa and the rest of Africa. This study also investigated the challenges in Nigeria's current CBM&As regulatory framework by identifying certain gaps and reviewing the CBM&A framework of South Africa to provide recommendations to help fashion a more robust investment-friendly regulatory framework in Nigeria.

5.2 Summary of key points

The theme of this study is the review and analysis of the present legislative framework in Nigeria and its impact on FDI quality and volume with particular emphasis on CBM&A inflows. Various key legislations such as Nigeria's Competition Act, Taxation Legislations were considered in an attempt to achieve this goal.

Chapter one was the introductory chapter that contained a background to the study, a broad overview of the research paper, research problem, research objectives and a foundational structure of its following chapters.

Chapter two of this study contained a working understanding of CBM&As by highlighting the components of CBM&As, namely: M&As and FDI. The chapter further analysed the theories and historical development of CBM&A and FDI, the concept of due diligence in M&A transactions, and the benefits and adverse effect of FDI if unbalanced and poorly regulated to Nigeria.

Chapter three provided the regulatory and legislative structure of CBM&A in light of competition and investment in Nigeria, ECOWAS and the AfCFTA. It was admitted that some

laws are quite investment friendly, especially the NIPC Act but some other legislations are riddled with uncertainties and gaps to be urgently addressed.

Chapter four is a critical analysis of the legislative framework in the Companies Act, Competition Act, Taxation Act and so on with some extension to the regulatory institutions and their administrative capacity to improve efficiency. Gaps in the ECOWAS and AfCFTA regulations were analysed to be addressed using lessons from the South African Competition and Companies Act

Chapter five considers recommendations to address the identified gaps.

5.3 Conclusion and recommendations

The present legislative framework in Nigeria is fair enough to encourage investment but quite inadequate to attract and retain quality foreign investment from Africa and the globe owing to certain vagaries contained therein. The onus is on regulatory and implementing institutions to implement firmly and consistently the good provisions that encourage investment while the legislature and policymakers review the extant legislations and regulatory framework to make them more efficient. This will incentivise investment through the assurance of certainty which eventually impacts CBMA inflows.

The analysis chapter contained some ‘by the way’ recommendations as analyses were made. However, key recommendations were saved for this latter chapter. The inclusion of merger provisions in Nigeria's key corporate legislation the CAMA is advised. It is noted that though the Competition Act deals with merger regulations, it is not the first preferential legislation on Companies and related matters. It is secondary to the CAMA in that respect. The CAMA should contain first provisions on Mergers and provide a reference to the Competition Act for more elaboration.

The Competition Act is promising and quite detailed but it is noted that the Commission does not have the requisite skill set nor does it have the manpower to deal with merger approvals and regulations which had been the preserve of SEC and other industry regulators. It is recommended that periodic review and amendment be carried out on the bill and cooperatively

be implemented with other legislation on mergers. Also, the Commission is advised to carry along other necessary bodies in the discharge of its functions. Furthermore, it is recommended that instead of creating committees to discharge its specialised functions, separate professional executive departments be created in its stead.

It is recommended that corporate taxation be reviewed and reduced to prevent investment disincentive. It is also recommended that taxation legislations be reviewed to address the issue of excessive and double taxation paid by investors. It is recommended that tax holidays be provided for specialised industries such as mergers in information industries to encourage innovation and investment flows in that area.

It is recommended that though ECOWAS states have various and some divergent legislative regimes. The laws touching on investment be harmonised to ensure easy investment process. Though ECOWAS has a competition authority and regulations, it does not have regulations on CBM&A specifically. It is recommended that in addition to legislative harmonisation as achieved in OHADA, ECOWAS provides regulations or policies to encourage CBM&A among its members.

The AfCFTA protocol on Investment is currently negotiated it is recommended that negotiations on CBMA a between African MNEs, effective investment governance and dispute settlement framework be negotiated between states especially Nigeria which is Africa's largest economy to attract quality investments and invest in its sister African nations.

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