

DYNAMICS OF REGULATOR FUNCTIONALITY: AN ASSESSMENT OF THE LEGAL AND INSTITUTIONAL FRAMEWORKS OF THE NIGERIA SECURITIES AND EXCHANGE COMMISSION

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Abstract

This paper is a critical evaluation of the regulatory structures of Nigeria's Securities and Exchange Commission (SEC) in the maintenance of capital market stability, the sustenance of confidence in securities and the protection of the investing public with a view to finding whether they meet shareholder expectations and strategic best practices and standards. In the context of the regulation of corporations in Nigeria and the SEC's concomitant powers of control, surveillance, monitoring, investigation of companies and enforcement of securities and investment statutes, codes and rules; the finding is that of under-performance of the securities market and corporations failure as a direct fall out of the SEC's fluid legal foundation and inappropriate or near absence of application of regulatory instruments. The paper recommends that SEC's regulatory capacity should be strengthened to facilitate the exercise of investor rights and the strategic monitoring of the management of the capital market to enhance the return on capital for shareholders and the company.

Keywords: Regulatory Structures, Strategic Best Practices, Investor Rights, SEC.

1. Introduction

The security market represents a very strategic component of Nigeria's free market economy. The role of the Securities and Exchange Commission (SEC) as a regulatory agency in the control and supervision of the management of companies, therefore, becomes very critical. The obligatory provisions of the laws in this direction, imposes legal duties on the regulatory agency to conduct its supervisory duties competently to secure the well-being of investments and the protection of the rights of the shareholder. The

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object is to ensure compliance with and the enforcement of the statute and codes governing the operation and engagement of companies as well as to make the operators accountable to the company and to shareholders.

The maintenance of stability, sustenance of confidence in the securities market and the protection of the investing public therefore becomes the most important reason for statutory capital market regulation the world over.¹ Legal structures for the protection of the shareholder under the Nigerian Investments and Securities Act are, therefore, aimed at making the securities market responsive to economic dynamics, instill investor confidence, deepen the protection devices for the shareholder and encourage the “interplay of market forces to promote competition and efficiency in the capital market”.² In furtherance of this objective, the Investments and Securities Act, 2007 (the ISA) established the Securities and Exchange Commission (the SEC)³ with the brief to regulate the capital market and to operate and enforce the Act for the safeguard of the economy; an agency which would readily and more acceptably establish remedies for unfair mismanagement of investor funds and would become a corporations Ombudsman ready to investigate, probe or adjudicate in the interest of the shareholder.⁴

The collapse of the capital markets or of corporations has, inexorably, been tied to the performance of the economies of nations. The imperative for sound regulatory governance as a pillar of corporations’ management cannot therefore be overemphasized. The attempt here is to answer the question as to whether Nigerian companies have fared well in the application of statutory standards and codes of best practices as represented in the SEC’s regulation of their affairs.

¹ “Issues in Capital Market” (1993) SEC Research and Marketing Development Department Publication, at 125.

² Ibid at 129.

³ Section 1(i) of the ISA.

⁴ Wedderburn, K. W., “A Corporations Ombudsman”, 24, 1960, *Modern Law Review* at p. 668.

2. Evolution of the Capital Market in Nigeria

Nigeria's first foray into capital market transaction began at about 1946 when the then colonial administration floated a development bond. The success of this bond floatation galvanized government into nursing the idea of establishing a formal capital market. In 1958, the Barback Committee which was set up by government to study this possibility submitted its report with a recommendation that a Nigerian Capital Market be established. In 1960 the Lagos Stock Exchange Commission was established. The establishment of the capital market was to, apart from enabling government to mobilize capital for economic development, enable Nigerians invest and participate in the share and ownership of foreign and local companies. It was also motivated by government's desire to provide facilities for the quotation and ready marketability of shares and stocks.⁵

The Lagos Stock Exchange commenced operations in 1961 with 19 securities listed for trading. Many of the listed companies had foreign and multinational affiliations but representing a cross section of the economy⁶. With the increase of the number of operators at the Stock Exchange arose the need to introduce regulation to check abuse. Government therefore set up a Capital Issue Committee in the Central Bank to monitor and regulate the operations of the Stock Exchange. Subsequently in 1973 government enacted the Capital Issues Commission Act. The Commission was the first formal regulatory body for the capital market. The Commission was also granted the exclusive powers to resolve disputes in the capital market. Appeals from the Commission were to lie to the Federal Commissioner of Finance whose decision was final. This however did not preclude parties to institute civil proceedings in the regular courts.

In 1979 the Capital Issues Commission was transformed into the Securities and Exchange Commission by virtue of the Securities and Exchange Commission Act, 1979. The Act established the Securities and Exchange Commission and largely

⁵ Nwankwo, C. O., *Money and Capital Market in Nigeria Today*, (Lagos, University of Lagos Press, 1991) at 42-60.

⁶ Preamble to Nigerian Investment and Securities Law Reports, (1994) at 6.

retained dispute resolution mechanism of the 1973 Act. In 1986 the Securities and Exchange Commission commenced operations and in 1986 the Lagos Stock Exchange became the Nigerian Stock Exchange. It should be noted that the policy changes recounted above were as a result of government's desire to ensure optimal utility of the capital market. Panels of experts were commissioned to review capital market operations; the Okigbo Panel of 1975 and the Adeosun Panel of 1976. Both Panels reported that the country's capital market was neither vibrant nor accessible and that it had failed to harness the considerable pool of investible funds that were available outside the formal sector of the economy⁷. The policy changes of 1979 and 1980 were products of these reports. In 1995 due to the phenomenal growth in private and public company operations in Nigeria, the government commissioned a Panel headed by Dennis Odife with a mandate to do a comprehensive review of the capital market operation in Nigeria in line with international standards and best practices. It was equally mandated to develop a necessary framework for the strengthening of regulations on the operation of the capital market.

The Panel submitted its report in 1996 and upon its recommendations; government in 1999 enacted the Investments and Securities Act⁸. One fundamental and far reaching innovation of the 1999 Act was the establishment of the Investments and Securities Tribunal (IST). By the combined effect of sections 224 and 237 (3) of the 1999 Act, the IST was deemed to be a civil court with powers to resolve disputes and controversies that arise by the operations of the Act and rules made pursuant to it within the ambit of the jurisdiction, power and authority conferred on it under the Act.

Again, in 2007 there was a need to further review the Investments and Securities Act. A technical committee was set up and its recommendations resulted in the repeal of the 1999 Act and the enactment of the Investment and Securities Act, 2007. The new Act gave the Securities and Exchange Commission (SEC) wider powers over operators including the power to intervene in the

⁷ Ibid at 7.

⁸ Cap 124, LFN 2010.

management and control of the affairs of the capital market operators and companies. The Act also retained the IST as in the 1999 Act. In instituting the IST government envisioned a specialized judicial body that would expeditiously dispense with matters before it without the characteristic delays of the regular courts. The concept of IST is novel to the Nigerian economic space. Its object is to strengthen the regulatory aspect of the capital market in fostering investor confidence and maintaining the integrity of the capital market.

It would seem that the new Act has met with the standards set by International Commission of Securities Commission (IOSCO). The Nigeria Securities and Exchange Commission is now an Appendix "X" signatory⁹ to the IOSCO's multilateral memorandum of understanding. The general object of the Commission is to formulate general policies for the regulation and development of the capital market and the achievement and exercise of its functions as set out under the Acts.

3. Legal Framework

Section 13 of the ISA prescribes the powers and functions of the SEC for the giving effect to the provisions of the Act. In particular, the SEC shall carryout the functions and exercise the powers prescribed as follows:

- a) regulate investments and securities business in Nigeria as defined in this Act;
- b) register and regulate securities exchanges, capital trade points, futures, options and derivatives exchanges, commodity, exchanges and any other recognized investment exchange;
- c) regulate all offers of securities by public companies and entities;
- d) register securities of public companies;
- e) render assistance as may be deemed necessary to promoters and investors wishing to establish securities exchanges and capital trade points;

⁹ This signifies Nigeria's admission to global Securities Regulatory community.

- f) prepare adequate guidelines and organize training programmes and disseminate information necessary for the establishment of securities exchanges and capital trade points;
- g) register and regulate corporate and individual capital market operators as defined in this Act;
- h) register, and regulate the workings of venture capital funds and collective investments schemes in whatever form;
- i) facilitate the establishment of a nationwide system for securities trading in the Nigerian capital market in order to protect investors and maintain fair and orderly markets;
- j) facilitate the linking of all markets in securities with information and communication technology facilities;
- k) act in the public interest having regard to the protection of investors and the maintenance of fair and orderly markets and to this end establish a nationwide trust scheme - to compensate investors whose losses are not covered under the investors protection funds administered. by securities exchanges and capital trade points;
- l) keep and maintain a register of foreign portfolio investments;
- m) register and regulate securities depository companies, clearing and settlement companies, custodians of assets and securities, credit rating agencies and such other agencies and intermediaries;
- n) protect the integrity of the securities market against all forms of abuses including insider dealings;
- o) promote and register self regulatory organizations including, securities exchanges, capital trade points and capital market trade associations to which it may delegate its powers;
- p) review approve and regulate mergers, acquisitions, takeovers and all forms of business combinations and

- affected transactions of all companies as defined in this Act;
- q) authorize and regulate cross-border securities transactions;
 - r) call or information from inspect, conduct inquiries and, audit of securities exchanges, capital market operators, collective investment schemes and all their regulated entities;
 - s) promote investors' education and the training of all categories of intermediaries in the securities industry;
 - t) call for, or furnish to any person, such information as may be considered necessary by it for the efficient discharge of its functions;
 - u) levy fees', penalties and administrative costs of proceedings or other charges on any person in relation to investments and securities business in Nigeria in accordance with the provisions of this Act;
 - v) intervene in the management and control of capital market operators which it considers has failed, is failing or in crisis including entering into the premises and doing whatsoever the Commission deems necessary for the protection of investors;
 - w) enter and seal up the premises of persons illegally carrying out capital market operations;
 - x) in furtherance of its role of protecting the integrity of the securities market, seek judicial order to freeze the assets (including bank accounts) of any person whose assets were derived from the violation of the Act, or any securities law or regulation in Nigeria or other jurisdiction;
 - y) relate effectively, with domestic and foreign regulators and supervisors of other financial institutions including entering into co-operative agreement on matters of common interest;
 - z) conduct research into all or any aspect of the securities industry;

- i. prevent fraudulent and unfair trade practices relating to the securities industry;
- ii. disqualify persons considered unfit from being employed in any arm of the securities industry;
- iii. advise the Minister on all matters relating;
- iv. perform such other functions and exercise powers not inconsistent with this Act as are necessary or expedient for giving full effect to the provisions of this Act.

Further to the general powers and functions of the SEC in section 13 of the ISA, the Act specifically empowers the SEC to register and regulate securities exchanges, capital trade points and self regulatory organizations. Section 28 of the Act provides:

No Securities Exchange or Capital trade point as defined in section 315 of this Act shall commence operation unless registered with the Commission in accordance with the provisions of this Act and the rules and regulations made thereunder.

Section 47 of the ISA empowers the SEC to order special examination or investigation of books and affairs of capital market operators where it is in the public interest to so do particularly where the SEC is satisfied that:

- i. The operation of the capital market is being conducted in a manner detrimental to interest of its clients, shareholders or creditors;
- ii. The capital market operator has insufficient funds to meet its liabilities to its clients, beneficiaries or creditors;
- iii. The capital market operator has contravened the provisions of the Act.

The order for examination or investigation of the books and affairs of capital market operators may be undertaken *suo motu* by SEC or, as provided in 47(e), where an application is made thereby by

- (i) a director or shareholder of the capital market operator;

- (ii) a client, beneficiary or creditor of the capital market operator.

Section 310(1) of the ISA provides that the SEC may appoint one or more committees to carry out, on its behalf, such of its functions as the SEC may determine. Pursuant to this, the SEC has retained its Administrative Proceeding Committee which was set up under the Investments and Securities Act 1999. The APC of the SEC is a quasi-judicial body established for the purpose of giving opportunity for hearing to capital operators and other institutions in the market who are perceived to have violated or have actually violated and threatened to violate the provision of the Investments and Securities Act and the rules and regulations made thereunder or such operators against whom investors have lodged complaints.¹⁰ All decisions of the APC are subject to be confirmed by the Commission not later than 14 days after the making of the decision.¹¹ Any party, who is not satisfied with the decision of the APC, as confirmed by the Commission, may within 30 days of the receipt of the decision, appeal to the investments and Securities Tribunal.¹²

4. SEC's Investor Protection Tools

The establishment of the SEC can be anchored on Gower's postulation that

a professional body originally established to protect the interest of its members cannot readily convert itself into one which also protects the public against its members. Independent lay members of its governing body may help, but merely as window-dressing, more helpful, perhaps, is the provision of an Ombudsman to whom members of the public may address complaints.¹³

¹⁰ Introduction to Rules of Procedure of S.E.C. Administrative Proceedings Committee.

¹¹ Ibid at Rule 12.

¹² Ibid at Rule 13.

¹³ Gowers, L.C.B "Review of Investor Protection" Report Part I, 1985, Her Majesty's Stationary Office, (London) at p. 11. 78.

Deriving from the above, therefore, the intendment of the SEC as an Ombudsman, it would seem, was to have an institution that would adequately protect the investing public, and maintain stability and confidence in Nigeria's economic space. For the purpose of distilling this subject, the regulatory tools of the SEC shall be assessed under the following rubrics representing the synopsis of its functions that are relevant to this topic.

i. Surveillance

The surveillance activities of the SEC include the monitoring of the capital market to ensure that participants keep within the ethics of the market¹⁴ particularly the compliance with the Investments and Securities Act and the rules and regulations made thereunder. It is to ensure that a public quoted company remains fit and proper through routine inspection, target inspection and spot checks on stocks and company books.

ii. Investigation

Generally, the SEC has powers to carry out investigations based on information gathered from surveillance activities or from public sources. Cases of fraud, deceptive dealings, insider abuse as well as flagrant stealing by market operators¹⁵ may occasion the need for investigation. However, the following were identified as grounds for investigation by the SEC:

- (a) non purchase of shares
- (b) unauthorized disposal of client shares
- (c) fraudulent diversion of share sales proceeds
- (d) unauthorized use of clients funds
- (e) trading on clients' shares
- (f) insider trading
- (g) connivance between registrars and brokers to verify and transfer shares of investors without their authority
- (h) the laundering of illegal funds etc.

¹⁴ "The Concept of Investor Protection in the Securities Market", (1991), op cit at 60.

¹⁵ Sambo, A. "Monitoring and Investigation- The main stay of Capital Market Regulation", 12th Ed, 2007, *Securities Market Journal*, at p. 41.

iii. Enforcement and Compliance

One of the cardinal regulatory functions of the SEC is the enforcement of compliance with the Act and the rules by operators as well as quoted companies. It is non compliance with the law that is the bane of companies in Nigeria with grave consequences for the shareholder. The SEC undertakes its enforcement and compliance functions through the Administrative Proceedings Committee.

iv. Judicial Process

The judicial process is a regulatory tool inherent in the SEC's brief for the purpose of instilling discipline in the capital market and compelling compliance with the Act and enforcement its rules and regulations. In deed section 13(x) of the Act empowers the SEC to seek judicial order to freeze the assets (including bank accounts) of any person whose assets were derived from the violation of the ISA or any securities law or regulation in Nigeria or other jurisdictions in furtherance of the its role of protecting the integrity of the securities market. The judicial institutions by which the SEC may have recourse to in the execution of its mandate are the courts as prescribed in the Constitution and those institutions created under the Investments and Securities Act – the Investments and Securities Tribunal (the IST) and the Administrative Proceedings Committee (the APC) of the SEC.

5. Appraisal of the Legal and Institutional Frameworks

5.1 The Law

A general drafting feature of the ISA is the propensity of its drafters to inset clauses that tend to whittle down an otherwise cogent shareholder protection provision. Such instances form the major plank of our assessment here. The power of the SEC to investigate the affairs or examine books of capital market operators under section 47 of the Act, it is contended, is the fulcrum of its regulatory function. The spirit of the provision in this section is to generally allow individual investor or the director or shareholder of a capital market operator to invoke the provisions of the section to cause the investigation of the activities of capital market

operators.¹⁶ However, a proviso to the section states that the SEC shall not order a special examination or investigation of the affairs of a capital market operator if it is satisfied that it is not necessary to do so. This, it is submitted, undermines the beneficial effect of Section 47. It is contended that the discretion granted to SEC under this proviso is superfluous and unwieldy and is capable of being abused. Indeed, an otherwise genuine application to cause an examination or investigation of the books or affairs of a capital market operator under the section may be swept under the carpet on the mere grounds that it is not necessary to do so by an unscrupulous and corrupt official without a quality check on the merit or otherwise of such application. It is difficult to ascertain what the proviso is intended to cure. If it was intended to check frivolous applications, the drafters would have provided for some criteria under which private applications are to be entertained rather than a nebulous provision anchored on subjective grounds.

Section 54 of ISA generally prescribes punishment, in terms of imprisonment or a fine, for sale, transfer or offer of securities without registration. This provision presupposes that punishment can only be handed down by a court of competent jurisdiction as envisaged by the Constitution of the Federal Republic of Nigeria.¹⁷ Curiously subsection (7) of the section completely subverts the ventilation of the question of contravention before a properly constituted court of law for no apparent reason. The subsection states that “The Commission may, in lieu of a prosecution under subsection (2) of this section impose a penalty of N1, 000,000 and a further sum of N5, 000 for everyday which violation continues”. This form of drafting which represents the general grain of the penal provisions in the ISA¹⁸ negates the principle of certainty of punishment known to our criminal codes. It is imprecise as to what manner of trial the

¹⁶ See section 47 (e)(i) & (ii) of ISA.

¹⁷ Section 36.

¹⁸ See for instance, Section 66(2) of the Act which provides that the Commission may administratively apply any of the penalties for the contravention of any of the provisions of the Act. See also Section 77(3) etc.

violator would face; whether a formal trial in court or an administrative procedure by the Commission (SEC).

Section 68 of the Act punishes a maker of an untrue statement in a prospectus. However, the drafters introduced a clause which reads:¹⁹

No person shall be liable under subsection (3) if he proves that:
he had reasonable ground to believe and did believe up to the time of publication of the advertisement or circular that the statement is true.

By this, all it takes to be exonerated is to show “reasonable ground” of belief despite the regulatory rule imposed generally in section 68.

How does a belief that a statement is true which in the long run turns out to be untrue vitiate a criminal intention when the issuer of the statement had all the time to check its veracity before issuing it and taking into cognizance the purpose for which the statement is intended? In any event the ISA states that a public company making an invitation to the public to deposit money with it, shall prior to making the invitation, obtain the written consent of the SEC²⁰. The inference to be drawn is that statements ought to be, and are scrutinized by the SEC before approval of their issuance. Fluid provisions of this nature, which are replete in the ISA, are reasons for the weak regulatory reach of the SEC.

Again section 77(1) requires that a formal consent shall be obtained from an expert whose opinion is to be included in prospectus before its issuance and prescribes punishment for the issuer if the expert opinion turns out to be untrue in a similar manner relating to untrue statements in a prospectus.²¹ For reasons that are not discernable, section 86(2) provides that:

¹⁹ Section 68(4).

²⁰ Section 68 of ISA.

²¹ Section 65 of ISA.

A person shall not be deemed to for the purposes of this section to have authorized the issue of a prospectus by reason only of his having given consent required by section 77 of this Act to the inclusion in it of a statement purporting to be made by him as an expert.

This provision in one fell swoop exonerates the maker of an untrue statement purported to be an expert opinion upon which reliance an investor may have acted to his prejudice. The curious aspect of this provision is that while the Act punishes the issuer of an untrue statement,²² it does not punish the person who provided the expert opinion upon which, in all probability, shareholders relied in purchasing the shares or depositing money. This in spite of the mandatory requirement in section 77 that the consent of the expert be sought before his opinion can be included in a prospectus. It is submitted that where an expert opinion is untrue and misleading the provider of the expert opinion and the issuer of the statement containing the expert opinion contravene the rule against the use of untrue statements in a prospectus.

The ISA depends on shareholders and operators exercising their rights under it to be functional. A law of this nature ought to have effective and virile whistle-blowing provision. This cannot be said of the ISA. The enactment in section 306 is the only thing resembling a whistle-blowing provision. It provides for an obligation on the part of persons to disclose information connected with activities of their employer in relation to:²³

- (a) a criminal offence whether committed or likely to be committed.
- (b) failure or anticipated failure to comply with any legal obligation.
- (c) deliberate concealment or anticipated concealment of a criminal offence or failure to comply with any legal obligation.

²² Section 86(1)(a) and (b).

²³ Subsection (1).

Section 306 lamely provides in subsection (5) that no employer shall subject an employee to any detriment by any act or any deliberate failure to act on the ground that the employee has made a disclosure in accordance with the provisions of this Act. This *ab initio* precludes confidentiality and protection. A whistle-blower protection is definitive of a whistle-blowing provision. This is glaringly absent. For the purpose of confidence in the law, a whist blower must be protected by statute, particularly by way of confidentiality in his/her identity, qualified privilege and immunity from prosecution and thus no penalty for occasioning a detriment on a whistle-blower employee, it is submitted, is a substitute for this legal best practice. It is submitted that section 306 of the ISA is unnecessarily narrow and shallow, incapable of providing the potential whistle-blower the assurance to voluntarily (even if compelled) disclose information and of no shareholder protection value. Clauses in the nature demonstrated here form the corpus of irreducible provisions of the ISA which compound their implementation by the SEC.

5.2 Institutions

Abugu²⁴ described the SEC as essentially an Ombudsman whose principal concern is investor protection and stability of the capital market.²⁵ Generally, the SEC has powers to carry out investigations based on information gathered from surveillance activities or from public sources. Cases of fraud, deceptive dealings, insider abuse as well as flagrant stealing by market operators²⁶ may occasion the need for investigation and enforcement of compliance with the Act and the rules by operators as well as quoted companies. It is non-compliance with the law that is the bane of companies in Nigeria with grave consequences

²⁴ Abugu, J.E.O, *Companies Securities, Law and Practice*, Lagos: University of Lagos Press, 2005, at p. 85.

²⁵ Agbadu-Fishim, J. "Regulatory Powers of the Securities and Exchange Commission : A Commentary", 2004, Vol. 6 No 5, *Modern Journal of Finance and Investment Law*, at p. 473.

²⁶ Sambo, A "Monitoring and Investigation- The main stay of Capital Market Regulation", 12th Ed., 2007, *Securities Market Journal*, at p. 41.

for the shareholder. The SEC undertakes its enforcement and compliance functions through the Administrative Proceedings Committee (APC).

The APC has been a tool by which the SEC demonstrates its capacity to regulate the capital market. Established under the previous Investment and Securities Act in 1999, it has been a vehicle for the discharge of SEC's enforcement function. The APC is a quasi judicial body established by the SEC pursuant to section 310(1) of the it's Act²⁷ for the purpose of hearing complaints from parties who are operators or clients of operators in the capital market. By its Rules²⁸ parties are entitled to be represented by legal practitioners. The APC conducts its proceedings in a manner similar to a court or tribunal and its decision are subject to the confirmation by the SEC and appeals from its decisions lies to the Investment Securities Tribunal (IST). A party who has not appeared before the APC cannot go to the IST for redress. Above all, by virtue of its rules, the SEC reserves the right to confirm or not to confirm any awards, sanctions or decisions made by the APC before they can be operational.²⁹ The effect of all this is that through the operation of the APC the SEC has transformed to a super regulator that can approbate and reprobate. The SEC constitutes the APC, it determines the rules by which the APC is to operate, and it gives or withholds validity to any decision or determination of the APC. A cursory look at a case decided by the SEC is apposite to illustrate the undue powers residing in the SEC unwittingly granted by the ISA which, in all parameter, impinge on investor protection.

In a case involving Cadbury Plc,³⁰ the APC found that Akintola Williams Deliotte, the external auditors and reporting accountants to Cadbury and registered market consultants with the SEC, had compromised and colluded with Cadbury to overstate the accounts of the company to the tune of N13.25billion from the year 2002 to 2006 contrary to the SEC Act and the SEC Code of

²⁷ ISA 2007.

²⁸ Rule 10, Rules of APC.

²⁹ Rule 9, Rules of APC.

³⁰ *SEC v Cadbury Plc & 2 Ors.* APC Reports, 2008.

Conduct for capital market operators to the detriment of Cadbury's shareholders and the company. A matter as profound as this, which had a debilitating effect on the Nigerian capital market was brought before the APC, an administrative panel instead of an appropriate law court. The sanctions imposed on the firm were a fine of N20million or in the event of failure to pay, the loss of registration with SEC, a reprimand not to further engage in such shady practice and an undertaking to be of good conduct. These sanctions, we contend, were lame and patently ineffectual and, as it has turned out, did not deter Cadbury itself or other companies from the crass abuse of the fiduciary duties owed to the shareholders³¹.

The APC is, a mere domestic body but its powers, it is opined, are quiet unwieldy for such a body and by extension the SEC. Expressing similar views, Idigbe³² argued that there cannot be justice within such absolute concentration of power in SEC, the likely result which is arbitrariness and abuse of power.

The process of appearing before the APC before a matter can be instituted, with leave of SEC, does not help the legal process. If anything it increases the burden on the investor litigant in terms of costs and transactional time and inhibits his freedom to seek redress in any competent court or other tribunal, secured of its independence and impartiality, to determine his rights and obligations. This is a clear infraction of sections 6 and 36 of the Constitution³³. It is also capable of eroding the confidence of the investor in the process as to the nature of justice that the APC is likely to dispense. The implication of what has been analyzed here is that the independence of the APC cannot be assured. Secondly, there is no certainty that the competence of the APC may not be interfered with by the SEC or that its impartiality can be assured.

³¹ The perennial company collapse in Nigeria attests to this conclusion.

³² Idigbe, A, 2010 'Overview of Capital Market Dispute Resolution Options in Nigeria and the Role of Lawyers in the Process', Lagos: NIIA.

³³ 1999 Constitution of the FRN as Amended.

6. Implication for Shareholder Protection

Nigeria has generally been held to be a nation with an undeniable reputation and affinity for corruption and fraud related incidents, a history of management ineptitude or outright inability to manage big businesses and a growing penchant to be ready to pay the price for breaking the law based on a knowledge that it can be negotiated upon³⁴. A categorization of this nature puts a great strain on the estimation of the country in the eyes of the international community. In spite of the powers of the APC, it is ridiculous that it has no coercive powers to enforce compliance with its decisions. This demonstrates the weak judicial regulatory base inherent in the Nigerian economic space. The shareholder is, in most cases, unable to secure appropriate judicial response to manifold irregularities perpetrated on him by the operators of the capital market and directors of companies in Nigeria.

In the Proshare's³⁵ Nigerian Capital Market Report, 2012 on the appraisal of the role of statutory regulators of incorporated entities in Nigeria, it was found that "the worst and sustained decline in value of the capital market that occurred was driven in part by the breakdown of the needed rules of engagement in the market place"³⁶. The level of compliance with regulatory standards and code of the best practices was also appraised. In the same year the World Bank rated Nigeria 5.7 on the Investor Protection Index.³⁷ This index consists of three dimensions of investor protection, transparency of transactions (Extent of Disclosure Index), liability for self dealing (Extent of Director Liability Index) and shareholder's ability to sue officers and directors for misconduct³⁸. The index range from 0 to 10, with higher values indicating greater disclosure, greater liability of directors, greater

³⁴ Olufemi Awoyemi, "Corporate Governance-Financial Crisis and the Nigerian Leadership Meltdown", Vol. 1, No 22, 2009, *Proshare Nigeria* at 7, see www.proshareng.com

³⁵ Proshare is an online financial, regulatory and business communication service provider, located in Lagos, Nigeria.

³⁶ Olufemi Awoyemi op cit at p. 9.

³⁷ eStandards Forum, Financial Standards Foundation, <http://www.estandardsforum.org>, 10th December, 2012.

³⁸ World Bank Doing Business Indicators, 2010, in eStandards Forum, *ibid*.

powers of shareholders to challenge the transaction and better investor protection.³⁹ Ahmed and Bello found that holding regulators to account for gross regulatory failures have not received much attention in Nigeria. They opined that the SEC and other regulatory agencies in Nigeria have become terribly uncoordinated and entangled in a free-for-all regulatory atmosphere while market infractions and insider dealings were increasingly ignored and condoned.⁴⁰

This state of affairs has not changed significantly. This conclusion is reinforced by the ranking of the Nigerian SEC as the third worst performing Stock Exchange globally by the London Telegraph for the year 2014.⁴¹ Currently Nigeria is ranked 170 out of 187 in the world in the area of Ease of Doing Business by the World Bank⁴². In particular in the protection of minority investor index Nigeria is ranked number 62 worldwide as against 61 in 2014⁴³. The SEC was found to have serious limitations in the exercise of its functions particularly in the use of its regulatory tools. Ancillary to the above, it has equally been found that the SEC has been bogged down by “bureaucracy, regulatory laxity, corruption and increasing technological challenges.”⁴⁴ According to Demaki⁴⁵ losing investors’ confidence, giving the fact that poor performance of Nigeria companies in recent years, already presents a problem of attracting investors for economic

³⁹ Ibid.

⁴⁰ Ahmed, A.B. and Bello Mohammed, Regulatory Failures and the collapse of the Capital Market in Nigeria: Aligning Responsibilities with Accountability, *Journal of Law, Policy and Globalization*, 2015, vol.40, at p.168, at <http://www.iiste.org/articles>. Accessed on 30th September, 2016.

⁴¹ Cladwell, K. “The ten worst performing Stock Markets in 2014” (2014, December, 24) The Telegraph London online at www.telegraph.co.uk accessed 2015, January 1. The report has it that the SEC lost 33% of the equities traded on its floor in the year 2014 and therefore ranked third on the worst performance index after Russia and Colombia.

⁴² World Bank Group Ease of Doing Business Report, 2015.

⁴³ Ibid.

⁴⁴ Ahmed A.B. and Bello Mohammed op. cit. at p. 173.

⁴⁵ Demaki, G.O, “Proliferation of Codes of Corporate Governance in Nigeria and Economic development”, vol. 1(6), 2011, *Business and Management Review*, p. 1.

development. Secondly, that Nigeria is already loosing domestic investors who are attracted to international market. The Nigeria Stock Exchange is weak and almost stagnated in the last 10 years, while markets around the world are growing strongly⁴⁶. Ikhide⁴⁷ has observed that in spite of the obvious growth in the capital market in Nigeria, it is difficult to ascribe the change to any well-thought-out or planned programme of financial liberalization focused on the capital market and advocated for a formulation of a programme of reforms specially directed at capital market given its role in economic development.

7. Conclusion

A comprehensive reform to the legal and institutional frameworks of shareholder protection under the ISA should be undertaken. The Act should be amended to limit the role of the APC of the SEC to an internal mechanism for dispute resolution between market operators and the SEC and a preliminary investigative and advisory outfit to the SEC. Similarly, the Act should be amended to distinguish between contraventions that are crimes, which are to be prosecuted before the regular courts and those that are civil wrongs which are to be dealt with administratively. Section 306 of ISA should be amended to create a comprehensive whistle blower provision to compel all publicly quoted companies and government owned companies to, by law, whether overtly or covertly, establish and maintain a system to receive disclosures confidentially and act on them and to compulsorily publicize, routinely, the existence of such system of confidential disclosures. Individual liability, enshrined by regulation, would be necessary in this regard to ensure professionalism and prevent fraud and abuses.⁴⁸

⁴⁶ Ibid.

⁴⁷ Ikhide, S. I., "Financial Liberalization and the Growth of Capital Market in Nigeria", No. 1-2, 1997, *African Review of Money, Finance and Banking*, p. 28.

⁴⁸ Oluwadayisi, A., "An Analysis of Liability for Misstatement in prospectus in Public Offer of Securities in Nigeria," Vol. 6(4), 2015, *Gravitas Review of Business & Property Law*, p. 33.

The law and institutions for the protection of the shareholder should be aimed at making the securities market responsive to economic dynamics and instilling investor confidence. In particular, they should be aimed at deepening the protection devices for the shareholder and encouraging the interplay of market forces to promote competition as well as the efficiency in the capital market. However, our finding is that the ISA as an investor protection instrument suffers apparent disconnect from the above objective. It grants undue and unbridled discretion to the SEC thereby eroding, in the consequence, the investor protection potentiality of the Act. The fluid provisions of the ISA have translated to limitations in the exercise of the regulatory functions of the SEC, particularly in the use of regulatory tools. The foregoing clearly demonstrates that the Nigerian investor environment ranks far lower than global averages. The Nigeria investor ought not to be hamstrung by laws which ordinarily should protect him. There is, therefore, the need for urgent legislative surgical attention to make shareholding as safe as possible for the investor.