

## Doing Business in Nigeria by Foreigners: Some Aspects of Law, Policy, and Practice

The economic importance of Nigeria among developing countries cannot be ignored. It is the largest producer of crude oil in Africa,<sup>1</sup> approximately the eighth largest producer of crude oil in the world,<sup>2</sup> and the fifth largest producer within the Organization of Petroleum Exporting Countries (OPEC).<sup>3</sup> Nigeria is the second largest supplier of crude oil to the United States.<sup>4</sup>

Apart from crude oil, Nigeria is rich in other natural and mineral resources in high demand in industrialized countries, notably natural gas, columbite, rubber, iron ore, cocoa, and palm kernel.<sup>5</sup> Foreign investments and trading have always played and still play a significant part in the Nigerian economy through the presence of companies such as Chevron, Texaco, Dupont, Mobil, and recently,

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1. Nigeria presently produces over 2 million barrels of oil per day (bpd), which far overshadows its closest rivals—Libya: 1.5 million bpd; Egypt: 870,000 bpd; and Algeria: 820,000 bpd. See RICHARD U. UCHE, *PETROLEUM ACCOUNTING AND TAXATION IN NIGERIA* 32 (1992); see also *AFRICAN BUSINESS*, Dec. 1991, at 43.

2. Terence P. Stewart & Margaret E. O. Edozien, *Towards a Truly Global Marketing Strategy: A Need to Consider Trade and Investment Opportunities in West Africa*, 17 N.C. J. INT'L L. & COM. REG. 121, 130 (1992).

3. OPEC was founded in 1960 by Venezuela, Iran, and Saudi Arabia in response to the reduction in the prices of oil. The objective was to return the price of oil to a pre-1959 level. It presently consists of 13 members. Nigeria joined OPEC in 1971 as the eleventh member. See *NIGERIA'S EXTERNAL RELATIONS: THE FIRST TWENTY-FIVE YEARS* 111-12 (G.O. Olusanya & R.A. Akindele eds., 1986).

4. U.S. DEP'T OF COMMERCE, *FOREIGN ECONOMIC TRENDS AND THEIR IMPLICATIONS FOR THE UNITED STATES: NIGERIA* 11 (June 1990).

5. Stewart & Edozien, *supra* note 2, at 203.

General Motors.<sup>6</sup> Yet, the Nigerian economy is not necessarily the exclusive preserve of big multinational corporations; smaller firms are also present.<sup>7</sup> Indeed, the country has been described as one of the last frontiers for international investors.<sup>8</sup>

Geographically, Nigeria is in West Africa, bounded on the west by the Republic of Benin, on the north by the Republic of Niger, on the east by the Republic of Cameroon, and on the south by the Atlantic Ocean.<sup>9</sup> The country occupies an area of approximately 923,768 square kilometers, or 356,700 square miles, which some writers estimate to be roughly equivalent to the combined size of California, Nevada, and Utah.<sup>10</sup> The country has a huge population,<sup>11</sup> considered the largest in Africa,<sup>12</sup> and, therefore, is a large market for foreign investors. Despite these attributes, certain economic indicators concerning Nigeria can be discouraging. For instance, her gross national product (GNP) per capita has fallen from \$1,000 in 1980<sup>13</sup> to \$340 presently.<sup>14</sup>

Nigeria is currently saddled with an external debt estimated to be in the region of 27 billion U.S. dollars.<sup>15</sup> Although it exports other raw materials such as cocoa, palm kernel, and rubber,<sup>16</sup> it has basically a single commodity economy: oil, which earns over 80 percent of the country's foreign income.<sup>17</sup> Consequently, fluctuations in the international prices of oil fundamentally affect Nigeria's economy.

The focus of this article is on some of the practical aspects of conducting business transactions in Nigeria and the regulations that may affect a foreign investor or a prospective foreign investor or businessperson who intends to do

6. *Id.* at 138; see also AFR. CONNECTION NEWSPAPER, Oct. 1991, at 10.

7. For a list of corporations and the nature of their business, see AFR. CONNECTION NEWSPAPER, *supra* note 6, at 26.

8. Richard J. Faletti, *Investing in Nigeria—The Law, Good Intentions, Illusion and Substance*, 5 NW. J. INT'L L. & BUS. 743, 743-44 (1983-84) (citing Jonathan Spivak, *Lagos Is Frustrating and Inconvenient but Foreigners Still Find It Irresistible*, WALL ST. J., Sept. 27, 1982, at 36).

9. Stewart & Edozien, *supra* note 2, at 126; see also Chudi Ubezonu, *The Law, Policy And Practice Of Technology Transfer to Nigeria* 20 (1990) (unpublished Ph.D. law thesis, University of London).

10. Stewart & Edozien, *supra* note 2, at 126.

11. The precise population of Nigeria has been the subject of controversy. The different estimates indicate that the population hovers somewhere between 88.5 and 118 million inhabitants. See generally Stewart & Edozien, *supra* note 2, at 127; DAILY CHAMPION (Nig.), Jan. 6, 1993, at 12; World Bank estimates, *reprinted in* AFRICAN BUSINESS, Apr. 1992, at 20.

12. EUROPA PUBLICATIONS LTD., AFRICA SOUTH OF THE SAHARA 1990, at 775 (19th ed. 1990).

13. U.S. DEP'T OF STATE, INVESTMENT CLIMATE STATEMENT: NIGERIA 1 (Apr. 1990).

14. THE ECONOMIST INTELLIGENCE UNIT NIGERIA COUNTRY PROFILE 1991-1992, at 25 (1991). More recent estimates put the GNP per capita at \$290. NAT'L CONCORD NEWSPAPER (Nig.), Apr. 5, 1993, at 3.

15. A recent estimate puts the figure at \$27 billion following a reduction pursuant to agreements with the London Club of Creditors. NEWSWATCH (Nig.), Mar. 8, 1993, at 31; see also FIN. TIMES (U.K.), Mar. 25, 1993, at 6.

16. Stewart & Edozien, *supra* note 2, at 203.

17. *Id.* at 130.

business in or with Nigeria. The article begins with a brief introduction to the Nigerian economic system. It then examines the procedure for entry into the Nigerian commercial system, forms of business organizations, equity participation of foreign interests, registration of foreign technology transactions, fiscal policies, and the disincentives to doing business in Nigeria. Although numerous articles have been written about foreign investments in Nigeria,<sup>18</sup> information contained herein comprises the most recent developments in terms of legislations and policy. The author intends this article to serve as a source of information not only among attorneys advising foreign investors, but also among academics and students of law who follow developments in foreign investments in developing countries in general, and Nigeria in particular. The information herein is current as of February 1994.

## I. Basic Structure of the Nigerian Economy

Nigeria operates what may be termed a "mixed economic system"<sup>19</sup> in which private individuals, corporate entities, and government bodies participate in business activities and can own property jointly or individually. The government has primary responsibility for promoting and legislating economic activities through the promulgation of appropriate legislation and policies in addition to investments in various sectors of the economy.<sup>20</sup> Successive Nigerian governments have pursued a policy of cooperation rather than exclusion or confrontation with foreign investors and businessmen.

## II. Procedure for Entry and Establishment of Foreign Investment in Nigeria

Until recently, the procedure for establishing foreign investment in Nigeria was fraught with pitfalls and frustrations as foreign investors and their Nigerian

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18. These include: George P. Macdonald, *Recent Legislations in Nigeria and Ghana Affecting Foreign Private Direct Investment*, 6 INT'L LAW. 548, 555 (1972); Jerome F. Donovan, *Nigeria after "Indigenization": Is There Any Room Left for the American Businessman?*, 8 INT'L LAW. 601 (1974); Bernard Blankenheimer, *The Foreign Investment Climate in Nigeria*, 10 VAND. J. TRANSNAT'L L. 589 (1977); Jerome F. Donovan, *Nigeria: Still Safe For U.S. Investors?*, 10 VAND. J. TRANSNAT'L L. 601 (1977); Niki Tobi, *The Nigerian Enterprises Promotion Act*, 15 J. WORLD TRADE L. 543 (1981); Richard J. Faletti, *Investing in Nigeria—The Law, Good Intentions, Illusion and Substance*, 5 NW. J. INT'L L. & BUS. 743 (1983-84); Sabinus A. Megwa, *Foreign Direct Investment Climate in Nigeria: The Changing Law and Development Policies*, 21 COLUM. J. TRANSNAT'L L. 487 (1983); Oserheimen A. Osunbor, *Nigeria's Investment Laws and the State's Control of Multinationals*, 3 ICSID REV. 38 (1988); Fiona C. Beveridge, *Taking Control of Foreign Investment: A Case Study of Indigenisation in Nigeria*, 40 INT'L & COMP. L.Q. 302 (1991); Stewart & Edozien, *supra* note 2, at 121.

19. Alhaji Hassan Adamu, *Nigeria: A Profile*, Paper Presented at a Seminar in London on Nigeria's Foreign Investment Laws and Intellectual Property Rights, Organized by the Common Law Institute of Intellectual Property Unit, Queen Mary and Westfield College, University of London 2 (Nov. 4 & 5, 1992) (unpublished manuscript).

20. *Id.*

partners had to go from one government ministry to another in search of different permits and approvals before the venture could be established.<sup>21</sup> This practice was not only costly, but time-wasting, and was bound to be a disincentive to foreign investors in Nigeria.

To arrest this state of affairs, the Government of Nigeria promulgated the Industrial Development Coordination Act (IDC Act),<sup>22</sup> which set up the Industrial Development Coordination Committee (IDCC)<sup>23</sup> to act as a coordinating center to issue all permits and approvals connected with foreign trade and investment in Nigeria.<sup>24</sup> The stated objectives of the IDCC are to: (1) obviate delays in granting approvals for new investments; (2) create one approval center instead of the former situation in which a multiplicity of approving centers raised unnecessary barriers to prospective foreign investors in terms of time and financial cost; and (3) obviate the lack of coordination among approving ministries and eliminate conflicting and sometimes duplicating demands by ministries before approvals are granted.<sup>25</sup>

The law required the IDCC to be chaired by the Minister of Industries.<sup>26</sup> Other members of the IDCC include the Ministers of Trade and Tourism; Finance and Economic Development; Internal Affairs, Science and Technology; Agricultural and Rural Development; and Labour, Employment and Productivity.<sup>27</sup>

Under the new system introduced by the IDC Act, a prospective foreign investor most obtain only three basic approvals from the IDCC to establish business operations in Nigeria: (1) a business permit; (2) approved status; and (3) investment guarantee approvals.<sup>28</sup> The business permit includes permission to employ expatriates, whereas approved status ensures that imported capital can be repatriated.<sup>29</sup> Investment guarantee approval ensures that in the case of socio-political changes in Nigeria, such investments will not be affected, and guarantees the repatriation of imported capital.<sup>30</sup>

A foreign investor interested in coming to Nigeria is required first to apply for and obtain a business or visitor's visa from the Nigerian embassy, consulate, or high commission stationed in the country from which the investor is proceed-

21. See Ubezonu, *supra* note 9, at 293-95; see also Faletti, *supra* note 18, at 744-45.

22. CAP 178, Laws of the Federation of Nigeria (1990). The 1990 Consolidated Laws of Nigeria, which contain all Nigerian Laws up to 1990, are compiled in chapters (CAPS) and designated as "Acts." The military government in 1992 ran into some technical legal problems in the Nigerian courts and decided to redesignate these laws as "Decrees" (Decree No. 55 of 1992). Reference to these laws in this article will be to "Acts," first, for ease of reference, and secondly, because of the anticipated return to democratic rule in Nigeria.

23. IDC Act § 1.

24. *Id.* §§ 3(1), 3(2)(a).

25. FEDERAL MINISTRY OF INDUSTRIES (NIGERIA), THE INDUSTRIAL POLICY OF NIGERIA 36-37 (July 1990) [hereinafter NIGERIAN INDUSTRIAL POLICY].

26. IDC Act § 2(1)(a).

27. *Id.* § 2(1)(b)(i)-(iv).

28. NIGERIAN INDUSTRIAL POLICY, *supra* note 25, at 32.

29. *Id.*

30. *Id.* at 33.

ing.<sup>31</sup> To conduct business operations, the investor must apply to the IDCC located at the Federal Ministry of Industries in Abuja,<sup>32</sup> Nigeria, for the above-listed three approvals.<sup>33</sup> The IDC Act also provides that a decision on the application by a foreign investor must be made within thirty days of the application.<sup>34</sup> Prospective foreign investors in specific industries (for example, fishing, pharmaceuticals, or oil and gas) may have to satisfy additional requirements.<sup>35</sup>

The changes in the procedure for entry of foreign investments as well as the time within which decisions concerning foreign applications must be reached are clearly designed to attract foreign investment and to eliminate the frustrations and the bureaucratic bottlenecks that characterized the pre-1988 system. Despite these improvements, however, the IDCC requires applicants to provide an enormous amount of information and submit an almost endless list of attachments. Any missing or unclear information or documentation causes delays in granting approvals, which can become frustrating to prospective foreign applicants.

### III. Forms of Business Operations in Nigeria

The principal forms of business operations in Nigeria are sole proprietorships, partnerships, and incorporated companies.<sup>36</sup> Sole proprietorships are quite com-

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31. Immigration Act, CAP 171, § 8(2), Laws of the Federation of Nigeria (1990); see also U.S. DEP'T OF COMMERCE, *MARKETING IN NIGERIA* 44-45 (Feb. 1988) [hereinafter *MARKETING IN NIGERIA*]

32. Abuja is the new Federal Capital Territory and is located in the center of Nigeria.

33. A prospective investor applying for a business permit and expatriate quota will need to file IDCC FORM I, which should be accompanied by the following: (1) certificate of incorporation; (2) memorandum and articles of association; (3) details of shareholding; (4) joint venture or technical agreements if any; (5) evidence of factory building and address thereof; (6) tax clearance certificate; (7) evidence of training program for Nigerians; (8) feasibility report, especially for new industries; (9) project implementation program. Checklists appearing on IDCC FORM I stipulate that a completed IDCC FORM I should be in 10 copies. It should be accompanied by 10 copies of the partnership agreement, where applicable, and of the certificate of incorporation, and by two copies of the payment receipts for IDCC FORM I. All companies requiring a business permit and expatriate quota must have a minimum share capital of two million naira (₦). Companies with a share capital of at least ₦5 million are entitled to two automatic expatriate quota portions, while those with ₦10 million are entitled to four automatic portions.

Applications for approved status must be on FORM IDCC 2/IDI, which must be made out in 10 copies. These are to be submitted with 10 copies of the following 4 documents: (1) joint venture agreement, if any; (2) business permit; (3) certificate of incorporation; (4) tax clearance certificate; together with (5) original and duplicate copies of treasury receipts for the purchase of IDCC FORM 2; (6) two copies of the memorandum and articles of association; and (7) two copies of the feasibility studies for these applications. See 4 D. SASEGBON, *NIGERIAN COMPANIES AND ALLIED MATTERS LAW AND PRACTICE* 314-24 (1991).

The conditions for granting approvals relating to investment guarantees are: (1) approvals status in principle granted by IDCC; (2) evidence of compliance with the Nigerian Enterprises Promotion Act 1989; (3) a copy of the business permit issued by IDCC; and (4) a copy of the audited account of the company if already in existence. See *NIGERIAN INDUSTRIAL POLICY*, *supra* note 25, at 33-34.

34. IDC Act § 9(1).

35. *NIGERIAN INDUSTRIAL POLICY*, *supra* note 25, at 32.

36. See *MARKETING IN NIGERIA*, *supra* note 31, at 42. Incorporated companies are the equivalent of corporations in the United States.

mon and relatively unsophisticated. They occur most commonly in distributive trade in the commercial area. Partnerships are not allowed to include more than twenty persons,<sup>37</sup> and the partners are personally liable for the debts of the partnership.<sup>38</sup> This type of arrangement is popular with professionals such as lawyers, accountants, and estate agents.

For foreign investors the most suitable form for conducting business in Nigeria is through the incorporation of a company limited by shares.<sup>39</sup> The Companies and Allied Matters Act (CAMA) requires foreign investors to conduct operations in Nigeria as a Nigerian registered entity or a Nigerian incorporated company. Section 54(1) of the CAMA provides that no foreign company can carry on business in Nigeria unless it is incorporated as a separate entity in Nigeria.

For a foreign investor or trader to incorporate a company in Nigeria, the investor must file the following documents with the Corporate Affairs Commission (CAC) in Abuja:

- (1) the company's memorandum and articles of association;
- (2) a notice of the address of the registered office of the company (not a post office address);
- (3) a statement listing the names, particulars, and consent of the first directors;
- (4) a statement of authorized share capital signed by one director;
- (5) a declaration by a local attorney that the foreign investor has complied with the requirements of the CAMA; and
- (6) any other documents that may be required by the CAC.<sup>40</sup>

The CAC will issue a certificate of incorporation when it is satisfied with all the documents.<sup>41</sup> The effect of incorporation is that the company becomes a body corporate with a common seal, has a separate legal identity from that of its shareholders, and is imbued with perpetual succession.<sup>42</sup>

Most, if not all, companies adopted by foreign investors are normally limited by shares, meaning that the liability of members is limited to the amount, if any, unpaid on the shares.<sup>43</sup> Some foreign companies may, however, be exempted from local incorporation through application to the National Council of Ministers

37. Companies and Allied Matters Act (CAMA), CAP 59, § 19(1), Laws of the Federation of Nigeria (1990). Except, of course, if it is a firm of accountants or attorneys. *Id.* § 19(2)(6)(i), (ii).

38. ABDULAI, TAIWO & Co. (SOLICITORS), ESTABLISHING A BUSINESS IN NIGERIA 13 (1993).

39. See CAMA § 21(1)(a). CAMA also recognizes two other types of incorporated companies, namely companies limited by guarantee with no share capital used mainly by charitable organizations, and unlimited companies where there is no limit as to liability of members. *Id.* § 21(i)(b), (c). Incorporated companies may be public or private. *Id.* §§ 22, 24.

40. CAMA § 35(2)(a)-(e), (3).

41. *Id.* § 36(5), (6).

42. See generally Olubukola Soley, *Nigeria*, in 4 DOING BUSINESS IN AFRICA 127, 134 (Dennis Campbell ed., 1986). Some designations have changed but the basic documentations remain the same. What basically has changed is that the CAC, rather than the Registrar of Companies, accepts the documentation related to the incorporation of companies. See also CAMA § 37.

43. CAMA § 21(1)(a).

because they belong to one or more of the following categories: (1) companies invited by or with the approval of the federal government of Nigeria to execute specified projects;<sup>44</sup> (2) companies executing specific loan projects on behalf of donor countries or international organizations;<sup>45</sup> (3) foreign government-owned companies engaged solely in export promotion activities;<sup>46</sup> and (4) engineering and technical experts engaged in specialized projects with state governments, state government agencies, or any other person where such contact has been approved by the federal government of Nigeria.<sup>47</sup>

An application for exemption from incorporation in Nigeria is required to be made in writing and addressed to the secretary to the federal government of Nigeria.<sup>48</sup> The application should contain the name and address of the foreign company outside Nigeria; the name or proposed name of business in Nigeria; the name and address of each director, partner, or other principal officer of the foreign company; a certified copy of the charter, statutes, or memorandum and articles of the foreign company; the names of authorized representatives in Nigeria; the proposed business and duration of such business in Nigeria; particulars of any previous project carried out as an exempted foreign company; and such other particulars as may be required by the secretary to the federal government of Nigeria.<sup>49</sup>

#### IV. Equity Participation and Ownership in Nigerian Businesses

Before 1989 a foreign company<sup>50</sup> could not own 100 percent equity in Nigerian businesses or operations. Foreign operations in Nigeria could only be in the form of a joint venture arrangement.<sup>51</sup> That situation changed in December 1989, however, with the promulgation of the Nigerian Enterprises Promotions Act 1989.<sup>52</sup> The main reason for the relaxation of restriction on equity participation by foreigners was the Nigerian Government's desire to attract foreign investment into the Nigerian economy.<sup>53</sup>

The Promotions Act 1989 lists forty economic activities reserved exclusively

44. *Id.* § 56(1)(a).

45. *Id.* § 56(1)(b).

46. *Id.* § 56(1)(c).

47. *Id.* § 56(1)(d).

48. *Id.* § 56(2).

49. *Id.* § 52(2)(a)-(h).

50. The term "foreign company" was defined by the former Companies Act 1968 as a company incorporated outside Nigeria that had established a branch in Nigeria on October 1, 1968, or had the intention to establish a branch after that date. Companies Act 1968, § 368. The present Companies and Allied Matters Act 1990 contains no clear definition, but the meaning would not appear to be different.

51. Osunbor, *supra* note 18, at 53.

52. CAP 303, Laws of the Federation of Nigeria (1990) [hereinafter Promotions Act 1989].

53. NIGERIAN INDUSTRIAL POLICY, *supra* note 25, at 42.

to Nigerians.<sup>54</sup> All other activities are open to 100 percent equity participation by foreign investors.<sup>55</sup> Nevertheless, foreign investors can participate and fully own activities on the exclusive list if they are prepared to invest at least ₦20,000,000<sup>56</sup> and they obtain prior approval from the IDCC.<sup>57</sup> These changes introduced by the Promotions Act 1989 do not affect ownership structures in the banking, insurance, oil, and mining industries.<sup>58</sup> Equally, economic activities that came into force pursuant to the Nigerian Enterprises Promotion Act 1977 are to remain as they are.<sup>59</sup>

In May 1991 the U.S. Department of Commerce suggested at least twelve sectors in the Nigerian economy that offer good prospects for U.S. investors. These economic activities encompass microcomputer systems, food processing machinery, telephone network equipment, medical instruments, commercial refrigeration equipment, commercial printing machinery, oil drilling machinery, cosmetics, industrial instruments, air traffic control equipment, civilian jet aircraft, and engineering services.<sup>60</sup>

## V. Registration of Technology Transactions in Nigeria

In accord with developments and trends in some developing countries concerning the regulation of technology transfer transactions,<sup>61</sup> the Nigerian Government in 1979 enacted the National Office of Industrial Property Act<sup>62</sup> specifically to screen contracts involving foreign technology transactions in Nigeria. The National Office Act set up the National Office of Industrial Property, later changed

54. These are mainly less sophisticated and less capital intensive economic activities such as bread making, department stores, operation of taxis, etc. Television broadcasting, although perhaps capital intensive, is included in this exclusive list—perhaps for security purposes. See Appendix A for the list of 40 activities exclusive to Nigerians.

55. NIGERIAN INDUSTRIAL POLICY, *supra* note 25, at 42.

56. *Id.* The official rate of exchange of the Nigerian naira is ₦22 (₦21.9960) to US\$1. The GUARDIAN (Nig.), Feb. 7, 1994, at 1. Thus, ₦20 million translates to roughly US\$909,090.

57. NIGERIAN INDUSTRIAL POLICY, *supra* note 25, at 42.

58. These activities can only be pursued in the form of joint ventures with Nigerian interests as was the case before the promulgation of the Promotion Act 1989.

59. NIGERIAN INDUSTRIAL POLICY, *supra* note 25, at 42. The Nigerian Enterprises Promotion Act 1977, which has now been repealed, was the main legislation that regulated the ownership of equity interests by foreigners in the Nigerian economy. By this legislation involvement of foreign investors in Nigerian economic activities could only be in the form of a joint venture. See Nigerian Enterprises Promotions Act 1977, §§ 4, 5, 6. This legislation is discussed in Megwa, *supra* note 18, at 498-502; Blankenheimer, *supra* note 18, at 596-97; Beveridge, *supra* note 18, at 315-16.

60. U.S. DEP'T OF COMMERCE, NIGERIA, COUNTRY MARKETING PLAN 3 (May 1991); see also Stewart & Edozien, *supra* note 2, at 141.

61. For a list of countries that now have foreign technology screening laws, see MICHAEL BLAKENEY, LEGAL ASPECTS OF THE TRANSFER OF TECHNOLOGY TO DEVELOPING COUNTRIES 162 (1989).

62. CAP 268, Laws of the Federation of Nigeria (1990) [hereinafter National Office Act]. The name of this legislation has been changed to the National Office of Technology Acquisition and Promotion Act pursuant to the National Office of Industrial Property (Change of Name, etc.), Decree No. 82 of 1992, § 2.



to the National Office of Technology Acquisition and Promotion (the National Office),<sup>63</sup> with responsibility, inter alia, to receive and register such agreements.<sup>64</sup>

Foreign investors whose transactions may involve the transfer of technology, and who wish to be paid for the transfer in foreign currency, must register the technology agreement with the National Office within sixty days after the execution of the agreement.<sup>65</sup> Every application for registration should be addressed to the director of the National Office<sup>66</sup> and should be accompanied by the technology agreement.

Technology agreements must be submitted with Revised Form NOIP 1-84<sup>67</sup> and Revised Form NOIP 2-84.<sup>68</sup> Form 1-84 requires general information about the applicant (that is, the company's name, the address of the company, and the date of the technology agreement) and must be signed. Form 1-84 must be accompanied by the company's memorandum and articles of association, two certified true copies of the technology agreement, copies of any feasibility studies, annual audited accounts if not a new company, and two copies of Form 2-84.<sup>69</sup> Form 2-84 is a questionnaire asking for detailed information about the transferor of technology, the acquirer or transferee of the technology, the nature of technology to be transferred, the transfer arrangement, and other such information, and must be signed.<sup>70</sup> This documentation should be accompanied by a presentation fee of ₦200.<sup>71</sup>

Technology agreements are evaluated by the National Office, which when

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63. National Office Act § 1(1); Decree No. 82 of 1992, § 1(1). The decision to change the name of the National Office was born out of the desire, and rightly so, to reflect more accurately the precise functions of the National Office and the legislation creating it rather than confusing it with the office responsible for the protection of industrial property in Nigeria.

64. National Office Act § 4(d). Agreements contemplated by the National Office Act to be registrable are agreements whose purpose or intent is, in the opinion of the National Office, wholly or partially for or in connection with any of the following purposes: (1) use of trade marks; (2) the right to use patented inventions; (3) the supply of technical expertise in the form of the preparation of plans, diagrams, operating manuals, or any other form of technical assistance; (4) supply of basic or detailed engineering; (5) supply of machinery or plant; and (6) provision of operating staff or managerial assistance and the training of personnel. *Id.* § 4(d)(i)-(vi).

65. National Office Act § 5(2).

66. *Id.* § 5(3).

67. Hereinafter Form 1-84.

68. Hereinafter Form 2-84.

69. For a copy of Form 1-84, see NATIONAL OFFICE OF INDUSTRIAL PROPERTY, REVISED GUIDELINES ON ACQUISITION OF FOREIGN TECHNOLOGY UNDER DECREE NO. 70 OF 1979, at 25 (1989) [hereinafter NATIONAL OFFICE REVISED GUIDELINES].

70. For a copy of Form 2-84, see *id.* at 27-36.

71. NATIONAL OFFICE REVISED GUIDELINES, *supra* note 69, at 41. After registration of a technology agreement, payments are made to the National Office depending on the amount of payment for the technology to be acquired. For payments of technology above ₦5,000,000, the registration fee is ₦5,000. For technology agreements requiring a total payment of between ₦3,000,000 and ₦5,000,000, the registration fee is ₦3,000. Where total payment for transferred technology is below ₦3,000,000, the registration fee is ₦2,000. *Id.* For equivalents in dollars, see *supra* note 56.

satisfied with an agreement's contents and terms,<sup>72</sup> registers the agreement and issues a certificate thereof.<sup>73</sup> The consequence of nonregistration of technology agreements in Nigeria is the denial of foreign exchange for payment in respect of the technology agreement or transaction,<sup>74</sup> a matter of particular importance to foreign owners of technology.

The National Office is one of the main organs responsible for carrying out Nigeria's technology policy. The National Office was created as a purely defensive government agency to protect the national economy and Nigerian industries against the negative effects of uncontrolled inflows of foreign technology.<sup>75</sup>

## VI. Fiscal Policies and Laws

A country's fiscal policies are bound to affect foreign investments and trading. Equally, they will be a major consideration for a prospective foreign investor in determining whether to enter a particular country.

### A. EXCHANGE CONTROLS

Before January 24, 1994, purchases and transactions in foreign currencies in Nigeria were conducted with few procedural requirements under the Second Tier Foreign Exchange Market Act.<sup>76</sup> Under the SFEM Act both foreigners and Nigerians could freely sell and buy foreign or Nigerian currencies at the rate mutually agreed between the applicant purchaser and an authorized dealer.<sup>77</sup>

However, on January 24, 1994, the Nigerian Military Government, through the Central Bank of Nigeria (CBN), released the Monetary, Credit and Foreign

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72. Section 6(2)(a)-(r) of the National Office Act contains a list of 18 perceived restrictive provisions or terms that are not expected to be included in technology agreements submitted to the National Office. These include provisions on grant-back clauses, tie-in provisions, quality and quantity controls, limitations on research and development, exclusive sales clauses, etc.

73. National Office Act § 6(1).

74. *Id.* § 7. There has been some controversy over whether denial of foreign exchange approval is the only penalty for nonregistration of technology agreements. Some Nigerian writers have argued that unsubmitted technology agreements should be regarded as null and void and tainted with illegality. See, e.g., Olunmi A. Fagbemi, *Registration of Technology Transactions in Nigeria: Another View*, J. WORLD TRADE L., Aug. 1988, at 95, 98-100. The Nigerian Court of Appeal in the case of Beecham Group Ltd. v. Essdee Food Products Nigeria Ltd., 3 Nigerian Wkly L. Rep. (Part 11) 112, 113, 116 (1985) (cited and reported in Osunbor, *supra* note 18, at 60) confirmed that the only penalty existing under the National Office Act is the denial of foreign exchange for technology agreements with no certificates of registration.

75. NATIONAL OFFICE FOR TECHNOLOGY ACQUISITION AND PROMOTION, ANNUAL REPORT FOR THE YEAR 1991, at 13.

76. Second Tier Foreign Exchange Market Act, CAP 405, §§ 1(1), 3, Laws of the Federation of Nigeria (1990) [hereinafter SFEM Act]; see ARTHUR ANDERSEN & CO., GUIDE TO TRADE & INVESTMENT IN NIGERIA 47 (1988).

77. SFEM Act §§ 1(1), 4, 9(1)-(3).

Exchange/Trade Guidelines for the 1994 fiscal year,<sup>78</sup> which changed some aspects of the exchange control regime. Pursuant to the Guidelines, the official rate of the Nigerian currency has been pegged at ₦22 to US\$1 for all transactions.<sup>79</sup>

Under the terms of the Guidelines: all imports into Nigeria above \$1,000 must be made on the basis of letters of credit;<sup>80</sup> foreign exchange will be made available to importers fortnightly in bidding sessions organized by the CBN through designated banks;<sup>81</sup> and exporters of goods from Nigeria are required to render the proceeds of sale of such goods and services to the CBN.<sup>82</sup>

No person or corporation coming into Nigeria will be required to declare possession of foreign currency of less than \$5,000 or its equivalent. Possession of more than \$5,000 in foreign currency must be declared.<sup>83</sup> All imports of foreign currencies by foreigners into Nigeria can be lodged in banks in Nigeria. Those lodging such funds in Nigeria shall have free and unimpeded access to the funds in such foreign currencies either for the import of goods and services or for subsequent repatriation.<sup>84</sup> Thus, it is still permissible to operate accounts in foreign currencies in Nigerian banks.

Bureaux de change set up by the government in 1989<sup>85</sup> are still in place. They are, however, to be outlets for purchases at the official exchange rate of Nigerian currency by foreign entities with foreign currencies coming into Nigeria.<sup>86</sup> Bureaux de change are no longer allowed to sell foreign currencies in exchange for Nigerian currency<sup>87</sup> as was the case before.

The Nigerian Military Government by intervening in the foreign exchange rate and regime moved to stop the slide in the value of the Nigerian currency witnessed in recent months—a slide caused by the limited supply of, and high demand for, foreign currencies, which more or less determined the exchange

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78. Central Bank of Nigeria, Monetary, Credit and Foreign Exchange/Trade Guidelines for 1994 Fiscal Year (Monetary Policy Circular No. 28) [hereinafter the Guidelines]. Two points should be noted. First, although the provisions of the Guidelines fundamentally affected certain provisions of the SFEM Act, the Guidelines did not and could not abolish the Act. Second, although the Guidelines, which are government policy, are presently in force, as yet no law backs the Guidelines, although the government has promised to bring out such a law soon.

79. The Guidelines, *supra* note 78, at 11. Notwithstanding, some Nigerian newspapers have put the rate of exchange at ₦21.9960 to US\$1. See, e.g., THE GUARDIAN (Nig.), Feb. 7, 1994, at 1.

80. The Guidelines, *supra* note 78, at 11. The importers will continue to support the letters of credit with import duty reports (IDR) and clean reports of findings (CRFs) issued by the foreign inspection agents. *Id.*

81. BUSINESS TIMES (Nig.), Feb. 14, 1994, at 17.

82. The Guidelines, *supra* note 78, at 11.

83. *Id.* at 13.

84. *Id.* at 12; see the Foreign Currency (Domiciliary Accounts) Act, CAP 151, § 1(1), Laws of the Federation of Nigeria (1990).

85. Kingsley Moghalu, *Exchange Bureaus to Start Up in Nigeria*, N.Y. CITY TRIB., Aug. 7, 1989, at 2.

86. The Guidelines, *supra* note 78, at 12.

87. *Id.*

rate. It is too early to determine whether the new regime will be successful, or what the consequences will be.

## B. REPATRIATION OF CAPITAL AND DIVIDENDS FROM NIGERIA

One of the significant determinants for foreign investment is how easy or difficult it is to repatriate invested funds, or incomes therefrom, abroad. In Nigeria, dividends earned in respect to foreign-owned equity are remittable, but certain administrative procedures must be complied with.

Where a foreign investor intends to repatriate capital that is the result of capital or equipment imported into Nigeria, the investor has to apply for and obtain a certificate of importation from the CBN before or about the time that the equipment arrives in Nigeria.<sup>88</sup>

For dividends to be remitted by a foreign shareholder in a Nigerian incorporated company, an application has to be made to the CBN and the Federal Ministry of Finance supported by the following documents:

- (1) evidence of "approved status" on nonresident capital investments;<sup>89</sup>
- (2) a tax clearance certificate issued by the Federal Internal Revenue Service on the amount to be remitted;<sup>90</sup>
- (3) audited accounts of the local company for the year in which dividends were declared and in the two preceding years;<sup>91</sup>
- (4) a resolution of the board of directors of the local company authorizing the dividend declaration;<sup>92</sup>
- (5) a statement that the dividend declared by the local company is permissible within the law.<sup>93</sup>

The CBN and the Ministry of Finance will approve the repatriation if they are satisfied that the application relates to bona fide transactions.

For expatriates working in Nigeria 75 percent of their salary net of taxes can be repatriated abroad.<sup>94</sup>

## C. TAXES

All companies incorporated in Nigeria are subject to taxes levied by the Federal Government of Nigeria. The three basic taxes on corporations are the company income tax, the capital gains tax, and the petroleum profit tax. The current

88. SFEM Act § 14(2). A certificate of importation is necessary for "approved status." See *supra* note 33.

89. ABDULAI, TAIWO & Co., *supra* note 38, at 30; see NIGERIAN INDUSTRIAL POLICY, *supra* note 25, at 29; see also *supra* notes 28, 29, 33.

90. ABDULAI, TAIWO & Co., *supra* note 38, at 30.

91. *Id.*

92. *Id.*

93. *Id.*

94. The Guidelines, *supra* note 78, at 17.

company income tax is 35 percent.<sup>95</sup> Gains on the disposal of tangible and intangible assets are taxed at the rate of 20 percent.<sup>96</sup> The current petroleum profit tax is 85 percent.<sup>97</sup> The law limits the petroleum profit tax to companies in the oil and gas industry. Income generated by a company not related to its petroleum operations is not subject to the petroleum profit tax, but is subject to the ordinary company tax as to that income alone.<sup>98</sup>

Dividends, interest, and management and consultancy fees are subject to a withholding tax. A company must deduct the withholding tax at source for transmission to the Board of Inland Revenue. The current rate of withholding tax on dividends and interests is 10 percent.<sup>99</sup> Withholding tax on management, consultancy, and technical services is 10 percent.<sup>100</sup>

#### D. TAX INCENTIVES TO FOREIGN INVESTORS

Under certain circumstances the National Council of Ministers may grant "pioneer status" to foreign companies involved in certain designated industries.<sup>101</sup> Once a company receives pioneer status, it is entitled to a tax holiday period of between five and seven years.<sup>102</sup> Foreign companies who invest in economically disadvantaged areas<sup>103</sup> are entitled to special income tax concessions under the pioneer status scheme.<sup>104</sup>

95. FEDERAL MINISTRY OF INDUSTRIES (NIGERIA), INCENTIVES TO INDUSTRIES 6 (1991).

96. Capital Gains Tax Act, CAP 42, § 2(1), Laws of the Federation of Nigeria (1990). The Nigerian company tax regime is comprehensively discussed in Olakunle Orojo, Tax Implications of Doing Business in Nigeria, Paper Presented at a Seminar in London, on Nigeria's Foreign Investment Laws and Intellectual Property Rights, Organized by the Common Law Institute of Intellectual Property Unit, Queen Mary and Westfield College, University of London 3-26 (Nov. 4 & 5, 1992) (unpublished manuscript).

97. Petroleum Profit Tax Act, CAP 354, § 19(1), Laws of the Federation of Nigeria (1990). With the recent signing of production sharing contracts between the federal government of Nigeria and crude oil producing companies exploring for oil in the deep offshore and some other new designated areas, the government is planning to adjust the petroleum profit tax from 85% to 50%. These changes are expected to be reflected very soon in amendments to the Petroleum Profit Tax Act. See NIGERIAN TRIBUNE, Apr. 29, 1993, at 14.

98. ARTHUR ANDERSEN & Co., *supra* note 77, at 62.

99. Press briefing of the Nigerian Minister of Finance on the details of the 1994 budget on January 11, 1994, reprinted in FINANCE GUARDIAN (Nig.), Jan. 17, 1994, at 15.

100. ARTHUR ANDERSEN & Co., *supra* note 77, at 57.

101. Industrial Development (Income Tax Relief) Act, CAP 179, §§ 1(1)(9)(6), 4(6), Laws of the Federation of Nigeria (1990). The object of the pioneer concept is to encourage the establishment of industries designated as "pioneer" by the government through the grant of tax reliefs. For a list of designated industries, see SASEGBON, *supra* note 33, at 283-84.

102. SASEGBON, *supra* note 33, at 285.

103. *Id.* Economically disadvantaged areas are defined in terms of inadequacy of industrial production, social and economic infrastructures, and level of labor market development. NIGERIAN INDUSTRIAL POLICY, *supra* note 25, at 26.

104. These include seven years of income tax concessions, special concessions by relevant state governments, and an additional 5% over and above the initial capital depreciation allowance under the Company Income Tax Act. NIGERIAN INDUSTRIAL POLICY, *supra* note 25, at 25-26; see also Stewart & Edozien, *supra* note 2, at 140.

Provision is also made for tax relief for research and development (R&D). Up to 120 percent of expenses on R&D are tax deductible, provided that such R&D is carried out in Nigeria and is connected with business from which income or profit is derived.<sup>105</sup> For the purpose of R&D on local raw materials, 140 percent of expenses are tax deductible.<sup>106</sup>

## VII. Disincentives to Doing Business in Nigeria

Unfortunately, a number of disincentives may at times make it unattractive to do business in Nigeria. First is the instability that has characterized the Nigerian political system since the country's independence from the British in 1960. In its thirty-two-year political life Nigeria has witnessed two civilian regimes, several military administrations inherent with the coups that either bring the military to power or are a part of them, and a civil war.<sup>107</sup> Recently, Nigeria has become trapped in a political quagmire created by the established military junta. On June 26, 1993, the junta, for no apparent reason other than to perpetuate itself in power, annulled the presidential elections held two weeks earlier, elections that had been adjudged free and fair by both international and domestic observers. This type of action is bound to be a disincentive to a prospective foreign investor, although the evidence in Nigeria is not conclusive.

Secondly, the sources of information on laws and policies on foreign investment in Nigeria are contained in a bewildering array of different, and at times uncoordinated, materials and sources. Searching for information can be an unwieldy and time-wasting experience.<sup>108</sup> This lack of comprehensive codification can also be a disincentive to foreign investment.<sup>109</sup>

Thirdly, the policies and laws affecting foreign investments in Nigeria change frequently, and at times with little or no publicity. This method of legislating creates uncertainty and unpredictability in the whole system.

Fourthly, in recent times, a high incidence of fraud perpetrated by Nigerians on some innocent foreigners has prompted the Nigerian Government to publish advertisements in some international newspapers<sup>110</sup> to alert the international com-

105. NIGERIAN INDUSTRIAL POLICY, *supra* note 25, at 22.

106. *Id.* at 23.

107. See Stewart & Edozien, *supra* note 2, at 127-29. As this article went to press, the Nigerian Military Government is headed by General Sanni Abacha, who terminated the tenure of the Interim Government installed by the former head of the state, General Ibrahim Babangida. General Abacha, who assumed power on November 17, 1993, incidentally held various ministerial and official appointments under General Babangida. He has promised to return the country to civilian democracy, but has yet to disclose any timetable.

108. It is always advisable for prospective investors to engage a trusted local Nigerian attorney or firm of attorneys to give legal advice and information about relevant legislation.

109. See Osunbor, *supra* note 18, at 74, where he laments the lack of consolidation laws on foreign investment in Nigeria.

110. See, e.g., *Central Bank at Nigeria: Press Statement: Attempted Fraudulent Transfer of Funds*, N.Y. TIMES, Sept. 24, 1991, at D7. In some cases foreigners are willing accomplices in attempts to defraud the federal government of Nigeria. In any event, it is prudent to engage a local attorney.

munity. Prospective foreign investors or businessmen should be exceedingly careful.<sup>111</sup>

### VIII. Conclusion

In spite of the drawbacks that may exist, Nigeria still offers tremendous potential for foreign investors. The country has a large market, an abundance of mineral and natural resources, low wages, a general liberalization of trade and investment, and a promised return to civilian democracy. A historical examination of the attitude of successive Nigerian governments towards foreign investment and trading discloses a policy of cooperation rather than exclusion. This attitude will not change even in subsequent changes of government in Nigeria.

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111. The U.S. Department of Commerce in an Overseas Marketing Report on Nigeria of February 1988 listed a number of characteristics that, if present in any proposed transaction with a Nigerian company, the possibility of fraud should be suspected: the Nigerian firm offers to make payment by certified check or bank draft; the Nigerian firm provides only a post office box number; immediate shipment by air freight is requested especially for goods or quantities which would normally go by surface; letterhead stationery omits the names of all members of the board of directors of the Nigerian company; orders are placed via fax or cable (anybody can go into a local fax or cable office and send a fax or cable). U.S. DEP'T OF COMMERCE, *MARKETING IN NIGERIA* 25-26 (Overseas Business Report 88-02, Feb. 1988). To the above may be added: the Nigerian entity requests blank, but signed corporate stationery; the Nigerian entity requests the foreign corporation to disclose foreign bank account numbers; signatures on correspondence from the Nigerian entity disclose no clear names; disclosure by the Nigerian entity of supposedly confidential Nigerian government agency documents, etc. The list is not exhaustive, and prospective foreign investors, businessmen, or corporations are advised to take the services of a local attorney.

## **Appendix A**

### **LIST OF ENTERPRISES EXCLUSIVELY RESERVED FOR NIGERIANS UNDER THE NIGERIAN ENTERPRISES PROMOTION ACT 1989**

1. Advertising and public relations business.
2. All aspects of pool betting business and lotteries.
3. Assembly of radios, radiograms, record changers, television sets, tape recorders, and other electric domestic appliances not combined with manufacture of components.
4. Blending and bottling of alcoholic drinks.
5. Blocks and ordinary tile manufacture for building and construction works.
6. Bread and cake making.
7. Candle manufacture.
8. Casinos and gaming centres.
9. Cinemas and other places of entertainment.
10. Commercial transportation (wet and dry cargo and fuel).
11. Commission agents.
12. Department stores and supermarkets.
13. Distribution agencies, excluding motor vehicles, machines and equipment, and spare parts.
14. Electrical repair shops other than repair shops associated with distribution of electrical goods.
15. Estate agency.
16. Film distribution (including cinema films).
17. Hairdressing.
18. Ice cream making when not associated with the manufacture of other dairy products.
19. Indenting and confirming.
20. Laundry and dry cleaning.
21. Manufacturers' representatives.
22. Manufacture of suitcases, briefcases, handbags, purses, wallets, portfolios, and shopping bags.
23. Municipal bus services and taxis.
24. Newspaper publishing and printing.
25. Office cleaning.
26. Passenger bus services of any kind.
27. Poultry farming.



28. Printing of stationery (when not associated with printing of books).
29. Protective agencies.
30. Radio and television broadcasting.
31. Retail trade (except by or within department stores and supermarkets).
32. Singlet manufacture.
33. Stevedoring and shorehandling.
34. Tyre retreading.
35. Travel agencies.
36. Wholesale distribution of local manufactures and other locally produced goods.
37. Establishments specializing in the repair of watches, clocks, and jewelry, including imitation jewelry, for the general public.
38. Garment manufacture.
39. Grain mill products, including rice milling.
40. Manufacture of jewelry and related articles, including imitation jewelry.

