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Nigeria after "Indigenization": Is There Any Room Left for the American Businessman?

Introduction

Most American businessmen who keep up with opportunities in trade and investment abroad are familiar with the increasingly important position of Nigeria in the world economy. The most populous[1] and richest[2] of all black African nations, she has an abundance of two resources much coveted by the industrialized world: oil[3] and gas.[4] The country is administered by a military government, but its tone is one of moderation,[5] not the truculence Americans have come to expect from the colonels and generals who often rule developing countries.

Moveover, Nigeria has a history of amicable commercial relations with the U.S.,[6] and the greatly increased volume of foreign exchange becoming available to Nigeria (overwhelmingly from oil revenue)[7] will permit an even larger volume of trade and investment in the future.

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[1]Nigerian population has been reliably estimated at 65 million. African Progress (April 1973) at 40. This estimate will likely be confirmed by the 1973 census, whose results are not yet known.

[2]The government estimates that the Gross Domestic Product grew 10 percent in 1972-73 to $7.0 billion, a per capita GDP of some $100. The GDP is expected to be about $11.5 billion by 1975 and about $18.4 billion by 1980, for an average annual compound growth rate of 9.8 percent. Fed. Ministry of Economic Development and Reconstruction (Central Planning Office), *Guidelines for the Third National Development Plan 1975-1980* (1973). *See also* 3 NIGERIAN BUS. DIGEST (September 1973) at 6.

[3]By October 1973, daily production of high-grade, low-sulphur crude oil had reached 2.2 billion barrels. U.S. Department of Commerce (Investment Resources Division), *Economic Trends Report from Nigeria* (Dec. 10, 1973) at 4. This made it the sixth largest oil producing country. New York Times, Nov. 23, 1973, at 55, col. 5.

[4]Over 1 billion cubic feet of natural gas is being burned off daily from oil refineries in the Niger River Delta. A huge investment will be required to liquefy and ship this gas to industrial markets, but the planning for the project is well underway. *Op. cit., supra* n. 1, at 38.

[5]Gen. Yokubu Gowon, age 40, is a skilled conciliator who has announced his intention to return Nigeria to civilian control in 1976. *See generally* SATURDAY REVIEW—WORLD (Feb. 9, 1974) at 14 *ff.*

[6]The U.S. is Nigeria's second best customer and supplier. Our exports are primarily in agricultural products and capital equipment; our imports are in cocoa, rubber, peanut and palm crops, and, of course, oil. *Op. cit., supra* 1, at 36.

[7]Nigeria's oil revenue was $1.5 billion in 1972-73 when the posted price of crude was $4.39 a barrel; some 27 percent of Nigeria's production that year went to the U.S. New York Times, *supra*

Nonetheless, American businessmen today are exceedingly wary about investing in any developing country, especially in Africa. Racism in the South, drought and famine through the middle, and Libyan-style nationalization in the North are persuasive disincentives. Add to these fears an undifferentiated feeling that African states are inherently volatile politically, and the fact that most businessmen, who do not have to be in Africa for, say, the oil, bauxite, or copper, look elsewhere.

Most of the usual *cliches* that justly apply to doing business in much of Africa and other developing areas simply do not apply to Nigeria, however. Although it is only now fully emerging from its searing civil war,[8] Nigeria is taking control of her resources and destiny in a manner more calculated to encourage foreign businessmen than to scare them off.

The "Indigenization Decree"

Early in 1972, the federal military government of Nigeria issued an "Indigenization Decree"[9] which became effective on March 31, 1974. Its purpose was to eliminate or restrict foreign ownership in 55 non-agricultural sectors of the economy. These sectors were divided into two schedules. Schedule 1[10] comprised 22 relatively unsophisticated occupations that require minimum technical skill and were for the most part already dominated by Nigerians. Examples are hairdressing[11] and trucking.[12] Schedule 2[13] comprised 33 relatively more sophisticated businesses, examples of which are furniture manufacturing[14] and book printing.[15]

The *Decree* prohibited all foreign ownership of Schedule 1 enterprises.[16]

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n. 3. The price jumped to $8.31 a barrel in October 1973, and to $14.69 in January 1974, an increase that could well yield more than $6 billion per year in revenue. New York Times, Jan. 27, 1974, §F at 73, col. 1. Reasonably enough, the official *Guidelines for the Third National Development Plan 1975-1980* predict that the availability of foreign exchange to finance the Plan's many projects "is unlikely to feature as a major problem." *See also* West Africa (Sept. 3, 1973) at 1214.

[8]Nigeria has three major tribes: the Hausas in the North (50 percent of the population); the Ibos in the East (25 percent); and the Yorubas in the West (20 percent). The remaining 5 percent of the population is distributed among some 180 smaller tribes. In 1967, the Ibos seceded, establishing the Biafran State. Federal forces put down the rebellion in 1970 and restructured Nigeria into a twelve-state federal republic within four main regions, the boundaries of which run generally along tribal lines.

[9]Formally known as the Nigerian Enterprises Promotion Decree 1972, Decree No. 4, dated February 23, 1972, 59 Fed. Rep. of Nigeria Official Gazette (Supp.) (Feb. 28, 1972) All *ff.* (hereinafter referred to as the *Decree*), it is popularly, if clumsily, referred to as the "Nigerianization Decree" or the "Indigenization Decree."

[10]*Decree* §16 at A18.

[11]Schedule 1, Item 11, *Decree* at A19.

[12]Schedule 1, Item 12, *Decree* at A19.

[13]*Op. cit., supra* n. 10.

[14]Schedule 2, Item 13, *Decree* at A20.

[15]Schedule 2, Item 27, *Decree* at A20.

[16]*Decree* §4 at A13.

Foreigners may own up to 60 percent of Schedule 2 enterprises, but only if the affected company had either a paid up capital exceeding $600,000 or an annual turnover exceeding $1.5 million;[17] and the government decided which of the two tests to apply. (Member states of the Organization of African Unity were exempted from the *Decree.*)[18]

The *Decree* also established the Nigerian Enterprises Promotion Board (NEPB),[19] with power to enforce the *Decree* nationwide, and Enterprise Promotion Committees[20] in each of the twelve states to "assist and advise the [NEPB] on the implementation of the *Decree,* and to ensure that [its] provisions are complied with by aliens resident in every State."[21]

In 1972, all companies with any foreign ownership were required to inform the appropriate Enterprise Promotion Committee of the nature of their respective businesses, the nationalities of their owners, their capitalization, and their cash flows. The Committee, with the approval of the NEPB, then informed the companies of their classifications for purposes of the *Decree—i.e.,* Schedule 1, Schedule 2, or exempted altogether. Aggrieved companies could appeal to the Federal Commissioner for Industries for exemptions, but appeals to Nigerian courts were prohibited.[22] Firms that had obtained neither exemptions nor extensions of the two-year time limit within which to divest the required percentages of foreign ownership were subject to being seized and sold by the NEPB, with the proceeds remitted to the owners,[23] a startlingly refreshing change from most modern nationalization practices.

Indeed, President Gowon went to unusual lengths to reassure foreigners that he intended to provide both fair compensation and easy repatriation of the proceeds of the sales of all or portions of their businesses.[24] He has also repeatedly denied any intention of totally nationalizing the more important sectors of the economy. The Chairman of the NEPB was also deliberately moderate in his policy statements.[25]

Implementation of the Decree

Considering the pervasive extent of foreign ownership of Nigerian business,[26]

[17]*Decree* §5 at A13-A14.
[18]*Op. cit., supra* n. 10.
[19]*Decree* §1 at A11.
[20]*Decree* §2 at A12-A13.
[21]"Explanatory Note," *Decree* at A21.
[22]*Decree* §15 at A18.
[23]*Decree* §12 at A16-A18.
[24]Presidential Statement, April 1, 1973.
[25]The NEPB Chairman, in his first official pronouncement, warned his countrymen against "an inflexible approach which would lead to a negative result with ill-effect on the pace of development or its desirable extent." He added that, "it is not [the government's] intention to eliminate foreign investment participation in our economy. . . ." U.S. Department of Commerce (Investment Resources Div.), *Establishment of the Indigenization Board* (June 8, 1972) at 2.
[26]According to an industrial survey, 70 percent of Nigeria's 625 largest manufacturing companies were controlled by foreigners as late as 1968. New York Times, Oct. 2, 1973, at 17, col. 1.

indigenization has gone surprisingly smoothly, especially among the larger enterprises.[27]

American-owned businesses have been among the most innovative in their compliance and, in so doing, have underscored the areas not covered by the *Decree.* For example, a trucking company whose activities fell within Schedule 1, restructured itself as a leasing company, an unaffected line of business. A chicken farm (also Schedule 1) sold out to a Nigerian investor, but negotiated a management contract. (The *Decree* did not mandate indigenization of in-house management either, with the result that, theoretically, foreigners could continue to conduct most of the country's major businesses from the board rooms. This loophole could conceivably defeat the purpose of the Decree and will likely be closed in the near future.)[28]

Even foot-dragging on the part of some foreigners was met with rather gentle chiding, not belligerence, by Nigerian officials. The country's leading business periodical reacted as follows to one such case:

> Despite the Indigenization Decree, it appears some expatriates are still daft enough not to fall in with the mood of the country. For example, the whole country was shocked recently when the Federal Commissioner for Industries, Dr. J. E. Adetoro, openly decried the lack of effort of an expatriate Company in implementing [the *Decree*].[29]

Hardly a fire-eating threat.

Some political leaders, to be sure, react to any signs of reluctance to comply with the *Decree* in a xenophobic manner more typical of other developing countries. For Example, the Federal Commissioner for Works and Housing, in arguing that the benefits of indigenization should be widely spread among Nigerians of all classes, once intimated that "alien capitalists" might not be as welcome in Nigeria as before.[30] He was immediately and caustically challenged by the president of the Lagos Chamber of Commerce and Industry, who accused him of advancing his own brand of Fabian Socialism and concluded:

> The *Decree's* objective is not to eliminate "aliens" from our economy because they are "capitalists." On the contrary, the cardinal aim of the Decree is to progressively divest foreign investment into projects requiring large capitals [sic] or specialized skill or both, so as to promote indigenous enterprise in areas where Nigerian businessmen's competence are [sic] established; in other words, "to ensure that foreign investments are complementary to, rather than competitive with indigenous enterprise," but ultimately to ensure that the commanding heights of the economy are indigenously controlled.[31]

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[27]New York Times, Jan. 27, 1974, *supra* n. 7.

[28]U.S. Department of Commerce (Investment Resources Div.), *Guidelines for Nigeria's Third National Development Plan, 1975-80: Implications for U.S. Trade and Investment* (Sept. 24, 1973) at 2.

[29]3 NIGERIAN BUS. DIGEST (August 1973) at 5.

[30]3 NIGERIAN BUS. DIGEST (November 1973) at 8.

[31]*Id.*

It is doubtful that a stouter exposition of the expatriate's position could have been drafted by any foreign businessman.

Some post-indigenization diminution of the quality and quantity of goods and services traditionally provided by foreign-owned companies was expected and has occurred. There may even have been some initial falling off of foreign investment as foreigners wait until the dust settles. But the government rightly considers these costs to be insignificant when compared with the benefits of indigenization to Nigeria, a process which one official justifiably described as "the boldest step taken by any country in Africa to help its citizens in running the economy of their country."[32]

One of the most far-sighted steps taken by the government to implement indigenization was the establishing in October 1973 of the Nigerian Bank for Commerce and Industry. The Bank's two main functions were to finance Nigerians' purchases for foreign-owned companies and to act as the "buyer of last resort" of shares of foreign-owned companies for which no immediate Nigerian buyers could be found. The Bank was also empowered to make commercial loans to the newly Nigerianized businesses to ease cash flow problems which are sure to arise during the transition period. The Bank's regulations require purchasers of businesses to put up 30 percent of the price; the Bank will not acquire more than a 40 percent interest in any company nor make a loan of under $30,000,[33] preferring to leave the smaller loans to the commercial banks.

Since the amount of capital required to implement indigenization is reliably estimated at between $150 million and $225 million,[34] it is clear that an institution such as the Bank was required. Although the Bank's capitalization has not been publicized, it is doubtless large enough to do the job.[35]

Foreign-owned commerical banks played and continue to play an important role in the process, too. One of them made loans to Nigerian employees of companies covered by the *Decree* so that the employees could subscribe to the mandated public and private offerings of the shares of their respective companies. The loans proved to be beneficial to all concerned parties: the employees got valuable shares of stock; the foreign-owned firms who sold the stock got employees with stakes in the companies' post-indigenization future; and the foreign-owned bank got more Nigerian borrowers, helping it comply with Central Bank regulations in that regard.

As mentioned above, firms affected by the *Decree* disposed of their required percentage of shares either through private or public offerings; and when no buyer could be found, the Nigerian Bank for Commerce and Industry stepped into the breach, purchasing unsold shares for eventual resale to Nigerians. A

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[32]*Op. cit., supra* n. 29, at 4.
[33]*Op. cit., supra* n. 30, at 5.
[34]*Op. cit., supra* n. 30, at 3.
[35]*Op. cit., supra* n. 26.

Federal board named the Capital Issues Commission was charged with the responsibility of evaluating all shares offered to the public at large. Generally, it took into account both actual and project earnings per share. However, because reliable balance sheets were not uniformly available for the Commission's inspection, no truly reliable valuation could be made in some cases.[36]

Persons who bought shares at private offerings were on their own in evaluating their purchases.

Pre-Decree Indigenization

Of course, Nigeria has not waited until now to take steps to assure that the "commanding heights" of her economy remain locally controlled—and these days the most "commanding height" is, of course, oil. Beginning in 1965—two years before the outbreak of civil war—the government declared its intention to operate the railroads, telephone systems, and the electric industry. Since then, it has also acquired substantial minority interests in foreign banks and automobile assembly plants,[37] and just this May, concluding pre-*Decree* discussions with the affected oil companies, announced agreement in principle to acquire 55 percent of the Nigerian operations of Gulf, Mobile, Italy's Agip, France's Elf Group, and the Royal Dutch Shell Group-British Petroleum joint venture.[38] Negotiations between the government and the foreign companies, through tough, have been marked by general good will on both sides, giving foreign investors reasonable assurance that indigenization under the *Decree* will also go well.

Conclusion

As it is with stock exchanges, uncertainty is the traditional bugaboo of foreign investment. Businessmen and investors will not "play the game" if the rules of the game are constantly changing.

In a world grown increasingly less certain about everything, it is refreshing to find at least one developing country doing all it can to assure foreign investors that it will respect the sanctity of officially permitted investments. The Nigerian practice could well point the way to an enlightened compromise between the conflicting demands on the industrialized world for assured access to resources and the political demands of resource-rich developing countries. Workable models like Nigeria's are in short supply.

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[36] *Op. cit., supra* n. 30, at 6.

[37] Business International Corporation, *Investing, Licensing and Trading Conditions Abroad (Nigeria)* (June 1973) (Copyright).

[38] Wall Street Journal, May 20, 1974, at 5, col. 2.