

FDI AND NIGERIA'S IP LANDSCAPE

By

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Being the text of a lecture delivered on Wednesday 7th of June 2017

At Queen Mary University of London Global IP Lecture Series 2016/2017

BACKGROUND

- **Over 150 Million people**
- **Largest market & largest economy in Africa**
- **Young persons with some buying power**
- **Nigeria largely suffers Bad publicity yet little promotional effort to woo investors**
- **Pfizer, EMI left Nigeria but have returned**
- **MTN vs AT&T – unfathomable ROI**
- **1999 only 700,000 lines but unimaginable growth**

OUTLINE

- Paper in 2 parts
- Part I - framework for FDI
- On-going reforms, Anti-corruption crusade and effect on the regulatory landscape
- Why and how investors should respond law making and lobbying in Nigeria
- No expropriation
- Why foreigners doing business in Nigeria should asset up a Nigerian entity
- Foreign investors and employment policies beyond Nigerian standards to international standards
- Justice sector reforms & role of Foreign investor
- Part II etches Nigeria's intellectual property (IP) landscape.
- How ingenuity can plug the gaps in the law
- Imminent changes derivable from IP Bills
- Calls on the international community to join the local lobby for reforms
- Lecture is a crusade: campaign that regulatory framework for FDI and IP in Nigeria is sufficiently robust with incentives to attract and increase FDI.

REFORMS BY GOVERNMENT

- Array of incentives: tax holidays, Free Trade Zones, possible to negotiate more incentives
- Unprecedented move, issued three executive orders for investments
- Promotion of transparency and efficiency in the business environment Order
- MDAs to publish guidelines for approvals, licenses and the like
- MDAs: time lines to act on the applications, else they must refuse the application with reasons
Where they fail to do this, applications are to be regarded as having been granted and the MDAs can be reported to supervising Ministers
- Tourist and business visas are to be granted within 48 hours
- Reforms are being effected at the Ports
- MDAs are already implementing measures to comply with the executive orders.
- Privatization programme
- PPP for infrastructure projects
- Local Content Law & Petroleum Industry Bill

ANTI-CORRUPTION & NEW REGULATORY STANCE

- Various statutes to curb corruption & the prosecution of various persons including judges
- Zealous regulator seeking to please the master – penalty to Telco – Not business as usual
- Code of CG with raised bar: independent directors, disclosures, personal liabilities
- Summary of Ph.D research finding on enforceability of Codes of CG – (2003-2015 court cases)
- What does this teach investors?
- Watch/contribute to process of making regulation
- Compliance, compliance, compliance - capacity building – review of business practices
- Engage regulators (no school for regulators) – example of MNET and Broadcasting Commission
- Consider strategic actions challenging ultra-vires/illegal actions of regulators
- 2 Questions: “Does the law permit us to do what we want to do?”
- “What steps does the law stipulate we must take in doing what we want to do?”
- **Investors must Watch and Join Process of Law Making via trade groups**

ANTI-EXPROPRIATION GUARANTEES

- **Constitutional, statutory and treaty guarantees against expropriation of property**
- **S. 44 Nigerian Constitution**
- **s. 14 of the African Charter of Human and Peoples Rights**
- **s.24 Nigerian Investment Promotions Commission Act (NIPC Act)**
- **Nigeria is party to ICSID and MIGA**
- **Any expropriation attempt costs Nigeria bitterly when challenged**

OTHER CONSIDERATIONS

- **Foreign Companies can sue and are treated as persons, no discrimination**
- **Setting Up in Nigeria – why local entity needed if doing business**
- Pre-incorporation shareholders' agreement enforceable even if not ratified
- Nigerian company may be wholly owned by foreigners.
- **Employment Law – Investors should apply international standards**
- **Justice Sector Reforms and Litigation**
- Missing link: little reform of administrative arm of judiciary – “YES Prime Minister!”
- International community must give sustained support for reforms
- Investment that will cascade into changes all over Africa

IP REGULATORY FRAMEWORK

- Copyright: Copyright Act, 1988
- Trade Marks: Trade Marks Act, 1965 (a replica of the English 1938 Act)
- Merchandise Marks Act, 1916
- Counterfeit and Fake Drugs Act
- Common law action of passing off
- Patents and Designs: Patents and Designs Act, 1970
- Nigeria: Berne, Rome, Paris, UCC, PCT, WIPO Copyright Treaties & TRIPS
- The Trade Related Aspects of Intellectual Property, TRIPS

TRIPS' COMPLIANCE I

- TRIPS compliant in some respects, whilst it is TRIPS plus and TRIPS minus in some other respects
- Copyright = TRIPS compliant - computer software, databases and criminal sanctions against copyright infringement
- TRIPS plus: rental rights beyond TRIPS, more rights for sound recordings, longer duration of copyright for some works
- TRIPS minus: exceptions from copyright control may not accord with the normal exploitation of work or reasonably prejudicial to the legitimate interest of owners

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TRIPS' COMPLIANCE II

- Trade Marks TRIPS compliant: registration, opposition, non-use cancellation 5 years
- TRIPs minus: well-known marks, geographical indications of origin, shapes, services???
- Patents: TRIPS compliant no discrimination, “any technology”, term of 20 years provided annual dues are paid
- TRIPs minus: no special regime for plant or animal variety and they are not patentable
- TRIPs compliant: Inspection and Seizure Orders, Written judgments, forfeitures, injunctions, damages, account for profits and other administrative measures such as border seizures by the customs
- Over 100 years of IP adjudication

NOLLYWOOD & ENTERTAINMENT INDUSTRY EXPLOSION

- Nollywood contributes significant figure to Nigeria's GDP
- 3rd largest film industry in the world
- Not structured in western sense but “structured”
- World Bank identified Nollywood as leading non-oil sector and invested \$20 Million in 2011
- Nigerian government invested \$200 Million - Bank of Industries (BOI)
- Iroko TV, largest online distributor of legitimate Nigerian movies attracted \$5 Million investments
- MTNN, a Telco, now largest music distribution platform in Africa

REMITTANCE OF ROYALTIES/FEEES: NOTAP APPROVAL

- National Office of Technology Acquisition and Promotion (NOTAP) approval needed for licensed patented technology, software, trade marks, franchising or management services
- NOTAP may urge changes to agreement
- NOTAP encourages local content
- NOTAP frowns at seemingly anti-competitive clauses
- Central Bank: no approval for remittance of funds without NOTAP certificate
- Funds remittable via secondary market (expensive) may be breach of regulation
- Bank fined over N1 Billion by the Financial Reporting Council (FRCN)
- FRCN sanctioned Bank's auditors, the chairman & a director
- My Opinion: Non-registration with NOTAP does not nullify agreement or make it unenforceable or illegal
- *Beecham Group Ltd v Essdee Food Products Ltd CA*: the only penalty for failure to register an agreement with NOTAP as provided by the Act is that foreign exchange will not be released for the agreement
- *Beecham Group Ltd v Essdee Food Products Ltd*(1985) 3 NWLR (part 11) 112; [1997-1989] 2 I.P.L.R. 239.

DUE DILIGENCE IN IP TRANSACTIONS

- In a take-over, merger, demerger, licensing, due diligence and records essential
- Zeneca and TETMOSOL soap
- Imperial Chemical Industries (ICI) demerged pharmaceuticals/cosmetics to Zeneca
- Assignment of TETMOSOL to Zeneca applied for but not registered in TM Register
- Before demerger, ICI licensed TETMOSOL to Jagal, who refused transfer to Zeneca
- Jagal won Zeneca at trial. Court refused to admit recordal of assignment of TETMOSOL from ICI to Zeneca registered after court action started
- Zeneca gave up? Appealed and decision reversed

SOFTWARE: IMPENDING PATENT LITIGATION AND INVESTMENT PROSPECTS

- Mark Zuckerberg visited Nigeria's "Silicon Valley" international interest
- Local patents: Significant increase – software for mobile/communications tech
- Tech companies in Nigeria targets of patent actions
- Formal examination system may permit "unpatentable" grants that
- "Unpatentable" grant not set aside can be basis for injunction
- Investors' response: a watch service to identify potential patent with false claims
- Actions against such applications or "unpatentable" grants
- Opportunities for foreign investments:
 - assisting locals to raise capital eg AIM market
 - capacity building

CONFIDENTIAL INFORMATION AND PRIVACY

- Some business ideas not fit for traditional IP because of IP characteristics
- “copyright does not protect ideas per se”
- “copyright must be fixed”
- “patents must be registered”
- When shared with possible sponsors or investors they can be stolen
- Confidential information: major consulting firm settled litigation for over \$250,000
- Copyright actions for unauthorized use of personal photos of distributors and models failed author of photo is owner © in Nigeria
- Privacy action based on constitution: Section 37 of the Nigerian Constitution provides that “The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected
- Nigerian courts will enforce confidentiality clauses, non-circumvention agreements, and privacy.

COMPANY NAME, COMPANY LAW, NOT TRADE MARK LAW

- Fresh approach
- Company names: significance of being able to trade in your company name - CITI Bank and Honeywell Inc
- Citibank initially operated as Nigerian International Bank
- Registered CITI mark but not CITI as part of company name
- Later registered CITI Bank but about 7 had registered “CITI” eg CITI Motors
- Laches & acquiescence and the local statute of limitation: No remedy
- We got class action on “CITI” co.s & CAC not as a TM action but company law
- Ultra vires the CAC to register a company with name identical registered TM
- Perpetual injunction and change of name orders
- Change in jurisprudence, several cases followed

COMPANY NAME II

- Honeywell: 3 actions for HONEYWELL trade mark and company name
- H Inc., a US corporation trading for over 200 years in 100 countries
- H. Inc incorporated a Nigerian subsidiary with HONEYWELL in its name
- H. Inc obtained HONEYWELL TMs in Nigeria
- H Nigeria had registered a Nigerian business, same name in 1968
- H Nigeria set up H Nig Ltd before 1975 and registered H as TM
- H Nig was able to obtain injunction against H Inc. on the use of HONEYWELL
- Not TM law per se but company law
- Settlement: joint use of TMs but H Inc removed HONEYWELL from its Nigerian subsidiary

ARTISTIC COPYRIGHT IN UNREGISTERED MARKS

- Sometimes impracticable for investor to register in all territories
- No registration, not possible to sue for TM infringement
- Passing Off action possible where mark unregistered but there must be local goodwill
- Cadbury CHOKI mark, unregistered but no local goodwill, popular in Asia and Latin America
- No remedy under traditional TM
- © protects artist works
- Cadbury sued for the infringement of its artistic copyright in the trade mark in obtaining injunction and the matter settled
- Investor and innovative approach, do not blame the law all the time

UNREGISTERED DESIGNS AND COPYRIGHT

- Designs law probably most dissimilar from one nation to another nation
- Nigerian designs law has its roots in the 1911 English Act:
 - “This Act shall not apply to designs capable of being registered under the Patents and Designs Act, 1907, except **designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process**”.
- 1988 Copyright Act (1970 Act too) like its 1970
- Not eligible for copyright if author at time of making work intended it to be used as a model or pattern to be multiplied by any industrial process
- Protectable under the Patents and Designs Act, 1970
- Vlisco had to abandon its claim against Unilever recently
- No registration of designs in Nigeria yet drawings intended for industrial replication

NO COMPETITION STATUTE IN NIGERIA?

- No single statute known competition or anti-trust law in Nigeria
- Competition regulations by SEC, NCC & NOTAP
- Satellite broadcasting company needed to add CNN to its bouquet blocked by a dominant player
- We relied on the English 1623 Statute of Monopolies as a statute of general application
- Letter before action = matter resolved

MICROSOFT CASE: NO © FOR FOREIGN INVESTORS

- Investors: never give up on cases that can be appealed
- McDonalds South Africa case appealed to highest SA court
- *Microsoft Corporation v Franike Associates Ltd.* CA affirmed trial court, no prove that statute provided © for FIs, no gazette presented to court
- Similar line of authority made *per incuriam*- must be reversed
- Copyright (Reciprocal Extension) Order, 1972 in Gazette under 1970 Act
- 1972 Order lists 57 countries including USA & most European countries
- 1972 order saved by 1988 saving provisions
- Call on Microsoft to appeal: do not give up on Nigeria

CYBER-SQUATTING & OTHER CYBER-CRIMES

- Cybercrime (Prohibition, Prevention, etc) Act, 2015
- Act criminalises cyber-squatting registered unregistered marks
- Act criminalises: cyberstalking, fraudulent issuance of e-instructions, cyber-threats, identity threats and impersonation, child pornography, phishing, spamming, spreading of computer virus and card related fraud, among other crimes.
- Penalties under this Act are somewhat deterrent for instance, they include of N5 Million or a term of imprisonment of up to two years or both.
- Possible to stop cyber-squatting before this Act under TM law
- **Copyright Bill: Anti-Piracy Devices and Technology Protection Measures**
- **Copyright Bill: ISPs and the DCMA**

CRIMINAL PROSECUTION & LESSONS

- Customs, Police
- Standards Organisation of Nigeria
- Nigerian Copyright Commission
- National Agency for Food Drugs Administration and Control, NAFDAC
- Consumer Protection Council
- Scrutiny of warning advertorials in newspapers
- Scrutiny of report alleged offences to the police
- My Duwin matter: report to police with court action
- *Olufemi Aladetuyi v Daramola Taiwo*: petition to police without a court action
- BIC advertorial when court action pending
- Lessons
- Inform trial court before police action in ex parte orders
- Be guided in wording adverts

COLLECTING SOCIETIES

- NCC has licensed three sector led collecting societies
 - Reproduction Rights Society of Nigeria (REPRONIG) for the book industry
 - Audio-Visual Rights Society (AVRS) for the film industry
 - Copyright Society of Nigeria (COSON) for the music industry
 - Recently, Musical Copyright Society of Nigeria (MCSN), for music
- ORDER FROM AG
- Legal history for MSCN cases: Court of Appeal decisions of illegality
 - Legality of action of Attorney General: subject to challenge

IMMINENT CHANGES: INDUSTRIAL PROPERTY BILL

- Couple of versions of the Industrial Property Bill before the National Assembly.
- Autonomous agency: Industrial Property Commission
- Substantive patent examination system and introduce a Tribunal to hear opposition etc
- Plant variety, animal variety and utility models
- Geographical indications of origin
- Stringer regime for well-known marks
- Criminal sanctions for various breaches of industrial property rights.

CHANGES EXPECTED IN COPYRIGHT BILL

- Copyright Bill with the Attorney General of the Federation
- Bill resulted from in-depth consultation by the NCC
- Grants films, broadcast rights
- Right to make available/access
- Stringent criminal sanctions
- Detailed provisions dealing with online issues
- online provisions

CONCLUSION

- End of my campaign
- Not a politician, my manifesto is backed with examples of success stories and measurable predictions
- I hope you are convinced that that the regulatory framework for FDI and IP in Nigeria is sufficiently robust with incentives to attract and increase FDI. If so, help spread the news. If not, please feel free to take me on.
- Thank you