

Foreign investments in Nigeria - preliminary legal issues

1. Introduction and Purpose

Africa's economy is growing and rapidly so. Nigeria occupies a key place in this exponential growth. As the most populous country in Africa, the seventh most populous country in the world and reading available statistics on the growing rate of foreign investments in Nigeria and the future of the Nigerian economy, it is not out of place to conclude that Nigeria is a strategic market for all manner of foreign investments. Nigeria is renowned for her abundant mineral resources and her oil reserves have brought great revenues to her. As a result of, among other things, Nigeria's promising outlook for investment and future growth, she has been recognised among the "Next Eleven" economies as one of the countries with the potentials to becoming one of the largest economies in the 21st century alongside the leading emerging economies of Brazil, Russia, India, China and South Africa.

Experience has shown that there are certain issues that commonly arise and questions that often come up when foreign investors seek to invest in Nigeria. This article (while attempting to address some of those issues that investors often seek answers to) is not intended to be specific to investments in any given sector of the economy and does not purport to be conclusive on any of the issues discussed.

2. Common Sectors for Foreign Investments in Nigeria

Before Nigeria joined the league of oil exporting countries and even for a number of years thereafter, agriculture accounted for the largest fraction of the country's foreign earnings. However, since Nigeria joined that league of exporters, the entire economic landscape changed with oil exports accounting for about 95% of Nigeria's foreign trade earnings and approximately 80% of the total revenue of the Government of Nigeria. It is needless to say therefore that one key sector for foreign direct investments in Nigeria is the oil and gas sector with many of the world oil majors having a presence in Nigeria.

Other sectors include: telecommunications; electricity; real estate (mostly malls and office complexes and more recently residential developments); petrochemical industries (such as fertilizer plants); manufacturing; agriculture; food and beverages; fast moving consumer goods; insurance; banking; infrastructure; health care; and tourism.

3. Why Invest in Nigeria?

Reasons abound in favour of a decision to invest in Nigeria. Besides her huge oil and gas deposits, Nigeria has abundant deposits of other natural resources which include but are not limited to bitumen, limestone, coal, iron ore, lead and zinc. Most of these resources are largely unexploited. The Nigerian market is also quite large. With a population of over 160,000,000 persons, Nigeria is undoubtedly the largest market for virtually all products in Africa. Further, Nigeria is largely a free market. The Government of Nigeria is gradually taking its hands off several sectors of the economy and there have been very serious talks about deregulating most sectors of the economy including the power and oil and gas sectors (the privatization of the power sector is on-going). The various incentives that have been put in place to encourage investments (as we will see later) are also reasons to consider and make investments in Nigeria.



Key Contacts



Desmond Ogba
Associate
G. Elias & Co
desmond.ogba@gelias.com
T +234 8066745165

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4. The Issues

(a) **Local Incorporation**

A foreign company intending to carry on business in Nigeria is required to incorporate a company in Nigeria before doing so unless the company or the proposed business qualifies for exemption under statute. The statutory exemptions are predominantly confined to companies formed to carry on specific government approved projects and entities controlled by foreign states. A foreign entity may, however, invest in a Nigerian company without getting incorporated if it does not plan to do business itself in Nigeria.

(b) **Registrations, permits, licences and other approvals**

A Nigerian entity that is set up with foreign participation to carry on business in Nigeria will before commencing business need to register with the Nigerian Investment and Promotion Commission ("**NIPC**"), a statutory body established to encourage, promote, co-ordinate and monitor investments in Nigeria. Although such registration would seem to largely be for record and statistical purposes, dealers authorised to deal in foreign exchange are required by the Central Bank of Nigeria ("**CBN**") to ensure that NIPC registration certificate is provided before funds are repatriated on behalf of non-resident investors in companies that need NIPC registration.

The entity will then proceed to obtain the operational licences that it requires from the relevant government departments: banking (CBN); telecommunications (Nigerian Communications Commission); insurance (National Insurance Commission), pensions (National Pensions Commission); aviation (Nigerian Civil Aviation Authority).

The entity will also need to obtain business permits to do business and work permits and expatriate quota for its foreign employees. The NIPC is empowered to provide the necessary liaison between an enterprise and any government department, agency and other public authorities and as such assists to a great extent in coordinating the acquisition of many of these permits.

(c) **Capital Importation and other Foreign Exchange Rules**

- (i) **Capital importation and remittances** -To fund their investments in Nigeria, foreigners are free, subject to money laundering restrictions, to bring in any recognised foreign currency into Nigeria. Such funds will have to be brought in through an authorised dealer (usually a bank authorised by the CBN). The bank through which the funds were imported will need to issue a certificate of capital importation ("**CCI**") to the investor to evidence the inflow of such funds into Nigeria. Where capital is not imported in form of funds but is imported in form of equipment, machinery or raw materials, a CCI will also be required.

In the absence of a CCI, foreign exchange cannot be purchased from the official foreign exchange market for an easy repatriation of the proceeds of the foreigner's investment from Nigeria. If, for example, no CCI was issued to a foreign lender as evidence of funds disbursed to a Nigerian business, the foreign lender may be unable to receive any principal or interest payments in its offshore accounts because the borrower will be unable to access the official foreign exchange market for the purpose of purchasing foreign currency to remit such principal and interest payment. However, it could if it has access to independent sources of foreign currency (as would a borrower that generates foreign currency through exports) lawfully make such interest and principal payments from its own resources.

- (ii) **Local transactions in foreign currency** -Payments in foreign currency for local transactions in Nigeria is optional and may be enforced if the parties so agree. However, to ensure prompt and easy payments, the person entitled to receive payments locally in foreign currency should ensure that (a) the payer has a funded domiciliary account or other offshore sources from which it will source the foreign currency because the Foreign Exchange Manual published by the CBN requires that payment for local transactions in foreign currency must be from only these sources; and (b) for practical purposes, the foreign exchange rate or bench mark for determining such rate is pre-agreed, in the event that payment in foreign currency is for any reason frustrated.

- (iii) **Offshore accounts** - Nigerian companies are permitted to open and maintain accounts offshore. However, where such a company is an exporter, Nigerian law requires it to repatriate and credit all export proceeds into a domiciliary account opened with a Nigerian bank within 90 days from the date of such export. In effect, even when the export proceeds flow into an offshore account, the exporter has to ensure that the proceeds are again brought into Nigeria within the permitted time-frame. In certain scenarios, particularly in structured trade finance contexts, foreign lenders who may have taken security over those offshore accounts or who look to those accounts for repayment are uncomfortable with the back and forth movement of the export proceeds and will usually seek some form of comfort. The real comfort that lenders often seek is to request the exporter in such context to approach the relevant authorities in Nigeria

to waive the repatriation rule. Such waiver is very rarely granted. To the writer's knowledge, it has not been granted in contexts where in effect no Federal Government entity is among the exporters.

(d) **Foreign Ownership and extent of foreign participation in Nigerian businesses**

In 1972, Nigeria promulgated the Nigerian Enterprises Promotion Decree, the purpose of which was to promote the participation of Nigerians in the economy by giving Nigerians control and ownership of certain businesses and barring foreigners from investing in certain enterprises in Nigeria.

After a series of changes to this policy by successive administrations, two important milestones were achieved in 1995 with respect to foreign direct investments. Through the enactment of the NIPC Act, Nigeria opened up all sectors of the Nigerian economy to foreign participation except those businesses contained in the negative list (such as production of arms and ammunition, dealing in narcotics drugs and psychotropic substances, production of military and para-military wears). The said Act also made it possible for Nigerian businesses to be fully owned by foreigners. In spite of these landmark achievements, certain industries still have requirements that ensure compulsory participation in or control of such businesses by Nigerians. The most prominent of these include:

- (i) **Aviation** - To qualify for the grant of an aviation licence or other related permit or authorization in Nigeria, the Nigerian Civil Aviation Authority has to be satisfied that the applicant is a Nigerian citizen or in the case of a corporate body, it is a company registered in Nigeria and which is controlled by Nigerian nationals. This requirement does not apply to licences, permits, certificates and other authorisations needed by any person for the purpose of operating an aircraft for private use only.
- (ii) **Petroleum** - An oil prospecting or exploration licence or an oil mining lease can only be granted to a company incorporated in Nigeria, but there is no express requirement for such company to be controlled by Nigerians. However, the Nigerian Oil and Gas Industry Content Development Act, 2010 (the "**Local Content Act**") requires that preference be given to Nigerian independent operators in the award of oil blocks, oil field licences, oil lifting licences and in all projects for which contract is to be awarded in the Nigerian oil and gas industry subject to the fulfilment of certain conditions specified by the Minister of Petroleum.
- (iii) **Cabotage** - There are different restrictions on foreign participation in coastal and cabotage trade in Nigeria. For example, no vessel other than one that is wholly owned and manned by a Nigerian citizen, built and registered in Nigeria is permitted to engage in domestic coastal carriage of cargo and passengers within the coastal, territorial, inland waters, island or any point within the exclusive economic zone of Nigeria. Vessels of any type or size are also prohibited from trading or engaging in any domestic trading in the inland waters unless such vessels are wholly owned by Nigerians. These restrictions notwithstanding, the law confers on the Minister in charge of shipping the power to grant waivers and authorise a departure from this strict regime if the Minister is satisfied that no wholly owned Nigerian vessel is available or suitable to provide the required services or to perform the relevant activity.
- (iv) **Real Estate** - In many States in Nigeria, foreigners cannot generally acquire any interest or right in or over land unless the transaction under which the interest or right is acquired has been previously approved by the Governor in writing. That consent is customarily granted upon the payment of prescribed fees and satisfaction of certain other conditions.
- (v) **Wireless Telegraphy** – The Wireless Telegraphy Regulations made under the Wireless Telegraphy Act, 1966 prohibits the grant of wireless telegraphy licence (other than a broadcast receiving licence or a dealer's licence) to a person other than a Nigerian citizen except with the approval in writing of the Director-General of the Ministry of Communications.

(e) **Expropriation and Nationalization**

Assets owned by foreign nationals are not subject to arbitrary expropriation. The Nigerian Constitution safeguards every person's right to property and any interest therein and forbids a compulsory acquisition of such property or interest except in accordance with the provisions of a law which requires prompt payment of compensation and which allows the person claiming compensation access to a court for the determination of his interest in the property and the amount paid or payable as compensation. The NIPC Act and many of the bilateral investment treaties entered into by Nigeria also provide similar guarantees against expropriation of assets.

(f) **Critical Oil Industry Documents**

- (i) *The Petroleum Industry Bill, 2012* - The regulatory future of the Nigerian oil and gas industry depends largely on the passage of the Petroleum Industry Bill, 2012 (the "**PIB**") into law. If the current version of the PIB is passed into law, it will lead to drastic changes in the industry because it will at least: repeal not less than nine petroleum industry legislations and create a single statute in the stead of the repealed legislations for the industry; restructure and reorganise industry institutions and regulatory framework by breaking up the Nigerian National Petroleum Corporation ("**NNPC**") into different legal entities each with power to do different things including regulation, investments and dealings in gas; allow for a partial privatization of the National oil company through a floatation of at least 30% of its shares on the Nigerian Stock Exchange (the "**Exchange**"); create a new fiscal regime for the oil industry; make corporate social responsibility compulsory by requiring upstream petroleum producing companies to make monthly contributions into a fund established for petroleum host communities; and deregulate the downstream sector.
- (ii) *The Local Content Act* - In Nigeria, the usual trend was for international oil companies ("**IOCs**") to award service contracts to their own subsidiaries or other foreign-owned companies. However, due to the increasing calls for the IOCs to involve Nigerians and Nigerian companies in their projects, in 2010, the Local Content Act came into force. The purpose of the Local Content Act is to give Nigerians priority in obtaining contracts in the oil and- as industry and to build capacity and skills among Nigerians. Compliance with the Local Content Act is a major criterion for the award of licences, permits and other interest in the oil and gas sector. Details of how to comply with the Local Content Act and how compliance is gauged or monitored cannot be comprehensively discussed in an article of this size. The schedule to the Local Content Act (the "**Schedule**"), however, contains a minimum Nigerian content that should exist in any project in the Nigerian oil and gas industry. In prescribing the minimum Nigerian content, it appears that there are a few contradictions. For our own purpose, we will look at three common services: legal, financial and insurance services.

For legal services, Section 51 of the Local Content Act mandates all operators, contractors and other entities engaged in any operation, business or transaction in the oil and gas industry and which require legal services to retain only the services of a Nigerian legal practitioner or a firm of Nigerian legal practitioners whose offices are located in any part of Nigeria. The Schedule contradicts this by stating that only 50% Nigerian content is required for legal consultancy services.

For financial services, all operators, contractors and other entities engaged in any operation, business or transaction in the oil and gas industry are required by section 52 (1) to retain only the services of Nigerian financial institutions or organisations, except where to the satisfaction of the Nigerian Content Development and Monitoring Board this is impracticable. The Schedule also contradicts this by dictating different percentages for different financial services. For example, only 50% Nigerian content is required for credit granting services.

In respect of insurance services, section 49 (1) requires that all insurable risks relating to oil and gas business in Nigeria are to be placed with insurance companies licensed in Nigeria. The Schedule contradicts this by dictating that only 70% Nigerian content is required for non-life insurance services. This domestic insurance requirement is not an entirely new concept in the context of insurances in Nigeria because the Insurance Act in Nigeria had for long required that no insurance or re-insurance relating to any life, asset, interest or properties in Nigerian businesses should be placed offshore except where the person satisfies the National Insurance Commission that by reason of the exceptional nature of the risk involved or other exceptional circumstances, such risk cannot be placed with a Nigerian insurer, in which case the National Insurance Commission may in writing permit such person to insure abroad.

(g) **Taxation**

The most common taxes are the companies income tax (30%); petroleum profits tax (85% for petroleum operations carried out under joint venture with NNPC or under any non-production sharing contract over five years and 65.75% for non-production sharing contracts in the first five years during which the company has not fully amortised all pre-production capitalised expenditure and 50% for production sharing contracts with NNPC); education tax (2% of assessable profits) value added tax on goods and services only (5%), capital gains tax (10%, though not payable on disposal of shares); withholding tax (5% - 10%) and stamp duties (assessed and payable on a nominal or ad valorem basis).

(h) ***Double Tax Treaties and Income Tax Relief on Foreign Loans***

There are double tax treaties between Nigeria and several other countries in respect of income taxes and capital gains. Presently, the countries are limited but include Belgium, France, Canada, Romania, Netherlands, South Africa, Slovakia, the United Kingdom, Pakistan, China and Philippines. A key benefit of these treaties is that they offer an allowance of up to 2.5% on the rate of withholding tax that would ordinarily have applied on an eligible payment. Such withholding tax is the final tax for dividends, interest and similar payments made to foreign investors.

Income tax relief is available on a sliding scale (ranging from 100% to 0) on lending by foreigners to Nigerian companies, depending on the tenor of the loan. If a foreign loan is structured to have a tenor above 7 years (inclusive of moratorium) with a grace period of not less than 2 years, the interest payable on such loan will be tax free. If the tenor is between 5 and 7 years (inclusive of moratorium) with a grace period of not less than 18 months, the tax could be reduced by 70%. The tax could also reduce by 40% if the tenor of the loan is between 2 to 4 years (inclusive of moratorium) with a grace period of not less than 12 months. The relevant legislation used the terms "moratorium" and "grace period" differently but did not define them.

(i) ***Mandatory Contributions***

There are certain mandatory contributions which Nigerian companies are required to make for the benefit of employees. There are contributory pensions (at least 7.5% of an employee's monthly emoluments, applicable to employers with five or more employees); industrial training fund (1% of the annual payroll, applicable to employers with twenty five or more employees); employees' compensation fund contributions (1% of the total monthly payroll); and group life insurance (a minimum of three times the annual total emolument of each employee).

(j) ***Bilateral Investment Treaties***

Nigeria has concluded several bilateral investment treaties with different countries including China, France, Germany, Italy, Korea, Netherlands, Finland, Russia, Turkey and the United Kingdom. Some of these treaties accord citizens of the contracting states rights against expropriation, national or most favoured nations treatment, repatriation of investment and returns thereon, compensation for losses occasioned by wars, riots and related causes to the same extent that the contracting states would compensate their citizens. Under the Nigerian Constitution, treaties cannot have the force of law until they have been ratified and made part of Nigeria's domestic laws by the National Assembly.

(k) ***Security and Perfection***

Generally, security can be taken over all forms of assets including intellectual property and licences. However, before taking certain kinds of security, some form of consent need to be obtained. For example, the consent of the issuing authority may be required where security is to be taken over a licence and the consent of the Governor where a mortgage is to be created over land. Some securities also require registration. The Companies and Allied Matters Act requires certain charges created by companies over their assets to be registered at the Corporate Affairs Commission (a "**Registrable Charge**") within 90 days of their creation. Where such charge is a mortgage over land, it must also be registered at the lands registry in the State where such land is situated. Where a company fails to register a Registrable Charge, that charge will be held to be void against the Company's liquidator or any creditor of the company.

(l) ***Applicable law***

There is no special requirement under Nigerian law for specific contracts to be governed by the law of a particular jurisdiction. The applicable law that governs a transaction is subject to the contractual agreement between the parties and such choice of law will be respected by Nigerian Courts provided that such choice was not made in bad faith or contrary to public policy of Nigeria. Tax, immigration and bankruptcy matters are ultimately controlled by domestic legislation irrespective of the agreement of the parties. Where security is to be taken over assets in Nigeria, the document creating that security will also be governed by Nigerian law.

(m) ***International Arbitration, Submission to Foreign Jurisdiction and Enforcement of Judgments***

Nigeria is a signatory to the International Centre for Settlement of Investment Disputes Convention and the 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards (also called the "New York Convention"). Nigerian Courts will generally recognise contractual provisions that call for international arbitration but may refuse to recognise and enforce arbitration awards on grounds of public policy or lack of fair hearing.

Furthermore, submission by Nigerian companies to the jurisdiction of the courts of a foreign country is valid and effective. However, care should be taken to ensure that the judgments of the courts of that jurisdiction are such that may be enforced in Nigeria against such companies.

In that regard, subject to the satisfaction of some statutorily prescribed conditions, Nigerian Courts will generally recognise and enforce the judgments of courts of countries with which Nigeria has a reciprocal enforcement arrangement. Two legislations (sometimes said to be contradictory) regulate the enforcement of foreign judgments in Nigeria and there have been arguments on which legislation should govern in all cases. What is, however, clear is that foreign judgments from the Courts of Commonwealth countries are enforceable in Nigeria but local advice on enforceability should be sought on a case by case basis.

(n) ***Waiver of Immunity***

Waivers of immunity are effective and enforceable in Nigeria.

(o) ***Corporate Governance***

The system by which companies are controlled or directed in Nigeria may be stated in their founding and constitutional documents or in shareholder agreements. In addition, there are some codes of corporate governance to which all companies in the relevant sector must adhere. For example, there is a Code of Corporate Governance for Licensed Pension Operators issued by the National Pensions Commission, Code of Corporate Governance for the Insurance Industry in Nigeria issued by the National Insurance Commission, the Code of Corporate Governance for Banks in Nigeria issued by the CBN; various Codes and Guidelines issued by the Nigerian Communications Commission for the telecommunications industry. There is also the Code of Corporate governance issued by the Securities and Exchange Commission ("**SEC**") to apply to all companies seeking to raise funds from the capital market and to all public companies.

(p) ***Restriction on Certain Exports***

In trade finance transactions and any other kind of transactions where the financiers lend on the back of the commodity to be produced and exported, it is imperative for the financiers to be sure that such goods produced for the purpose of the transaction can legally be exported from Nigeria. For example, on the face of the statutes that there is a prohibition on the export of maize, yam tubers, rice, cassava tubers, beans and any of their products or derivatives.

(q) ***Free Trade Zones in Nigeria***

At least twenty zones have been declared free trade zones (FTZs) in Nigeria. The FTZs are operated by the Federal or State Government or the private sector or a combination of more than one of them. The FTZs offer several incentives to investors including exemption from taxes, waiver of all import and export licences, rent-free land during the first six-months of construction, 100% repatriation of capital, profits and dividends, duty and tax free imports, one stop approval for permits, operating licences and several other incentives. Investors who wish to enjoy these incentives are enjoined to consider investing in any FTZ that has become operational or where possible, take steps to procure the declaration of a business zone as an FTZ. In any case, most of these incentives now also exist under other schemes put in place by the government.

(r) ***Pioneer Status Companies***

Under the Industrial Development (Income Tax Relief) Act, 1970 certain businesses are listed as qualified or eligible for pioneer status. The key benefit of the pioneer status is that it gives a tax holiday of up to five years to companies that hold the pioneer status certificate. The grant of pioneer status is aimed at enabling the concerned industry to make a reasonable level of profits within its formative years. The profit so made is expected to be ploughed back into the business. Such businesses include cement manufacturing, glass and glassware manufacturing, quarrying and processing of marbles, real estate development, formulation and manufacture of pharmaceutical products, manufacture and distribution of gas and at least 60 other businesses.

(s) ***Public Offerings and Listings***

Only public companies can undertake public offerings of securities in Nigeria. There is no time frame within which a company must undertake an initial public offering. Public offerings are generally regulated by SEC.

A company can also list its securities on either the main board of the Exchange or on the Alternative Securities Market of the Exchange. The latter which has more flexible listing requirements targets small and medium scale enterprises while the former looks more to blue chips companies.

Two over-the-counter securities markets have been licensed and will shortly become fully operational - one primarily for equity and backed by stockbrokers, the other primarily for debt and backed by banks.

(t) **What risks exist?**

- (i) **Bribery and corruption** - With Nigeria's current ranking by Transparency International as the 35th most corrupt country in the world, corruption is undoubtedly an issue to consider when investing in Nigeria. Care should be taken to ensure that advisers and promoters do not in the interest of "getting the deal through" engage in corrupt practices. This is especially so because such persons may be regarded as "closely connected" to the foreign investor or their foreign counterparty under the UK Bribery Act, the US Foreign Corrupt Practices Act and similar anti-corruption legislations.
- (ii) **Slow judicial system** – The court system is not as effective as one would have expected. Although, a State like Lagos State has put in place rules of court that seek to reduce the time spent in the resolution of disputes within certain monetary threshold, that system is still fraught with some inefficiencies and has not, in the writer's view, really achieved its purpose.
- (iii) **Change in laws and government policies** - Sometimes the government can be erratic and inconsistent in its policies. Palpable delays in passing some important laws could also be an issue. Take the delay in passing the PIB, for instance.
- (iv) **Political Unrest and Insecurity** - The activities of a group of fundamentalists in the Northern part of the country and cases of kidnapping in certain parts of Southern Nigeria are issues to worry about. Adequate information regarding the existing security situation should be obtained at all times.
- (v) **Failure or lack of infrastructure** - Almost all parts of the country have problems with steady power supply, inadequate housing, poor transport system and bad network of roads. Although these failures tend to increase the comparative cost of doing business, they ironically present investors with immediate investment opportunities into which such investors could put their resources and expect high yields.

Contact and Disclaimer:

Desmond Ogba is an associate in the Lagos-based business law firm of G. Elias & Co and can be reached on desmond.ogba@gelias.com or +234 8066745165. More information about G. Elias & Co. can be obtained on www.gelias.com.

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