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Privatization and Foreign Investments in Nigeria

Lawrence O. Azubuike
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GOLDEN GATE UNIVERSITY

SCHOOL OF LAW

S.J.D. DISSERTATION

PRIVATIZATION AND FOREIGN INVESTMENTS IN NIGERIA

Submitted by

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LL.B (Hons), LL.M

October 2007
San Francisco, California, USA

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DEDICATION

This dissertation is dedicated to the memories of Mpa, Caje and Ugonna.

ACKNOWLEDGMENTS

I express gratitude to God for enabling me complete this endeavor and for His mercies.

I express profound gratitude to Professor Chris Okeke, the Chair of my dissertation committee, for his understanding, encouragement and assistance in seeing that this work comes to fruition. Professor Sompong Sucharitkul immensely helped both by his comments as a member of the committee and while he was the Director of the Graduate Program at the School of Law. I thank him sincerely. I also thank Professor Jon Sylvester. His keen interest in Africa, and its development, made him a perfect fit for the Committee. I thank him for serving on the Committee.

I thank my family for their patience and tolerance while I was researching and writing this dissertation. My loving wife, Maria, comes in for a special mention. She provided invaluable support for the production of this work.

To others, into whose convenience I intruded in the course of doing this work, I say, as I always do, borrowing the words of Shakespeare, "your pains are registered where every day I turn the leaf to read them."

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ABSTRACT

Nigeria's political economy has straddled the ideological divide between socialism and capitalism. The country produces oil, and at some point in its existence, it embarked on robust state involvement in the economy. This was marked by the acquisition, or establishment, of numerous state enterprises. Over the years, the performance of these enterprises was found to be dismal, and as part of the overall reform of the economy, Nigeria has joined the global trend toward reduction in direct state ownership of enterprises. Indeed, it has embarked on massive divestment of state interests in once publicly owned firms. Besides the universal rationale of efficiency, one of the objectives of the privatization exercise in Nigeria is the attraction and retention of foreign investments. This work examines the direct and indirect linkage between the government's divestiture of its interests in firms, on the one hand, and foreign investments in the country, on the other hand.

The study is divided into seven chapters. Chapter 1 reviews the political and economic history of Nigeria, to set the background and context that necessitated the introduction of the reform package of which privatization is just an aspect. Chapter 2 is a discussion of various natures of state involvement in an economy. This ranges from mere regulation to active participation. The Chapter discusses the competing conceptual and ideological theories and tries to situate the Nigerian experience within the broader conceptual dichotomies of capitalism, socialism and the via media of mixed economy. Chapter 3 is an examination of the meaning and rationales for privatization of state owned enterprises generally and the Nigerian attempts in particular. Nigeria's privatization program is an

ongoing exercise. Yet two distinct attempts are identifiable: one which started in 1988 and the reinvigoration of the exercise, albeit with new constitutive frameworks, in 1999. Thus, Chapters 4 and 5 review the legal and institutional frameworks for these two exercises. Chapter 6 deals with foreign investments in Nigeria. The discussion encapsulates the pros and cons of foreign investments, especially in Nigeria. Chapter 7 explores the direct and indirect linkages, between the privatization program in Nigeria and foreign investments in the country. This is particularly apposite because one of the touted objectives of the privatization exercise is the attraction of foreign investments. A conclusion follows. The work finds that although foreign investments appear to have been indirectly boosted by the privatization exercise, foreign investors initially did not show interest in direct acquisition of the shares and other interests being relinquished by the government, but that that attitude has been changing gradually.

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CHAPTER 1

A POLITICAL ECONOMY OF NIGERIA

I. INTRODUCTION

To set the overall context and background for this thesis, this chapter will review the political and economic history of Nigeria up to the present time. It is realized that such history is of itself so broad and indeed might constitute a full-fledged study. And, in actuality, there is a plethora of works devoted just to such history.¹ Thus, the attempt here will be to set the broad outlines of the historical experiences of Nigeria emphasizing those aspects that significantly give a sufficient background to a work such as this.

Nigeria is a complex sovereign nation situated in the western part of sub-Saharan Africa, and has a total land area of 923,768 square kilometers. With an estimated population of about 130 million people, Nigeria is the country with most blacks in the world.² It is also the most populated country in Africa and one of the most well

¹ See for example FOLORUNSHO AFODUNRINBI, *POLITICAL HISTORY OF NIGERIA* (New Millennium Communications, 2000); ALAN BURNS, *HISTORY OF NIGERIA* (Allen and Unwin, London, 1972); K.O. DIKE, *TRADE AND POLITICS IN THE NIGER DELTA, 1830-1885: AN INTRODUCTION TO THE ECONOMIC AND POLITICAL HISTORY OF NIGERIA* (Clarendon Press, Oxford, 1966)

² See C.C. Ifemesia, *Nigeria: The Country of the Niger Area*, in BONIFACE I. OBICHERE (ED), *STUDIES IN SOUTHERN NIGERIAN HISTORY*, 21 (Frank Cass Publishers, London, 1982)

known developing countries.³ It is bordered by the Atlantic Ocean to the south and by Niger Republic to the north. Its western neighbor is Benin Republic, part of the population of which is said to have an affinity with, or indeed to have come from, the Yorubas, a major group in Nigeria. To the east, Nigeria is flanked by Chad and the Cameroon.⁴ It has two main climactic seasons,⁵ the rainy and dry seasons, although the intensity of the seasons varies with the particular geographic part of the country. The rainy season is usually more intense in the south than it is in the north. The situation is reversed with the dry season, which is usually more intensive in the north than in the south. It is endowed with many rivers and waterways; the two most prominent ones are the Rivers Niger⁶ and Benue. Its peoples are multifarious and diverse. It is claimed that there are over 250 ethnic groups and languages in the country.⁷ As a result, there is hardly any one defining culture applicable to Nigerians. In contemporary times, the two dominant religions of Christianity and Islam co-exist with different forms of traditional religion, by

³ See TOYIN FALOLA, *CULTURE AND CUSTOMS OF NIGERIA*, 1 (Greenwood Publishing, Westport, CT, USA, 2002)

⁴ *Ibid* at 2

⁵ ONWUKA NJOKU, *ECONOMIC HISTORY OF NIGERIA, 19TH AND 20TH CENTURIES*, 6 (Magnet Business Enterprises, Enugu, Nigeria, 2001)

⁶ It is thought that the country's name was derived from this river. But see Ifemesia *supra* note 2 at 21-23, for a discussion of the academic and linguistic controversy on the source of the name Nigeria. Lady Lugard is credited with coining that name but some argue that the name had already been used in materials to which Lady Lugard had access before she allegedly coined it.

⁷ *Ibid* at 4.

which is meant a belief or faith system indigenous to the people before the advent of westerners or other foreigners. This has been a major source of friction and tension, with occasional, and sometimes violent, clashes occurring between the two major religions of Islam and Christianity. Some parts of the country practiced farming, other parts fishing, while others are known more for cattle rearing.

So pronounced are the differences, and lack of homogeneity, that it is an accepted notion that Nigeria is a creation of the British. Scholars⁸ and politicians alike are prone to start a discussion of Nigeria by reference to the momentous action taken by the British in 1914. It was in that year that the British colonial administration under the leadership of then Governor General, Lord Lugard, unified the southern and northern protectorates of Nigeria, to in essence form what is present day Nigeria. Hitherto that unification, popularly known as the amalgamation of northern and southern Nigeria, either protectorate had existed as a separate entity with its own governor general. Indeed, Lord Lugard, the architect of the amalgamation, in 1914, was on his second tour of duty, having served for six years, from 1900, as the high commissioner for northern Nigeria, and returning in 1912 to set in motion the process for the unification of Nigeria. Critics of the amalgamation accuse Lugard of bias towards the north and of attempting to institute a northern

⁸ See for example, Hassan A. Saliu and J.O. Durojaiye, *Background and Overview of Chapters*, in HASSAN A. SALIU (ED), *ISSUES IN CONTEMPORARY POLITICAL ECONOMY OF NIGERIA*, 1 (Sally & Associates, Ilorin, Nigeria, 1999) (asserting that: "the emergence of Nigeria in its modern sense can be traced to colonialism."

hegemony over the south. Lugard apparently was not impressed by the developing elites of the south but, instead, admired the laid back attitude of the north. Had Lugard not been changed as the governor general in 1918, it is speculated that he would have moved the capital of Nigeria from Lagos, the most cosmopolitan city in Nigeria then, and located in the south, to Kaduna situated in the north.⁹

Ade Ajayi would seem to allude to this preferential disposition on the part of Lugard, when he observes that Lugard gave two reasons for pressing for amalgamation. "First, Northern Nigeria needed to pool her resources with Southern Nigeria. For, while the administration in the North was still dependent on Colonial Office grants to balance its budget, the South with a better-developed overseas trade was able to exist on its customs and excise duties. Secondly, if the trade of the North was to expand rapidly, she needed an outlet to the sea which was open all the year round, in contrast to the River Niger on which traffic was seasonal."¹⁰

Whatever the merits, it seems clear that the merger was prompted by a desire on the part of the British for easy access for trading and economic purposes to the entirety of the geographical entity now called Nigeria. It is arguable that that

⁹ See

¹⁰ J.F. ADE AJAYI, MILESTONES IN NIGERIAN HISTORY, 27 (Longman, New Edition, 1980)

prejudice, in favor of the north, has been maintained by postcolonial rulers.¹¹ Historic as the amalgamation was, it did not wean the peoples of Nigeria of their profound attachment to their ethnic roots as is demonstrated by constant tensions and cleavages. Nor did the early leaders have any illusion that it would. The British government's reason for the unification was economic not political.¹² In fact, it has been noted that the British, out of immense concern with exploitation kept the ethnic nationalities as further apart as possible, and that this was so notwithstanding the celebrated amalgamation of the Northern and Southern protectorates.¹³ If the colonial powers were not interested in real integration amongst the people, the early post colonial leaders did not seem persuaded of the existence any such real unity either. Nor are the people themselves. It has been claimed that:

“the fact is that Nigerians individually and collectively tend not to have allegiance to the state imposed by the British in 1914. On an abstract level, Nigerians identify with the geographical entity mapped

¹¹ See KELECHI AMIHE KALU, *ECONOMIC DEVELOPMENT AND NIGERIAN FOREIGN POLICY*, 54 (Edwin Mellen Press, New York, 2000) (asserting, “... the practice of robbing the south to pay the north, once institutionalized, has remained a vexing issue. The same practice is at the root of the current strategy for economic development, manifested either in the form of economic diplomacy or as structural adjustment policies, within which the political and economic interests of the northern oligarchy are protected by the military establishment. Contemporary economic and political policies in Nigeria will be shown to parallel those of the colonial era, especially with respect to development, debt, and funding policies.”)

¹² J.F. ADE AJAYI, *supra* note 10 at 23 (asserting that: “the British were not seeking to unify Nigeria. They were not religious or political reformers seeking an empire where new religious or political principles could be enforced. They were essentially traders from abroad anxious to establish a situation favourable for the growth and development of their trade.”)

¹³ Saliu and Durojaiye, *supra* note 8 at p.1

out by the British, but concretely, seem unwilling to associate with the idea of Nigeria. Perhaps the key reason is that the founding fathers of Nigeria are foreigners. Hence most Nigerians irrespective of their nationalistic claims, have a tendency to first identify with their ancestral roots before identifying themselves as Nigerians."¹⁴

Similarly some of the nationalist leaders have been quoted to openly doubt the reality of the unity of Nigeria. Perhaps, the most famous statement in this regard is that credited to the late sage and Yoruba icon, Chief Obafemi Awolowo, who was the leader of one of the early political parties to have emerged on the Nigerian scene, the Action Group. He is quoted to have said that "Nigeria is not a nation. It is a mere geographic expression."¹⁵ His counterpart in the north, Sir Abubakar Tafawa Balewa, who led the Northern Peoples Congress, is said to have seen Nigerian unity as only a matter of intention, stating that "since the amalgamation of the North and the South provinces in 1914, Nigeria had existed as one country on paper... It is still far from being united. Nigerian unity is only a British intention for the country."¹⁶

¹⁴ KELECHI AMIHE KALU, *ECONOMIC DEVELOPMENT AND NIGERIA'S FOREIGN POLICY*, 39 (Edwin Mellen Press, Ltd, New York, 2000)

¹⁵ *Ibid* at 41 (quoting OBAFEMI AWOLOWO, *PATH TO NIGERIAN FREEDOM*); See also Jeffrey Herbst and Adebayo Olukoshi, *Nigeria: Economic and Political Reforms at Cross Purposes*, in STEPHAN HAGGARD AND STEVEN B. WEBB (ED), *VOTING FOR REFORM (DEMOCRACY, POLITICAL LIBERALIZATION, AND ECONOMIC ADJUSTMENT)*, 453, 454 (Published for the World Bank, Oxford University Press, 1994) (citing RICHARD A. JOSEPH, *DEMOCRACY AND PREBANDALISM IN NIGERIA*, 184 (Cambridge University Press, 1987)

¹⁶ KALU, *supra* note 11 at P.41 (citing Ayeni Olugbenga, *Which Way forward*, *West Africa*, Feb 14-20, 1994 P. 255)

However some argue that prior to the advent of the colonialists, the people inhabiting what is now called Nigeria interacted and communicated, even if they did not have a common government. Such communication was enabled by the many waterways existing in the territory of Nigeria and by the absence major mountains.¹⁷ Yet, others aver that though amalgamation was an act of the British, it was guided, and to a large extent dictated, by existing unities, geographical, commercial and cultural.¹⁸ Whatever the merits of amalgamation, it is clear that it did not erase any ethnic or other sectional cleavages. Those divisions, which persist today, underscore the fact that though formally enunciated as one entity in 1914, Nigeria's history, per force, involves the distinct histories of the several peoples that make up the country, an issue to which we now turn.

II. PRE - COLONIAL HISTORY OF NIGERIA

It is of course not always easy to determine how far back any historical study of any people can easily go. That dilemma is the more manifest when the place to be

¹⁷ ONWUKA NJOKU, *supra* note 5 at 6-7

¹⁸ ADE AJAYI, *supra* note 10 at 27. The eminent historian considers amalgamation a positive and asserts, at p. 28, that "we are therefore fortunate in Nigeria that by and large the British were drawn to recognize these unities and to follow them in their negotiations for acquisition and amalgamation"

studied was not always within the radar of early historians. "The early political history of Nigeria's states, large and small, is very complex, and full of obscurities."¹⁹ Evidence abounds of the existence, in what is present day Nigeria, of indigenous societies during prehistoric times.²⁰ Such evidence includes the finding of brass items in Bida, Ile-Ife and Benin, bronze in Igbo-Ukwu, terra cotta animals in Borno and terra cotta heads in Nok.²¹ Similarly, people lived in Nigeria, during both the stone and metal ages.²² Pre-colonial Nigeria was made up of many states. Some were large, some were small. Besides, even before the advent of the British, the contours of these states continued to change both from internal and external factors. Isichei argues that "in some areas, where the celebrated kingdoms developed, a change seems to have taken place which often follows a similar pattern, whereby a multiplicity of small-scale states, whose 'priest kings' were sometimes rulers of little territories, and sometimes linked with vocational guilds,

¹⁹ ELIZABETH ISICHEI, A HISTORY OF NIGERIA (WITH CONTRIBUTION BY PETER UCHE ISICHEI), 129 (Longman, London, Lagos, New York, 1983)

²⁰ TOYIN FALOLA, HISTORY OF NIGERIA, 37 (Greenwood Publishing group, Inc., Westport ,CT, USA, 1999); The Library of Congress documents that the earliest known example of a fossil skeleton with Negroid features, perhaps 10,000 years old, was found in Ileru in western Nigeria and attest to the antiquity of habitation in the region. See (visited 03/07/07)

²¹ Falola, supra note 20 at 37; The skilled artisans and ironworkers of the Nok were said to have flourished between the fourth century B.C and second century A.D. See (visited 03/07/07)

²² "Stone age refers to the period associated with hunter-gatherers who roamed the area in search of food and subsequently made a transition to agriculture." The metal age began with iron, and later copper, brass, and bronze." See Falola, supra note 20 at 37-38

gave way to unified kingdoms. The creation of a kingdom is often linked with an invasion from outside- but the invader need not come from far away.”²³

A. THE YORUBA KINGDOMS

The Yorubas occupy the western part of Nigeria and speak a language called Yoruba. They trace their origin to a common progenitor known as Oduduwa. Myth has it that Oduduwa founded the city of Ile-Ife. To this day the Yorubas regard that city as the center of their history and tradition. The origin of other cities is traced to Ile-Ife as it is claimed that Oduduwa dispatched his sons to establish the other cities such as Oyo, Ibadan and others. Remarkably, about the fifteenth century, some of these new cities surpassed Ile Ife in both political and economic powers, with the result that Ile-Ife’s relevance assumed only a spiritual dimension. Actually, this would seem to be case even in contemporary times. Most of the other Yoruba cities are larger and more developed than Ile-Ife. But in matters of tradition, Ile-Ife enjoys a pride of place and its traditional ruler, the *Ooni*, is regarded not just as the traditional ruler of the city but also as the traditional head of all Yorubas since he occupies the stool of their progenitor, Oduduwa.

²³ ISICHEI, *supra* note 19 at 129

Of all the cities founded by the children of Oduduwa, Oyo became the most powerful²⁴ and was headed by a traditional ruler called *Alafin* who was assisted by a council of state called *Oyo Mesi*. It achieved substantial military victories resulting in the extension of its empire further north to Nupe and Borgu and even parts of what is now the Republic of Benin, Nigeria's neighbors to the west.²⁵ Although, the Binis, to the east of the Yoruba kingdoms, are not strictly considered Yorubas, they have an affinity to Ile-Ife. Like the Yorubas, their traditional rulers are called Obas.²⁶ It is said that because of internal quarrels amongst the Binis, Oduduwa sent someone to rule them, and the practice endured. Today it is claimed that the Oba of Benin (the modern name) descended from Ile-Ife.

B. THE NORTHERN KINGDOMS

The history of pre-colonial northern Nigeria is the history of the Hausas, Fulani's and that of the other peoples who live in that region. The dominant pre-colonial

²⁴ Falola, *supra* note 20 at 20

²⁵ *Ibid*

²⁶ Falola notes that originally Benin's rulers were known as *Ogiso*. Then a dynasty was established by a certain Eweka, who, according to tradition, was influenced by the Yoruba and chose the title of Oba (king). See Falola, *supra* note 20 At 21

themes were the Kanem Bornu, the Hausa and later the Sokoto Caliphate. The Kanem Bornu empire in the north east part of Nigeria and existed partly outside the territory that constitutes present day Nigeria. The Hausas existed more or less in the center and were for a long time ruled by the Songhai Empire, which had stretched from Senegal and the Gambia, in the west, all the way into Hausa land including Kebbi, Katsina and Gobir. It was not until the sixteenth century when the Songhai empire collapsed following an invasion by an army from Morocco, that the Hausa states became independent, that is became free from Songhai's domination. About the same time Borno reached its zenith, and also benefited from the fall of the Songhai empire by being the uncontested power in northern Nigeria. A severe drought and famine in the middle of the eighteenth century combined with internal agitations and rivalries to weaken the Borno empire and set the stage for the Islamic jihad mounted by a cleric, Usman dan Fodio and the creation of the Sokoto Caliphate in the nineteenth century.²⁷

²⁷ Frick

²⁸ See
Hassan

C. THE IGBOS

A majority who are Igbos populates the eastern part of Nigeria. The unique feature of the history of the Igbos is the notion that prior to the advent of the colonialists they were a stateless society. This simply means that in contrast to the Yorubas and the Hausas and Fulanis, in respect of which certain organizational features had been documented at, what may fairly be said to be, a macro level, the Igbos "were divided into small mainly patrilineal clans, each with its own founding ancestor. Hundreds of villages existed not as members of one Igbo kingdom, but as autonomous units, each with its own government."²⁸ There was of course mutual cooperation among the various families and clans. Government existed at the level of these families and clans. Disputes and serious matters were settled by the elders or by age grades.²⁹

²⁸ Falola, *supra* note 20 at 44

²⁹ An age grade is an association of people born within a particular period usually between one to two years. Essentially, members of a particular age grade are usually age mates.

III. THE ADVENT OF THE BRITISH

As noted earlier, Britain colonized Nigeria and ruled the country for about six decades.³⁰ However, the first Europeans that happened on the Nigerian scene were the Portuguese, who arrived about the fifteenth century and concentrated on trading and missionary work. They had no territorial desires and restricted themselves to fortified trading stations.³¹ In the sixteenth century, the British, French and the Dutch began to compete with the Portuguese and the focus shifted to the dehumanizing and immoral trade in slaves.³² The British continued to place emphasis on trade but was willing to use force and intimidation to protect its trading interests. Principally, it used the instrumentality of a trading company known as the Royal Niger Company to carry out both its trading and quasi-governmental activities. Territorial annexation intensified in the nineteenth century. Lagos became a colony in 1861. In the late 1880s, the British intervened in what had been a sixteen-year war among the Yorubas and took over the area. Similarly, the British conquered Benin in 1897. Meanwhile there had been strong competition from the other Europeans, the French and the Dutch for more participation in the

³⁰ From 1900 to 1960; this was the period that of formal colonization. Certainly British coercion started way before 1900 and, some would argue that, it did not end with the independence proclamation of 1960.

³¹ Falola, *supra* note 20 at 50

³² *Ibid*

“spoils” of their exploration in Nigeria. The Berlin Conference of 1885 has become infamous for its brazen and obscene agenda: the so-called partition of Africa. In their nineteenth century wisdom, the conferees, in consequence of their distribution, allotted Nigeria to Britain to exploit, under the so-called principle of dual mandate. Britain was still not interested in formally acknowledging the annexation of Nigeria as a colony even though to all intents and purposes, it was maximally exploiting it. But it needed an assurance that the despoliation of the country would be its, to the exclusion of the other Europeans. While the conference acknowledged Britain’s claims to a sphere of influence in Nigeria, it stipulated that only effective occupation would secure full international recognition. Britain therefore took steps to effectively occupy Nigeria. It formed the Oil Rivers Protectorate, which covered the Niger Delta area up to Calabar. The British Consulate General relocated to Calabar.³³ This protectorate would later become the Niger Coast Protectorate³⁴ and be expanded to include the areas from Calabar to the Lagos colony. This was followed by the occupation of the entire south. The north became a protectorate in 1900.³⁵ The two protectorates were each headed by a higher commissioner until the amalgamation in 1914, when they came under the administration of one governor general. An alternative theory is that British

³³ Thus Calabar is sometimes regarded as the first capital of Nigeria.

³⁴ This was in 1894.

³⁵ Lord Lugard became its high commissioner.

annexation and occupation of Nigeria was accentuated by the need to stop slave trade, following its abolition by the British Parliament in 1807.

IV. COLONIAL ADMINISTRATION

Following amalgamation, Nigeria was administered as one entity.³⁶ As early as 1922 there had been agitations for greater involvement of Nigerians in its affairs. Herbert Macauley, often referred to as the father of Nigerian nationalism, founded his Nigerian National Democratic Party in 1922. That same year the Clifford Constitution, named after the then governor general, introduced a legislative council and a limited measure of elections into the council. Another major development was in 1946 with the introduction of the Richards Constitution of that year. That constitution introduced the concept of regionalism. A federal principle was introduced in 1951 and 1954 with the Macpherson Constitution and the Lyttleton Constitution respectively. All this while, there had been strong agitations, led by nationalist leaders, for independence. The independence Constitution of

³⁶ This was through the principle of indirect rule, by which the colonial administrators administered the colony through the local and already existing traditional institutions. That system was fairly successful in the north and west, which had established traditional authorities. In the east where there were no preexisting centralized authorities, the colonial authorities create what they called warrant chiefs, and tried to rule through these chiefs, but the indirect rule in this part was acclaimed to be a failure. There was also the Nigerian Council, which was touted as an avenue for the appointed members to express their opinions on the issues affecting governance but was in actuality merely advisory.

1960 granted independence to Nigeria even though the colonial link was not completely severed. The Queen of England remained head of the country. These links were completely cut in 1963 when Nigeria became a republic.

V. COLONIAL ADMINISTRATION AND THE ECONOMY

If Nigeria was born in 1914, it follows that its economy, at least that aspect that relates to the corporate entity, is of recent origin. But as we have seen, people lived and functioned in the territory now called Nigeria before the coming of the Europeans. These folks carried out economic activities although not at modern large scale or macro economic level. Agriculture was by far the most pervasive of the economic pursuits of the Nigerian peoples in the nineteenth century.³⁷ This was so in almost all parts of the country, even though the kind of agriculture practiced varied from part to part, depending on climate. In some parts farming in the nature of cultivation of crops, was the mainstay. Other parts, such as the Fulani of the north, engaged in animal rearing, while those with proximity to rivers were mainly fishers. The large number of waterways available facilitated trading.

³⁷ ONWUKA NJOKU, ECONOMIC HISTORY OF NIGERIA 19TH AND 20TH CENTURIES, 9 (Magnet Business Enterprises, Enugu, Nigeria, 2001)

Initially, such trading was of the form of trade by barter, whereby an individual brought goods, which they wanted to sell, and exchanged the goods with another person having an item, which the first individual wanted.³⁸ The concept of money developed later.

The parts of pre-colonial Nigeria, which had centralized administrations, like the old Yoruba kingdoms and the empires in the north, had various systems of paying tributes to the kings or rulers. That would equate modern system of taxation. In the other parts without centralized systems, communal efforts were usually pooled to address communal concerns. This could range from occasional levies or other impositions on adults or households to a requirement of participation in communal labor to address any needs requiring such labor.

The very nature of colonialism is that of exploitation. As we have seen, the British interest in Nigeria, nay Africa, was primarily commercial. Therefore, its focus was in running the colony in such a way as to maximize the realization of its interests.

³⁸This was cumbersome as it required double coincidence of needs, that is to say that a person desiring to sell did not just have to find another person in need of that which the first person wanted to sell, but rather another who not only needs such item but also had in their possession an item which the first person wanted so that they could exchange the items.

The economy was essentially dependent and a surrogate of the British economy.³⁹ According to Edame, "the output of the country were wholly primary products and mainly agriculture. These included cotton, rubber, palm oil, and tin, columbite and coal. The bulk of these were exported to Britain while the country with its vast land area and teeming population provided a virile market for British goods."⁴⁰ Thus, the thrust of the colonial economic approach was the development of Nigeria both as a source of raw materials for overseas use and as a market for finished products from abroad. This parasitic approach was reflected in the economic policies of the colonial administration, during the colonial era.

It has been argued that the colonial administration adopted a cavalier attitude towards development policy formulation in general.⁴¹ From amalgamation, in 1914, it took the colonial administration until 1945 to prepare a development plan for the colony. When it finally did so, after the Second World War and while nationalistic stirrings had begun, it produced a document that has been severely

³⁹ G.E. EDAME, *DEVELOPMENT ECONOMICS AND PLANNING IN NIGERIA*, 242 (Harmony Books, Benin City, Nigeria, 2001)

⁴⁰ G.E. EDAME, *supra* note 39 at 242; A.C. EYIUCHE, *THEORY AND METHODOLOGY OF DEVELOPMENT PLANNING IN DEVELOPING ECONOMIES (NIGERIA PLANNING EXPERIENCE 1945-2000)*, 242 (Maurice Production Services, Enugu, Nigeria, 2000)

⁴¹ See N.I. Ikpeze, C.C. Soludo and N.N. Elekwa, *Nigeria: The Political Economy of the Policy Process, Policy Choice and Implementation*, in CHARLES SOLUDO, MICHAEL OGBU AND HA-JOON CHANG (ED), *THE POLITICS OF TRADE AND INDUSTRIAL POLICY IN AFRICA FORCED CONSENSUS?* Chapter 13 (Africa World Press, Trenton, NJ, 2004)

criticized as not really being a plan.⁴² In 1945 the British prepared the *Ten-Year Plan of Development and Welfare for Nigeria, 1946-55*.⁴³ The plan was initiated as a result of a request by the British Colonial Office in London, which had wanted such plans from the colonies to assist it in disbursing the colonial development and welfare funds.⁴⁴ That plan was to be funded by twenty-three million pounds sterling from the United Kingdom government and twenty-six million pounds sterling from Nigeria itself. It was supposed to last ten years but was broken into 5-year sub-periods owing to rapid structural changes being then experienced in Nigeria. Even so, it was terminated in 1954, following the introduction of the concept of regionalism and that of regional autonomy. Each region launched its own development plan.⁴⁵ Its central objective was the improvement of the socio-economic well being of Nigerians.⁴⁶ "That was to be accomplished through the provision of physical facilities such as roads, telecommunications, water supply,

⁴² See KALU, *supra* note 11 at 57

⁴³ Government of Nigeria, *A Ten Year Development Plan of Development and Welfare for Nigeria, 1946-55* (Lagos, Government Printer, 1946)

⁴⁴ A.C.E. EYIUCHE, *THEORY AND METHODOLOGY OF DEVELOPMENT PLANNING IN DEVELOPING ECONOMIES (NIGERIA PLANNING EXPERIENCE 1945-2000)*, 53 (Maurice Production Services, Enugu, Nigeria, 2000)

⁴⁵ EYIUCHE, *supra* note 40 at 55

⁴⁶ KALU *supra* note 11 at 55

hospitals and general improvement in the ability of the people to feed themselves through increased agricultural research and yields.”⁴⁷

The colonial economic plan, as reflected in the Development and Welfare Plan, has been criticized on many grounds. First, as in most colonial policies, it was prepared by foreigners, notably senior colonial government officials, and suffered the defect that characterized most of such alien policies: It did not reflect the experiences and aspirations of the people. Similarly, it did not benefit from any data essential to a plan of that magnitude. Secondly, its treatment of industrialization was poor. Indeed, it seems that the drafters were loath to the idea of industrialization of the colony. It seemed to scoff at the notion of an industrial Nigeria, when it stated:

“Due regard will be given to the possibilities of industrialization where conditions warrant it, and where such production can be carried out economically and at reasonably competitive prices. It is not assumed, however, that Nigeria will become an industrial country as with its large population and area a great deal of its future must rest in agricultural development in its widest sense, and the improvement of village industries.”⁴⁸

The tenor of the document was anti industrialization, thus underscoring the fact that it merely furthered the dual colonial interests of finding a source of raw

⁴⁷ KALU supra note 11 at 55; EYIUCHE, supra note 40 at 54

⁴⁸ Quoted in KALU, supra note 11 at 56

materials for foreign industries and a market for the finished products of those industries. Perhaps, it could be argued that given the state of both educational and technological development at the time, Nigeria could not rapidly transform into an industrial colossus. Yet, the whole reason for a development plan should have been to document the aspirations of the people and focus their attention towards a goal. It would not have been overly ambitious at the time for Nigeria to aspire to become industrialized. The Development Plan instead of promoting this worthy goal dampened the zeal.

Thirdly, part of the funding for the Plan was to be sourced through loans in the London market.⁴⁹ Again, this benefited the colonial powers more than it did the people of Nigeria, and is also criticized as the genesis of the culture, which seems to have taken hold, for the government to always borrow for development plans.⁵⁰ Fourthly, and more importantly, the Plan is criticized as being no plan at all but merely a collection of projects, which had not been coordinated or related to any

⁴⁹ KALU, supra note 11 at 58

⁵⁰ KALU supra note 11 at 58

overall economic targets⁵¹, and the selection of which did not involve the population.⁵²

Before the introduction of the next Plan the colonial administration requested the International Bank for Reconstruction and Development (as the World Bank was then known) to undertake a mission "to assess the resources available for future development, to study the possibilities for development in the major sectors of the economy and to make recommendations for practical steps to be taken, including the timing and co-ordination of developmental activities."⁵³ The mission made up of ten full time members and five part time members spent about three months in Nigeria and retired to the Bank's headquarters to write their report.⁵⁴ Even though in this case, there was an attempt to understand and reflect the situation of Nigeria, the mission's report and the resulting five-year Development and Welfare Plan, 1955-62⁵⁵, still suffered from the same problem of inadequate Nigerian input. None

⁵¹ Anene Nnoli, K.O. Orji and Aforka C. Ibe, *Development Planning in Nigeria*, in AFORKA C. IBE (ED), *ECONOMIC PROBLEMS OF NIGERIA*, 56 (Sellyoak Int. Coy., Awka, Nigeria, 2002); Ikpeze, Soludo and Elekwa, *supra* note 41

⁵² EYIUCHE, *supra* note 40 at 54

⁵³ See *The Economic Development of Nigeria*, vii (a publication of the World Bank, 1955/01/01)

⁵⁴ *Ibid* at vii

⁵⁵ The Plan was initially to end in 1960 but was extended to 1962

of the fifteen members of the mission was Nigerian.⁵⁶ The Plan has thus been similarly dismissed as not well articulated.⁵⁷

VI. POST INDEPENDENCE AND ECONOMY

With independence in 1960, the reins of governance and of the economic destiny was bestowed on Nigerians, even though they inherited, from Britain, an economy that has been described as primitive, agrarian and import-consumer dependent.⁵⁸

The contest for political leadership in Nigeria has been exceptionally fierce, turbulent and even violent at times. This has affected the economy a lot. Indeed, the country fought a civil war from 1966 to 1970, which war obviously impacted the economy in adverse ways. The recurring decimal of loyalty to ethnicity, which has, more than anything else, militated both against national cohesion and economic development, reared its ugly head early in post independence Nigeria. In fact, the World Bank Mission, which had visited Nigeria in 1953, had warned of the dangers that undue emphasis on regionalism could pose to development when

⁵⁶ The Chief of Mission was from the Netherlands. The other members were from Australia, France, Italy, Turkey, the United Kingdom and the United States. See *The Economic Development of Nigeria*, vii (A publication of the World Bank, 1955/01/01)

⁵⁷ EYIUCHE, *supra* note 40 at 64-66

⁵⁸ *Ibid* at 68

they said that "while agreeing that political decentralization is necessary in a country as heterogeneous as Nigeria, we caution that regionalization carried too far, as for example by exaggerated emphasis on the particular good of any one region, may retard development of Nigeria as a whole."⁵⁹ A conspectus of the Nigerian political economy would reveal that this fear has been borne out. And not only that, it is arguable that the Nigerian enterprise, as an amalgam of diverse peoples, is proving unworkable.

At independence the country adopted the Westminster model of democracy. The Prime Minister⁶⁰ was from the northern part of the country. The Governor General⁶¹, who was essentially the British Queen's representative⁶², was from the East, while the leader of the opposition⁶³ came from the west. Thus was enunciated a pattern and an economy ever sensitive to, indeed driven by, ethnic tensions. Nonetheless, the first republic set about governing. It initiated the First National Development Plan, 1962-1968. Significantly, this development plan was introduced without the necessary population data obtainable from a census. The

⁵⁹ The Economic Development of Nigeria 22 (A World Bank Publication, 1955/01/01)

⁶⁰ Sir Abubakar Tafawa Balewa, who was the leader of the Northern Peoples Congress, which had won the most number of seats in the legislature.

⁶¹ Sir Nnamdi Azikiwe, the leader of the National Council of Nigeria and the Cameroons.

⁶² This situation changed in 1963 when the country became a republic and the Queen ceased to be its head.

⁶³ Sir Obafemi Awolowo, leader of Action Group

attempt to conduct a census in 1963 and the conduct of elections in 1964 are regarded as the immediate precursors to the crisis of the 1960s. Since electoral constituencies, and consequently allocation of federal resources, were to be based on population, politicians were alleged to have manipulated the count in their areas to maximize, some would say, inflate the official population figures in their areas. Besides, in a polity characterized by predominant allegiance to tribe, and where there was no political party with broad national following, every party and every politician had the practical incentive to inflate the number of people in their respective areas of influence.

The First National development Plan, 1962-1968, paid attention to industrialization and enunciated an open door policy which enabled Nigeria to enter into multilateral trade agreements with other countries.⁶⁴ It accorded priority to agriculture, industry and technical training and has been described as the first effort to relate planning to national development goals.⁶⁵ Even if the plan would have ushered in a viable economy, and whatever gains were made, it was distorted by the civil war, which raged from 1967 to 1970. The ethnic tensions came to a head following a coup, the leaders of which were mainly from the Eastern and

⁶⁴ T. A. ADEYIUCHE, *supra* note 40 at 89-90

⁶⁵ *Ibid* at 91-94

Midwestern parts of the country. Although the coup was aborted and it was revealed that the coupists intended to wipe out the leadership of the country, it happened that the actual victims were mainly from the north.⁶⁶ This prompted a counter coup, led by soldiers from the north, against eastern officers⁶⁷, and a pogrom on the easterners who were in the north. In consequence, the easterners no longer felt safe in Nigeria and decided to secede from the union. The central authority declared war on the east in order to prevent the secession. The war lasted until 1970 when the east surrendered.

The war's end was followed by the program of reconciliation, rehabilitation and reconstruction, which was, embarked upon by the federal government, now under the leadership of a military head of state⁶⁸ from the middle part of the country, known as the middle belt. The program aimed at reintegrating the east into mainstream Nigeria and also rebuilding the infrastructure, which had been destroyed by the war. There was introduced, another development plan, known as the Second National development Plan, 1970-74. It was unique in the sense that it

⁶⁶ The Prime Minister, Tafawa Balewa, a northerner, and the Premier of Northern Nigeria, Sir Ahmadu Bello, both died in the coup.

⁶⁷ General Aguiyi Ironsi, the Military Head of State, who had taken over the reins of government following the first coup, and who hailed from the east died in this coup.

⁶⁸ General Yakubu Gowon

was prepared by Nigerian economists and planners and ninety per cent of the total finance was expected to be generated internally.

VII. THE OIL BOOM AND THE CRISIS OF THE 1980S

The era 1970-1980 was the most prosperous for Nigeria. It was at the same time a period in which Nigeria was at its most profligate. Prior to 1970, agriculture was the leading sector of the Nigerian economy providing seventy per cent employment of the population and accounting for eighty per cent of government revenue.⁶⁹

Nigeria was also a major exporter of agricultural commodities such as cocoa and rubber.⁷⁰ Then, the oil boom came. That boom has been attributed to the Arab Israeli war in 1973, following which Arab countries imposed an oil embargo.⁷¹

Demand for Nigerian oil, which had been discovered in 1956, rose dramatically and the country was awash in oil money. Agricultural exports, as a percentage of total exports, decreased from 73 per cent in 1962 to 1 per cent in 1981, with oil

⁶⁹ MIKE OBADAN AND FRANK DINOWO, *ESSAYS ON NIGERAN ECONOMY*, 83 (Mindex Publishing Coy., Benin, Nigeria, 2000); See also Emmanuel E. Umebali, *Nigerian Economy: An Overview*, in UMEBALI AND MADU, *NIGERIAN ECONOMY: ISSUES AND TRENDS*, 1 (Acafor Books, Enugu, Nigeria, 1992)

⁷⁰ OBADAN AND DINOWO, *supra* note 69 at 83

⁷¹ KALU *supra* note 11 at 64

accounting for more than 93 per cent of exports between 1973 and 1981.⁷² Oil also accounted for 75 per cent of government revenue rising from 26.3 percent in 1970.⁷³

This development marked the onset of one malaise, and exacerbated an already existing condition, in the Nigerian economy. These were respectively, what have been termed the *Dutch disease* on the one hand and the *rentier* system or *clientelism* on the other. It has been noted that "oil is often not the blessing it appears to be: it provides great opportunities, but the very nature of the industry also makes these almost impossible to grasp and induces growing structural strains. A particular property of oil is that it casts a smokescreen over a country's real problems. Symptoms such as foreign exchange problems and fiscal inadequacies are temporarily concealed."⁷⁴ In a clear manifestation of the *Dutch disease*⁷⁵, the

⁷² Herbst and Olukoshi, *supra* note 15 at 458

⁷³ OBADAN AND DIMOWO, *supra* note 69 at 83

⁷⁴ See N.I. Ikpeze, C.C. Soludo and N.N. Elekwa, *supra* note 41. (Quoting Seers, D. 1981. "The Life Cycle of a Petroleum Economy and its Implications for Development," *Research for Development*, Vol. 1, No. 1)

⁷⁵ "Dutch disease is an economic concept that tries to explain the seeming relationship between the exploitation of natural resources and a decline in the manufacturing sector. The theory is that an increase in revenues from natural resources will deindustrialise a nation's economy by raising the exchange rate, which makes the manufacturing sector less competitive." See _____, (Visited 03/25/07)

government shifted attention from agriculture to mostly services.⁷⁶ Obadan and Dimowo contend that the new found wealth brought with it fundamental changes in the attitude of the government towards the economy.⁷⁷ Spending became rampant and was given additional impetus by the reconstruction program being undertaken after the civil war. The era witnessed a proliferation of public sector institutions and enterprises while private sector firms depended largely on imported inputs.⁷⁸ The head State was quoted to have said that Nigeria's problem was not money, but rather how to spend money.⁷⁹ And the powers that were, devised all kinds of ways to spend it, fortified in their Dutch courage that the oil wells were not running dry anytime soon, and that the world's demand for oil would not abate. The story is told of how government imported bags of cement, which had to stay at

⁷⁶ See Nigerian Structural Adjustment Program, Policies, Implementation, and Impact, vii (World Bank Report No 13053-UNI, May 13, 1994)

⁷⁷ These changes were: (i) the economy became heavily dependent on crude oil and spawned all kinds of investment in social, physical and economic infrastructure. There was no incentive to increase domestic revenue mobilization; (ii) deficit budgets became the order of the day as state governments embarked on spending, with the federal government readily financing these; (iii) state and federal governments embarked on white elephant projects; (iv) investment activities were largely urban based and emphasized social and economic infrastructure without adequate incentives for private sector participation. This adversely affected the productive sectors such as agriculture; (v) proliferation of firms which largely depended on imported inputs; (vi) emergence of widespread imbalances and distortions with the dependence on oil exposing the country to external shocks; (vii) competitiveness of agriculture was eroded by over valued exchange rate, inadequate pricing policies, rural-urban migration and neglect arising from the oil boom syndrome; (viii) the structure of policy incentives and controls encouraged import oriented production and consumption pattern with little incentives for non oil exports; (ix) the public sector, assisted by the Nigerian Enterprise Promotion Decrees 1972 and 1977, became the prime mover of the economy through huge investments in social, physical and economic infrastructure. See OBADAN AND DIMOWO, supra note 69 at 83-84.

⁷⁸ See Aham Anyanwu, *The Nigerian Economy Under the Structural Adjustment Programme*, in EMMANUEL UMEBALI AND EPHRAIM MADU (ED), NIGERIA ECONOMY; ISSUES AND TRENDS, 5 (Acafor Books, Enugu, Nigeria, 1992)

⁷⁹ See FALOLA, supra note 3 at 143

the port for more than one year before they could be unloaded. Meanwhile, the government continued to pay demurrage. While waiting for the unloading, the cement turned into crystals and had to be thrown away.⁸⁰ Within the same period, the government launched the Third National development Plan, 1975-1980, with a projected capital expenditure of 53.6 billion naira reflecting an increase of more than 1600 per cent over the Second National Development Plan, which had provided for a capital expenditure of 3.2 billion naira.

Political Scientists teach that people go into politics in order to control the machinery of government and influence its policies. In every society, such control to some extent entails influencing the allocation and distribution of state resources. In most advanced economies, individuals hardly seek political office for the reason of making money. Indeed, public servants are reputed not to be paid as well as those in comparable positions in the private sector. This is not so with the Nigerian scenario. The colonial administrators could have been servants of Her Majesty in Britain, but certainly were no servants of the people of Nigeria. They were, of course, not elected by them and not answerable to them. Thus, the legacy bequeathed to Nigerian leaders was not one of service to the people but rather that of an image of leaders and government officials as maximum rulers and exploiters

⁸⁰ FALOLA note 20 at 148-149

answerable to no one. The malady of corruption reared its head almost immediately independence was obtained. The plotters of the abortive coup in 1966 alluded to this cankerworm. They claimed that their action was aimed at the eradication of "ten per centers".⁸¹ The oil boom aggravated the problem of corruption and fed the *rentier* economy. A *rentier* economy has been described as one "whose major source of revenue does not arise from taxation on productive activities – agriculture, industry, services – undertaken by its economically active population. Instead, the rentier state lives by collecting a convenient income from sources into which it invests little or nothing. Rent comes in without opportunity costs, and if it comes in as centralized as in the case of oil, it is even more convenient from the treasury's point of view."⁸² The oil boom distorted the incentive structure and destroyed the traditional link between industry and government.⁸³ The state was pre-occupied with distributive politics rather than a systematic program of wealth creation and hence, did not take seriously the issue of providing an enabling environment for industrialization"⁸⁴ or other more

⁸¹ Referring to the fraudulent practice whereby government officials demanded that a prospective awardee of a government contract should pay them ten per cent of the contract price for their own personal use and enrichment.

⁸² Axel Harniet-Sievers, *Reforming the Rentier State: Some Thoughts on NEEDS*, in SAM AMADI AND FRANCIS OGWO (ED), *CONTEXTUALIZING NEEDS ECONOMIC/POLITICAL REFORM IN NIGERIA*, (Report of Civil Society Policy Dialogue on the National Economic Empowerment and Development Strategy (NEEDS)), xi (Hurislaws, Lagos, 2004)

⁸³ N.I. Ikpeze, C.C. Soludo and N.N. Elekwa, *supra* note 41

⁸⁴ Ikpeze et al *supra* note 41

productive sector. Politics or access to power became the quickest way to get rich and the contest for power has remained fierce and occasionally deadly. Even industrialists who could have driven the development of the private sector became caught up in the pursuit of access to the oil rent. Nearly all businessmen were in politics and nearly all politicians were in business.⁸⁵ It was also during the decade from 1971 to 1980 that Nigeria embarked upon the limited nationalization of some foreign companies⁸⁶ and the bureaucracy positioned itself to extract maximum rents from the exercise.⁸⁷ The boom did not last long. By the 1980s the country had been thrown into economic crisis from which it is still trying to rise.

In just under a decade, following the oil boom, the economy took a downturn. It is said that the first shock in the Nigerian economy was witnessed around 1977 and 1978, during the first regime of Olusegun Obasanjo, but the government ameliorated it by introducing austerity measures and these measures coupled with the recovery of the world oil market ensured that Obasanjo handed a healthy economy to Shehu Shagari, who became the President of the country in 1979.⁸⁸

⁸⁵ Ikpeze et al supra note 41

⁸⁶ See Nigerian Enterprises Promotion Decrees 1972 and 1977

⁸⁷ See Ikpeze et al supra note 41

⁸⁸ Aham Anyanwu, *The Nigerian Economy Under the Structural Adjustment Programme*, in UMEBALI AND MADU, *NIGERIA ECONOMY: ISSUES AND TRENDS*, 5,6 (Acafor Books, Enugu, Nigeria, 1972)

The civilian administration of Shagari became even more unrestrained, than the military administration before it, in spending. That administration also marked the adoption of the presidential system of government, which by its very nature is more expensive. Dispensation of political patronage became the order of day. The Fourth National Development Plan, 1981-1985, was expected to be funded from revenue generated from the export of crude oil.⁸⁹ In 1981, there came a glut in the world oil market, which significantly reduced the country's earnings from oil. As a result, the government had to borrow money from private sources to finance the development plan.⁹⁰ Instead of the shortfall occasioning a reduction in spending, the government paid no heed. Besides, elections were to be conducted in 1983, and the ruling party was prepared to share the oil rent in whatever manner that would ensure its return for a second term. Even then, signs of the recession were evident, as there was a scarcity of essential commodities. The government had difficulty raising enough money for basic government needs.⁹¹ But the administration attributed the problem to hoarding, "world wide" recession and the collapse in the international oil market.⁹² Successive administrations have since been struggling to

⁸⁹ KALU supra note 11 at 69

⁹⁰ KALU supra note 11 at 69

⁹¹ Kalu supra note 11 at 69

⁹² Anyanwu, supra note 78 at 86-87

alleviate the problem. The response of the Shagari administration was to pass the Economic Stabilization (Temporary Provisions) Act 1982. The Act introduced austerity measures by aiming to reduce public expenditures and curtailing imports. The Act remained a statement of intention only. Governmental actions did not follow the Act. Actual expenditures continued to exceed projected expenditures.⁹³ The international financial market became dubious about Nigeria's credibility.⁹⁴ Its negotiation with International Monetary Fund (IMF) was stalemated because Nigeria refused some of the conditionalities imposed by the IMF.⁹⁵ A combination of the worsening economic condition and the farce that was the 1983 election⁹⁶ gave the restive military the pretext, if it needed one, to intervene once more in the political process. A few months after winning, some would say stealing, its second term, the Shagari government was overthrown by a military junta led by Muhammed Buhari.

Buhari's regime continued the austerity measures imposed by its predecessors, but made little headway with the international agencies. It also rejected the IMF conditionalities. However, it tried to combat the cankerworm of corruption, by

⁹³ Herbst and Olukoshi, *supra* note 15 at 462

⁹⁴ *Ibid* at 463

⁹⁵ *Ibid* at 465-467

⁹⁶ That election was characterized by allegations of massive rigging and other voting fraud.

launching a social program which it dubbed "War Against Indiscipline" or "WAI", for short. The Buhari administration lasted only twenty months, and so it is difficult to assess the extent to which its social crusade succeeded, but it is generally agreed that for the short time, it was the only real attack on *clientelism* in Nigeria. Notwithstanding that, the economic conditions did not improve much. This and the excessively autocratic nature of the government generated a lot of dismay amongst the populace. In August 1985, another group of military officers, led by Ibrahim Babangida, cashed in on the disenchantment and wrested power from the Buhari government.

VIII The Babangida Administration: A Readmission into the International Economic Fold

Those who contend that the oil boom was a curse mostly point to the phenomenon of the *Dutch disease* to which we have already alluded. Another downside of that era is that its collapse led to the exclusion of Nigeria from the international financial fold. Shagari's government sought a facility from the IMF but did not get any because of its rejection of the conditionalities attached. Buhari's government also tried to get a much-needed financial shot in the arm from the multilateral

agencies to no avail. Nigeria practically became a pariah in international financial circles.

It would seem that the Babangida administration, from the out set, was determined to reinstate Nigeria into the friendly, or unfriendly, international financial community, led by the IMF and the World Bank. The sticking points in prior administrations' efforts to get assistance from the IMF and other financial institutions had been the conditions, which the IMF imposed on such assistance. Most of these conditions were not palatable to a generality of the people, informed or uninformed. Ironically, although Babangida's government came to power by force of arms, it wanted to differentiate itself from its immediate predecessor, which had been seen as insensitive and overly dictatorial, even for a military administration. Where it was thought that the Buhari government did not consult or listen to the people, Babangida wanted to have a semblance of consultation. And so it happened that the vexed economic issue, of whether or not to take the IMF loan with its conditionalities, was thrown open, for debate, to the people of Nigeria to be coordinated by a committee set up by the government.⁹⁷ Three options were said to face the nation: (i) continue with the austerity measures which had not had

⁹⁷Herbst and Olukoshi, supra note 15 at 472

much impact; (ii) adopt a structural adjustment program and take an IMF loan; or (iii) adopt a Nigerian variant of structural adjustment program, whatever that means. A field day ensued and opinions were expressed from all nooks and corners of the country, again some informed and some uninformed, but it was not difficult to fathom that the preponderance of the opinions was that of rejection of the IMF loan. The committee accordingly recommended a rejection of the IMF loan. The government interpreted the rejection of the IMF loan as an acceptance of option iii (the adoption of a local variant of structural adjustment). It did not seem to matter that the so called local variant entailed almost all the conditionalities associated with the IMF loan. Nigerians had spoken and the government pretended to be listening. It also did not matter that the IMF and the other multilateral agencies were now impressed and therefore willing to work with the government. In 1986 the government formally announced the adoption of a comprehensive structural adjustment program (SAP) in cooperation with the World Bank and with IMF clearance⁹⁸, thus removing any illusions about the real ownership of the program.

But by then the nation had been sufficiently mollified by the perceived populism of its government or was no longer interested in the complexities. Babangida also adopted a new method of development planning, called the rolling plan. Each plan

⁹⁸Herbst and Olukoshi, Ibid at 476

was for a two-year period but was reviewed at the end of each year and then extended or rolled over for another two years.

The main strategy of SAP included: the adoption of realistic exchange rate policy coupled with liberalization of the external trade and payment system; the adoption of appropriate pricing policies in all sectors with greater reliance on market forces and reduction in complex administration controls; and further rationalization and restructuring of public expenditure and custom tariffs.⁹⁹ One of the specific objectives of SAP was to lessen the dominance of productive investments in the public sector, improve the sector's efficiency and intensify the growth potential of the private sector.¹⁰⁰ It was in furtherance of this objective that the government embarked on privatization and commercialization of public enterprises¹⁰¹, which is the theme of this work. Subsequent administrations have continued with the privatization program originally begun by the Babangida administration. Thus, the

⁹⁹ See Anyanwu, supra note 78 at 6

¹⁰⁰ Others include: (i) restructure and diversify the productive base of the economy in order to reduce dependence on the oil sector and on imports; (ii) achieve fiscal and balance of payment viability over the period; and (iii) lay the basis for a sustainable non inflationary or minimum inflationary growth. See Anyanwu, supra note 78 at 6 (quoting the Central Bank of Nigeria Annual report and Statement of Accounts (December 1986 P.10))

¹⁰¹ The Buhari administration had rejected the idea of fundamentally changing the pattern of ownership of government parastatals and public enterprises even though it was prepared to reduce grants to them. See Herbst and Ojukoshi supra note 15 at 469

privatization program is an offshoot of the SAP and in essence is a reversal of part of the profligacy of the oil boom era.

IX. THE CURRENT SITUATION

The Babangida administration stepped aside in 1993 and was replaced by a short-lived interim administration,¹⁰² which itself was replaced by another military administration headed by Sani Abacha, who later died in office and was replaced by yet another military general, Abdulsalam Abubakar, who organized elections in 1999 and handed over to Olusegun Obasanjo who had earlier retired from the military. These administrations essentially continued with the reform efforts boldly initiated by the Babangida administration and indeed intensified the privatization component of the reform efforts. A notable development during these post Babangida administrations, is the upsurge in the agitation for resource allocation.

The crude oil, which Nigeria exports, comes mainly from the Niger Delta part of the country. However, the resource is appropriated by the Federal government, which under a formula that has varied over time allocates part of the proceeds to the states. The people of the Niger Delta began to feel deprived and to view the

¹⁰² Headed by Chief Ernest Shonekan who had been appointed by the Babangida government

allocation to them as insufficient since they consider their part of the country as the goose that lays the golden egg. The issue was recently addressed by the highest court in the country, the Supreme Court of Nigeria.¹⁰³ Yet, the agitation shows no sign of abating and has at times turned violent and deadly.

CONCLUSION

Nigeria's political and economic history has been one of struggle, internal strife and crisis. It was welded together by the colonial over lords and has managed to remain together happily or unhappily. For the most part, the economy has been dominated by the state, principally because of the existence of a precious natural resource: oil. Political authority has guaranteed access to the enormous rent from this resource. Such rent has not always been used frugally but instead has often been pillaged for personal and sometimes sectional interests, which have not always augured well for the betterment of the country as a whole. Such mismanagement resulted in a serious economic crisis, which has lasted more than a quarter of a century. Various governments have approached the problem in different ways. Finally, international financial assistance was sought and with it the

¹⁰³ See Attorney General Federation v Attorney General Abia State & Others, S.C. 28/2001, judgment delivered April 5, 2002

imposition of several conditions. In line with the neo-liberal economic tendencies of the international financial institutions, these conditions require the disengagement of the state from active participation in the economy except to set regulations and perform other functions that are inherently governmental in nature. Nigeria is trying to implement the reforms, one of which is the pursuit of privatization of state owned enterprises.

CHAPTER 2

NATURE OF STATE PARTICIPATION IN THE ECONOMY

INTRODUCTION

Having reviewed the political and economic history of Nigeria, as a background and context to the need for privatization of state owned enterprises, it is pertinent to explore the ideological tensions surrounding government involvement in the economy. The age-old controversy has been between advocates of robust state control of the economy, represented by the socialist school of thought, and the liberal school, which champions capitalism as the appropriate economic model. In between these is via medium of mixed economy. The following discussion attempts to analyze Nigeria's experience and to examine the conventional wisdom that Nigeria operates a mixed economy. One manifestation of Third World states' involvement in the economy is the prevalence of government owned enterprises. The discussion will then segue into a consideration of the origins of state or public enterprises in Nigeria and the rationales or objectives for them.

I. CAPITALISM

The earliest and still extant most popular economic model is capitalism.¹ It may also be known as the liberal economic model. It is a system in which the means of production are mostly privately owned. By privately owned is meant that the means of production are not owned by the government or the community at large. Thus, this admits of corporate and other forms of business alignments.

Capitalism is perhaps the most dominant economic model. It is at once the foremost and the most enduring model. In essence, it relegates the function of the state to provision of security and other duties that are inherently governmental. To Adam Smith, the father of capitalism and free market, the role of the state should be minimal, first because the unrestrained pursuit of individual interests will yield the greatest good to society, and second, because the state is an instrument of organized self-serving groups.² In a sense, capitalism preaches individual liberty believing that the healthy rivalry among individuals would augur well for the society. The so-called

¹ See generally on capitalism, and on this subsection, (visited April 10, 2007)

(visited April 10, 2007)

² See JOHN F. E. OHIORHENUAN, CAPITAL AND THE STATE IN NIGERIA, xvii (Greenwood Press, Westport CT, 1989) citing SMITH 1776 1910 THE WEALTH OF NATIONS, London: J.M. Dent)

theory of the "invisible hand", propounded by Adam Smith, posits that society is served by the tension among individuals and that the market is the most efficient and fairest arbitrator of resources. According to Adam Smith:

Every individual endeavours to employ his capital so that its produce may be of greatest value. He generally neither intends to promote the public interest, nor knows how much he is promoting it. He intends only his own security, only his own gain. And he is in this led by an invisible 'hand' to promote an end which was no part of his intention. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.³

Such individuals should have unrestrained liberty to participate in the economy according to their abilities. Adherents of the free market economy attribute much of the global economic progress of the 19th century and the post World War II to the liberal trade system.⁴ Proponents argue that one of the greatest strengths of capitalism is its ability to self coordinate the complex system of wants and to assign appropriate values to goods without the intervention of outside forces. Transactions between buyers and sellers result in a price system and the price of any commodity is a measure of its value. Furthermore, the profit motive encourages hard work and entrepreneurship. There is also the attempt to link capitalism to democracy.

³ ADAM SMITH, *THE WEALTH OF NATIONS* (1776) (Quoted in TONY CLEAVER, *UNDERSTANDING WORLD ECONOMY* 13 (Routledge, London, UK, 2002)

⁴ A. N. GAMBO, in M.E. AKOR (ED), *READINGS IN CONTEMPORARY ECONOMIC ISSUES*, 38 (Mono Expressions, Jos, 1995)

It is believed that a country cannot really be democratic if it is not practicing the economic model of capitalism. How can individuals be truly free if they are not the ultimate arbiters of their best economic interests? Most democratic states are capitalist, but there have also been capitalist states that were not fully democratic, and the existence of the latter group would seem to call into question the claimed capitalism - democracy linkage.

Capitalism as an economic model is sometimes equated with liberal economic theories. Yet, there are several variants of liberal economics and various advocates or proponents of such model. The common thread that runs through all of them is the primacy of the individual in the economy, with the state playing only a regulatory role, for "all forms of economic liberalism are inextricably committed to the market and price mechanism as the most efficient means of organising domestic and international economic relations."⁵ As already mentioned, Adam Smith was the founding father of the capitalism doctrine. He propounded the theory in the course of his critique of mercantilism, the model then prevailing in Britain and Europe. The concept entailed a strong state, which sought to maximize its trading and economic interests especially against other states. He advocated the

⁵ Gambo, *supra* note 4 at 39

centrality of individual liberty in the economy and accepted the laissez - faire approach, which allowed the individual unfettered participation in the economy.

David Ricardo took the principle of capitalism a step further. He argued that it is profitable for two parties to trade even if one of the parties is more efficient than the other in every type of economic production. This was the origin of the concept of comparative advantage. Thus society is better served where that state devotes its efforts towards the production of the particular goods in which it is most efficient.⁶

The gulf between absolute doctrines and reality has always posed an impediment in the evaluation of political and economic doctrines. In its purest form, capitalism does not brook state interference. But, in reality an economy can hardly be left wholly to the invisible hand of the market. There is only so much that the market can organize. This apparent limitation was underscored by the great depression of the 1930s. The massive unemployment of that period called into question the plaudits, which proponents had heaped on capitalism and threatened to undercut the theory.

⁶ See note 1

John Maynard Keynes thus tried to ameliorate the absoluteness of capitalism by advocating that it was consistent with capitalism for the state to intervene in the economy especially to create jobs.⁷ To him, state intervention was not only inevitable but also desirable for capitalism to triumph and operate efficiently⁸. In other words, it is the duty of the state and it is consistent with capitalism for the state to "pump prime" or jump-start the economy to avoid recession. The state can do this by cutting taxes and increasing governmental borrowing and spending during an economic downturn. His variant of capitalism is referred to as "welfare capitalism". It would seem that Keynes' version of capitalism is not easily distinguishable from the so-called "mixed economy" paradigm.

On the heels of the Keynesian theory of capitalism is the neoclassical school of economic thought or the Chicago school represented by Milton Friedman.⁹ This school is distinguished by its adherence to the purest form of capitalism. Proponents argued that market economies are inherently stable if left to themselves and that depressions result only from governmental intervention. In contradistinction to Keynes, who would have the

⁷ *ibid*

⁸ Gambo, *supra* note 4 p. 41

⁹ See note 1

government intervene in order that capitalism might function efficiently, Friedman and his supporters argued that the great depression resulted, not from the absence of governmental interference, but in fact because of the intervention of the Federal Reserve in the United States.

Although dominant, capitalism has not been without criticism. Some argue that capitalism and free market are not synonymous and that they are in fact contradictory. The fulcrum of capitalism is that one individual, freely and voluntarily, trades with another. However, the distortions inherent in a capitalist economy effectively fall on one party. Anarchists are at the forefront of this criticism and are irked by the protection, which the very state that capitalism would rather exclude, afforded to individuals who own property. Because those who do not own property or goods have no other recourse, they are forced to enter into transactions with those who own. Thus, some argue that the decision to do so is not really free but rather forced. Similarly, critics rebut the perceived benefit, of incentive to work hard, by noting that the protection of property rights, which forces those who do not have such rights to buy the use of the property, discourages productive activities, since the property owners are led to rent seeking. In other words, they rely on the rents they receive, and this is a disincentive to

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engage in productive activities. And this would not be ideal for any economy. Furthermore, capitalism is criticized on the basis that it sometimes leads to market failures. The optimal situation is one in which there is perfect competition. This capitalist utopia is not easy to attain, and frequently markets fail or become distorted resulting in monopolies, oligopolies and other anti competitive structures. The consequence is that resources are not efficiently allocated.

The more prevalent critique of capitalism is that it engenders exploitation. This criticism emanates mostly from the left. Capitalism is founded on entrepreneurship, which relies mostly on labor to prosper. Thus, capitalists are accused of exploiting labor and not paying proper wages. However, proponents argue that employers and employees usually agree on the wages to be paid and that both parties freely enter into the transaction. But the others counter that because of the differing bargaining powers, the so-called "consent of the employees" is a farce. It is also argued that the excessive individualism inherent in capitalism is not fair because individuals are not equally endowed. Some may be privileged either by birth, inheritance or even natural talents. Yet they have to compete with the less advantaged

ones. In most cases the privileged do better and the disadvantaged are usually worse off. This leads to social ills such as crimes.

II. SOCIALISM

Socialism is an economic, philosophical as well as political model.¹⁰ As an economic model, it advocates that the means of production and distribution be controlled by the people as a whole, represented by the state or the community. Socialism's center of gravity is the community. It views the individual as antithetic of the community, and the pursuit of individual interests as necessarily inconsistent with the common good. According to Le

Bon:

Socialism is certainly a reaction of the collectivity against the individual: a return to the past. Individualism and collectivism are, in their general essentials two opposing forces, which tend, if not to annihilate, at least to paralyse one another. In this struggle between the generally conflicting interests of the individual and those of the aggregate lies the true philosophic problem of socialism. The individual who is sufficiently strong to count only on his own intelligence and initiative, and is therefore highly capable of making headway, finds himself face to face with the masses, feeble in initiative and intelligence, but to whom their number gives might, the only upholder of right. The interests of the two opposing parties are conflicting.¹¹

¹⁰ See generally on socialism, and on this part, 2007)

(Visited April 10,

¹¹ GUSTAVE LEBON, THE PSYCHOLOGY OF SOCIALISM, 13-14 (Kitchener, Ontario, Canada, 2001)

Hence, whilst capitalists view competition among individuals as healthy, socialists see competition as unhealthy. Socialism is deeply suspicious of unbounded individual participation in the economy. It proceeds from the notion that economic resources are finite and the unrestrained acquisition by one individual implies the corresponding diminution of the resources available to others. Thus, to ensure equity and equality, the state or the community has to arbitrate the allocation of these scarce resources according to individual needs. In another sense, socialism acknowledges the inherent disparity in abilities, intelligence and other natural endowments, and is an attempt to repair this imbalance. Its distinguishing feature is that it would assign to the state the fundamental obligation of effecting such repair. The state is thus to redress the imbalance of destiny by redistributing wealth.¹² And it can confiscate resources before redistributing them.¹³

Socialism was initially developed in the context of a critique of capitalism. Although the term was first applied to the idea in the late 1920s, the origin of socialism is generally traced to the French Revolution of 1789. According to Muravchik:

¹² LE BON supra note 11 at 28

¹³ LE BON supra note 11 at 28

The manger in which socialism was born was the French Revolution, with its emphasis on equality, its profound anticlericalism and its promise that all things could be made anew. Amidst the chiliastic confusion of serial upheavals, one impassioned visionary, 'Gracchus' Babeuf, proposed that the way to give substance to the slogan 'liberty, equality, fraternity' was to collectivize all property."¹⁴

Following the Revolution, certain thinkers, notably Babeuf, began to espouse the idea of a common ownership of the means of production. It is pertinent to note that from the beginning, socialism and its advocates were viewed with skepticism and were in fact persecuted. Maybe it was not persecution, as opponents would note that the means which some of the early advocates adopted were mainly disruptive and in certain cases downright criminal. For instance Babeuf and his group were accused of what was termed Conspiracy of the Equals, an enterprise, which was alleged to have included the plan to use violence to achieve their objective of communal ownership.

Robert Owen and his disciples are credited with coining the term "socialism". And they also practically experimented the idea by establishing communal living in the nature of what were termed Villages of Unity and Cooperation. These did not prove particularly successful. Then, the famous

¹⁴ JOSHUA MURAVCHIK, HEAVEN ON EARTH: THE RISE AND FALL OF SOCIALISM, 10 (Encounter Books, San Francisco, 2003)

duo of Karl Marx and Friedrich Engels stepped in to provide the idea with an intellectual backing and to canvass it as a crusade. Indeed, modern socialism has almost become synonymous with Marxism. They championed a brand of socialism that they regarded as scientific socialism. To Marx and Engels, private property was theft. The class struggle was acute. Capital accumulation was destroying the middle class and enriching the wealthy; thus continuing to impoverish the poor. Marx and Engels predicted that this dynamic of capitalism would ultimately result in two stark classes: the very rich and paupers. In the end, this tension or class struggle would lead to a social revolution in which the proletariat would rise against the wealthy. Such revolution would illustrate the contradiction inherent in capitalism, and would also correct the social distortion.¹⁵ They considered this prognosis both scientific and historical.

Several commentators note that many years after the passing of the most popular ideologues of socialism, their prediction of the implosion of capitalism has yet to materialize, and several more commentators have spent more time modifying or rather reinterpreting the prediction. On the contrary,

¹⁵ MURAVCHIK supra note 14 at 70 and 95

countries, which have experimented with socialism, have had to abandon the idea in favor of a more liberal economic model.

Just like capitalism, there are variants of socialism. At its extreme are anarchists who view both capitalism and the state as inseparable and as equally to be despised. While Marx and Engels predicted that revolution was inevitable, Eduard Bernstein seemed to deny such inevitability but rather noted that moderate socialism evidenced by "the growth of trade unions and democracy had vitiated the raw powers of capitalists and had ameliorated capitalism."¹⁶

Nonetheless, in the 20th Century, several countries operated systems that were described as socialist. These ranged from China, the Soviet Union to many countries of Eastern Europe and some Third World countries. It seems to be a universal verdict though that these countries have not fared well economically, and towards the end of the 20th Century they began to take steps to abandon the system of central or state command of the economy in favor of a market driven one. The most pronounced departure was of course

¹⁶ MURAVCHIK *supra* note 14 at 107

in the Soviet Union, which had been the poster child of 20th Century socialism.

The concept of socialism has been subjected to several criticisms. The most important critique is that collectivism inherent in socialism serves as a disincentive to hard work. John Stuart Mills asserts that:

It is the common error of Socialists to overlook the natural indolence of mankind; their tendency to be passive, to be the slaves of habit, to persist indefinitely in a course once chosen. Let them once attain any state of existence which they consider tolerable, and the danger to be apprehended is that they will thenceforth stagnate; will not exert themselves to improve, and by letting their faculties rust, will lose even the energy required to preserve them from deterioration. Competition may not be the best conceivable stimulus, but it is at present a necessary one, and no one can foresee the time when it will not be indispensable to progress.¹⁷

Where one is guaranteed the provision of the necessities of life and is not at liberty to seek other luxuries, his incentive to work is most likely to be reduced. Socialists, however, argue that the propensity to laxity is checked by peer pressure. But critics note that even though peer pressure may work in a setting of a small group where the members know one another, its effectiveness is doubtful in a group such as country.

¹⁷ JOHN STUART MILL, THE PRINCIPLES OF POLITICAL ECONOMY (Book IV, Chapter 7, 1848)

Similar to the criticism of disincentive to work is the argument that competition, which is the catalyst for development, is stifled or non-existent in a socialist society. This leads to stagnation of the economy. It is also contended that socialism is usually coupled with fixed prices. This distorts the standard for measuring the value of goods and services and transmits misleading information. Capitalists see price as a reflection of the value and relative scarcity of any commodity. Thus, the price of any item is an indirect communication to the market as to the relative scarcity of such item and participants in the market guide themselves accordingly. But in a socialist system, the price might not bear any relation to the relative scarcity or value of a commodity. This may lead to chaos and distortion.

Socialism is further pilloried on the ground that it breeds dictatorship and human rights abuses. Essentially, the state runs all aspects of individuals' lives. The state might forcibly confiscate the resources hitherto belonging to individuals and then micromanage their daily activities. This results in absolute dictatorship.¹⁸ It is also argued that the historical experience of socialism does not really recommend the system because the few countries that have tried the economic model have had to abandon it.

¹⁸ See FRIEDRICH HAYEK, *THE ROAD TO SERFDOM*, (Routledge, 2001) (arguing that the road to socialism leads society to totalitarianism)

III. MIXED ECONOMY

The liberal, or capitalist, and the command, or socialist, divide represents two opposites, which in reality seldom exist. The tendency has been to characterize an economy as capitalist or as liberal if it manifests more of the core principles associated with that economic model, and to characterize it as socialist if it has more of the attributes of the latter model. Otherwise, what is more common is that a system would contain features of both economic models. Mixed economy is the concept that is ascribed to that system which cannot easily be pigeonholed into capitalist or socialist mold. Consequently, mixed economy is a form of default classification. No wonder, it lacks both the philosophical and ideological underpinnings and finesse of either capitalism or socialism. In the same vein, it is shorn of the passionate advocacy and advocates that have ensured the intellectual vibrancy and following associated with both capitalism and socialism. Yet, for all intents and purposes, mixed economy is not only more realistic than the other two models but also more sensible. An absolute divorce of the state from the economy is neither possible nor desirable and a complete control by the state of the means of production is not only unworkable but also

inimical to the wholesomeness of the polity. Both the state and the individual have roles to play.

An economy is generally described as mixed if it admits of both individual enterprise and government intervention in limited respects. Sometimes, too, government enterprises coexist and compete with private enterprises.

IV. NIGERIA: WHAT ECONOMIC MODEL?

It appears to be an accepted notion that pre-independent Nigeria's economy was mercantilist. Perhaps, a better way to put it is that Britain's economic attitude towards its colonies, including Nigeria, was mercantilist.¹⁹ This is not surprising. The motive for the colonization was exploitation and consequently Britain could adopt only the mercantilist model in the colonies, even though its own Adam Smith had criticized that economic model as far back as 1776. Nigeria was a colony conquered and dominated to provide both a source of raw materials and a market for British and European goods.

¹⁹ KELECHI AMIHE KALU, *ECONOMIC DEVELOPMENT AND NIGERIA'S FOREIGN POLICY*, 36 (Edwin Mellon Press, Ltd., New York, 2000) (noting that mercantilism (or state managed capitalism) rather than free markets characterized British overseas expansionism before the outbreak of the war)

The controversy is how to characterize the economic framework of post-colonial Nigeria. A cursory examination would reveal that the economy has manifested attributes of capitalism as well as some features of socialism and can justifiably be described as a mixed economy. Although the country became independent and obtained self rule, economic independence is a different matter. Many believe that colonialism was simply replaced by neocolonialism especially in the economic field. Tyokase argues that:

The giant strides of capitalism in Nigeria have been possible because of the class character of the leadership. The national leadership, a child of colonialism and bourgeois in character did not seek to make a break with the exploitative nature of the political economy; instead driven by the zeal to reap from the spoils of the struggle for independence, they had no interest in abandoning an economic system which guaranteed their economic priviledges [sic].²⁰

According to Tyokase, these privileged classes have increased their power by the use of funds to build private financial empires and by joining foreign firms and multinational corporations as junior partners.²¹ No doubt, post-colonial Nigeria has exhibited attributes of capitalism. Besides the fact that it

²⁰ C.T. Tyokase, *The Political Economy of Feudalism, Capitalism and Socialism*, in S.A. ADESINA, S.S. OGBONNA, R.A ADETORO AND C.T TYOKASE (ED), REFLECTIONS ON THE POLITICAL ECONOMY OF NIGERIA, 20 (Goad Educational Publishers, Abeokuta, Nigeria, 1999); See also AKIN FADAHUNSI, TECHNOLOGY AND THE DEVELOPMENT PROCESS: PROBLEMS AND PROSPECTS IN NIGERIA, 9 (Ahmadu Bello University Press, Ltd, 1992) (asserting that "Experience over the past three decades would thus suggest that for all practical purpose the major capitalist institutions - the World bank, the IMF and their powerful parent bodies like the OECD, and EEC have in the main succeeded in keeping the developing countries within the capitalist system - albeit as dependent neo-colonial states."

²¹ Tyokase, supra note 20 at 20-21

was a legacy bequeathed by the colonialists, such predisposition has been strengthened by the paternalistic assistance from the West and the multilateral agencies over which the West maintains enormous control. To quote Fadahunsi, "in almost all countries of the Third World that have to deal with the World Bank and the IMF the deference with which officials from these institutions are held is such that they very often dictate policy options – especially to technocrats in the Ministries of Finance (Treasury) and the Central Banks."²² Cynics note that sometimes the neocolonial control assumes a life and death dimension.²³ Such control over Third World economic direction was an integral part of the Cold War, as the pre-colonial scramble for partition of Africa was replaced by the post colonial struggle between the West and the Soviet Union to steer the newly independent countries towards capitalism or socialism, respectively. In most cases the

²² FADAHUNSI *supra* note 20 at 9

²³ See for example Uzodinma Nwala, *The Poverty of Ideology in Nigerian Development*, in OKWUDIBA NNOLI (ED), *PATH TO NIGERIAN DEVELOPMENT*, 151, 161 (Codesria, Dakar, Senegal, 1981) (citing a 1961 statement attributed to the then Minister of Economic Development, Mallam Waziri Ibrahim, as follows : "Certain measures have been taken to introduce a socialist philosophy of economic planning in certain neighbouring countries and this has resulted in the imperialists sabotaging the country. Imperialists have got various means of defending their monopoly. They have got their newspapers and television, and they go to any extent to tell lies. They can say or write any amount of untruths to discredit us. If we want really to set about improving our economy in any particular ways, they may say we are communists. They can make our countrymen to suspect our moves. If they do not succeed by false propaganda, by calling us all sorts of names, if they fail to make us unpopular in order to win their case, they can arrange assassination. They can do it by poison or by setting our own people against us. They can go to any extent without discrimination.") The writer also noted that the same Minister went on to assert that the charismatic Congolese leader Patrice Lumumba was killed because he was a real nationalist who wanted use the resources of the Congo for the welfare of the Congolese people as a whole.

West offered to help Third World countries in formulating their development plans all in an effort to prevent them from going socialist.

Indeed, in 1979 by a constitution of that year, the country chose a mixed economy model. The drafters of that constitution considered the various economic models but chose the mixed economy model because of several factors.²⁴ Principally, they thought that the mixed economy model was more consistent with the traditional ways of the Nigerian people. Besides, they felt it was more universal and more flexible and would better accommodate the state of the Nigerian nation. It would, however, seem that advocates of a more leftist or socialist tilt to the Nigerian economy reject the mixed economy model and see such description of the Nigerian economy as no more than a mask for what they consider unabashed capitalist mode of

²⁴ The reasons which the Constitution Drafting Committee gave for preferring a mixed economy were as follows: (i) traditionally Nigeria's ideology is and has always been a mixed economy; (2) Mixed economy would give a high degree of operational flexibility; (3) in point of fact the traditional Nigerian economy is 'socialist' in certain areas while permitting individual incentive and private ownership in other areas; (4) a sharp distinction must be established between the ultimate goals of the state and the stages through which the state must pass in order to effectively attain those goals; (5) the pragmatic and feasible goal of the state is to seek to enhance individual welfare by providing jobs and better education, housing and health facilities thus raising the standard of living; (6) that goal is more readily attainable under a system of private investment and individual entrepreneurship and this cannot be pursued simultaneously with extreme forms of income equalization; (7) Socialism is foreign to Nigeria and relies on paid bureaucrats of the state while capitalism depends on private entrepreneurs; Nigeria did not have the required technically trained bureaucrats; (8) the record of socialism in agriculture and housing is not as good as its record in heavy industries and not as good as that of capitalist West; (9) mixed economy is best because public sector plays a leading role in setting prices and in mitigating the harsher effects of private competition. See Inyang Eteng, *Myths and Fallacies in Nigerian Development*, in OKWUDIBA NNOLI (ED), *PATH TO NIGERIAN DEVELOPMENT*, 49, 51-52 (Codesria, Dakar, Senegal, 1981) (citing Report of the Constitution Drafting Committee containing the Draft Vol. 1, Section 3.7-2, p. xiii (Lagos: Federal Ministry of Information, 1976)

production.²⁵ Reacting to the argument that mixed economy accords with the traditions of the peoples of Nigeria, Eteng argues that in no sense did the subsistence economies that existed before the advent of the colonialists exhibit characteristics of the consumptionist capitalist prototype now prevailing in Nigeria.²⁶ He further contended that to designate Nigerian pre-colonial economies as "capitalist" simply because there existed some kind of exchange in some kind of market based on some kind of medium of exchange is, therefore, to portray gross and inexcusable ignorance of the nature of the capitalist system.²⁷ He further observed that "scientific socialism and capitalism are mutually exclusive categories; their synthesis into either a mixed economy or a neo welfarism is, therefore, a historical impossibility."²⁸ He and his colleagues would rather view the Nigerian economy through the prism of classic Marxist class analysis. Thus, to

²⁵ See Uzodinma Nwala, *The Poverty of Ideology in Nigerian Development*, in OKWUDIBA NNOLI (ED), *PATH TO NIGERIA DEVELOPMENT*, supra note 23, at 151 and 163 (stating that "the objective realities clearly show that 'mixed economy' is another name for capitalism.") See also T. Uzodinma Nwala, *Ideological Dependency and the Problem of Autonomy in Nigeria*, Paper read during the Workshop on Dependency and Underdevelopment in West Africa, organized by the Institute of African Studies, University of Nigeria, Nsukka, April 1978 and (cited in Uzodinma Nwala, *The Poverty of Ideology in Nigeria Development*, 163) (asserting that "the state or public sector which is regarded by the mixed economy theoreticians as the socialist sector is in fact established to promote private accumulation of the capitalist class. It is not run on socialist principles. Thus the so-called 'state enterprises' and institutions such as the railway, the telecommunication, the airways, mining, civil service, the army, the police, the public works, etc., do not serve the interest of labour but rather serve the interest of capital. Furthermore, they are operated mainly by private contractors and managed by members and clients of the bourgeois class.")

²⁶ Eteng, supra note 24 at 57

²⁷ Eteng supra note 24 at 58

²⁸ Eteng supra note 24 at 64

Onimode, "in Nigeria's recent history, three dominant classes have waged dialectical struggles that were often overt and visible, and sometimes latent and imperceptible. These are the imperialist bourgeoisie centered around the British in Nigeria, the Nigerian petty bourgeoisie which emerged as a ruling group after 1960, and the toiling class of workers, peasants, petty artisans, petty-market women and others."²⁹ The colonial period witnessed the struggle between the imperialist bourgeoisie on the one hand, and the latter two classes jointly on the other hand. Post-colonial Nigeria has been marked by a two-cornered struggle, one between the former imperialists and the Nigerian bourgeoisie, and another struggle between the Nigerian bourgeoisie and the masses. The Nigerian bourgeoisie would always seek the help of either the imperialists or the masses as its particular interests and the particular struggle might require.

Although, the class contradictions and struggles are present in Nigeria, it is doubtful if a socialist economy is the panacea. First, the history of that

²⁹ Bade Onimode, *Class struggle as a reality of Nigerian Development*, in OKWUDIBA NNOLI (ED), *PATH TO NIGERIAN DEVELOPMENT*, 166, 188 (Cordésria, Dakar, Senegal, 1981); He classified Nigerian petty bourgeoisie into four groups, namely (1) the bureaucratic bourgeoisie which is made up of those who control decision making and the bureaucracy in government and the corporations; (2) the comprador bourgeoisie which is made up of local indigenous agents and intermediaries of the imperialist importers; (3) the professional bourgeoisie made up of professionals like doctors, lawyers, engineers, accountants, management executives etc; and (4) middle or lower salaried sector in the public and private sector, who according to Onimode, should be closer to the masses but tend more toward the petty bourgeoisie because of the hope to join that class. See Onimode PP. 172-173

ideology has not been very impressive. As we have seen, countries that adopted the socialist model have had to abandon it for a market-oriented economy. Socialism has remained a utopia, and the reality of its application has been different from its almost transcendental rhetorics. Second, whilst undiluted capitalism might not be the traditional heritage of the people of Nigeria, neither is socialism. From time immemorial, traditional African societies admittedly were communal in outlook. This does not mean that all resources were pooled together, to be managed by a common administration. Each individual or family had its own household but every one came to the aid of those in need. Granted some factors of production, like land, were communally owned.³⁰ The essence of the communal ownership was not that any proceeds from the cultivation of the land were contributed to a common purse. Rather, while the ownership was vested in the community, the usufruct could lie in any member of the community who could cultivate the land for their own personal benefit.

³⁰ See *Amodu Tijani v The Secretary, Southern Provinces* (Holding that in traditional Nigerian society, land belonged to the village, community or the family and not to the individual)

The mixed economy model is not only the reality of the Nigerian economy³¹, but also the desirable model. At the risk of reductionism, mixed economy simply means the availability at the same time of the features of both the contending ideologies of socialism and capitalism. The Nigerian scenario reveals an admixture of the characteristics of both. The Constitution recognizes the right of every citizen of Nigeria to acquire and own immovable property.³² Almost as a counterpoint, there is also provision in the laws of the country, which vest the ownership of all land in a State of the Federation of Nigeria in the Governor of that State to hold for the benefit of the people.³³ This is a classic illustration of the tension between the individualism of capitalism and the communality of socialism. Similarly, the right to moveable property is also recognized, even though, just like the right to immovable property, such right may be compulsorily acquired provided

³¹ Osaheni Victor Iyayi, *Foreign Investors' Perceptions of Nigerian Public Policy on Foreign Investment*, 117, (Ph.d Dissertation submitted to the Golden Gate University, San Francisco, 1988, on file in the Golden Gate University Library); See also ALISON A. AYIDA, *REFLECTIONS ON NIGERIAN DEVELOPMENT*, 168 (Malthouse Press Ltd., and Heinemann Educational Books (Nig) Ltd, 1987) (noting that Nigeria operates a mixed economy with well entrenched private sector); and PETER OLAYIWOLA, *PETROLEUM AND STRUCTURAL CHANGE IN A DEVELOPING COUNTRY: THE CASE OF NIGERIA*, (Praeger, NY, 1987); Emeka Ezeife, *Nigeria*, in ADEBAYO ADEDEJI (ED), *INDIGENIZATION OF AFRICAN ECONOMIES*, 164, 171 (Hutchinson and Co. Ltd., London, 1981) (noting that even though the Second National Development Plan, 1970-1974, had called for the state to be the "commanding heights" of the economy, the situation changed with the Nigerian Enterprises Promotion Decrees 1972 and 1977. Under the decrees three models were considered: private sector led model, public sector led model and mixed model. Nigeria chose the mixed model.)

³² See Section 43 of the 1999 Constitution of Nigeria.

³³ Section 1 of the Land Use Act provides: Subject to the provisions of this Act, all land comprised in the territory of each State in the Federation are hereby vested in the Governor of that State and such land shall be held in trust and administered for the use of the and common benefit of all Nigerians in accordance with the provisions of this Act.

compensation is paid and other conditions are met.³⁴ Similarly, other forms of individual rights are on the books. On the other hand, as will later be shown, government has been heavily involved in the economy, owning its own enterprises and in some respects joining as partners with the private sector in other enterprises. The same Constitution also contains what are called fundamental objectives and directive principles of state policy, which essentially urge the State to harness the resources and operate the economy for the common good. Section 16 provides as follows:

(1) The State shall, within the context of the ideals and objectives for which provisions are made in this Constitution:

- harness the resources of the nation and promote national prosperity and an efficient, dynamic and self-reliant economy;

- control the national economy in such manner as to secure the maximum welfare, freedom and happiness of every citizen on the basis of social justice and equality of status and opportunity;

- without prejudice to its right to operate or participate in areas of the economy, other than the major sectors of the economy, manage and operate the major sectors of the economy;

- without prejudice to the right of any person to participate in areas of the economy within the major sector of the economy, protect the right of every citizen to engage in any economic activities outside the major sectors of the economy.

The State shall direct its policy towards ensuring:

- the promotion of a planned and balanced economic development

- that the material resources of the nation are harnessed and distributed as best as possible to serve the common good;

- that the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or of a group; and

³⁴ Section 44 of the Constitution

that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens.

In Section 17, the State social order is founded on ideals of Freedom, Equality and Justice. Every citizen shall have equality of rights, obligations and opportunities before the law.³⁵ The exploitation of human or natural resources in any form whatsoever for reasons other than the good of the community shall be prevented.³⁶ Similar pro-socialist prescriptions are contained in other parts of the Constitution.³⁷ However, these provisions are

³⁵ Section 17(2)(a)

³⁶ Section 17(2)(d)

³⁷ For instance section 17(3) provides:

“The State shall direct its policy towards ensuring that-

• all citizens, without discrimination on any group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment;

• conditions of work are just and humane, and that there are adequate facilities for leisure and for social, religious and cultural life;

• the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused;

• there are adequate medical and health facilities for all persons:

• there is equal pay for equal work without discrimination on account of sex, or on any other ground whatsoever;

• children, young persons and the age are protected against any exploitation whatsoever, and against moral and material neglect;

• provision is made for public assistance in deserving cases or other conditions of need; and

• the evolution and promotion of family life is encouraged.” Similarly, Section 18 provides:

Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels.

Government shall promote science and technology

Government shall strive to eradicate illiteracy; and to this end Government shall as and when practicable provide

• free, compulsory and universal primary education;

• free secondary education;

• free university education; and

• free adult literacy programme.

not enforceable, and therefore even though they empower the government to robustly participate in the economy for the common good, no one has ever maintained an action in court to compel the government to do so.

V. PUBLIC ENTERPRISES IN NIGERIA

Much of the Nigerian state's participation in the context of the mixed economy paradigm has been through the instrumentality of State Owned Enterprises (SOE). A certain ambiguity or confusion attends any attempt to define a public enterprise or SOE. This stems from the imprecision with which SOEs are viewed. Some see them as business entities albeit owned by the government, while others view them from the perspective of the social functions, which they sometimes perform. Ayodele, who offers the latter definition, sees public enterprises as:

“business enterprises effected with public interests, bear intimate connection with the process of transportation, other socioeconomic services and distribution; are under obligation to afford their facilities to the public generally upon demand at fair and non

discriminatory rates, enjoy, in large measure, an independence and freedom from business competition brought about by their acquisition of monopolistic status or by grant of a franchise or certificate from the state placing them in this position.”³⁸

On the other hand, Tanzi sees public enterprises as “organizations whose primary function is the production and sale of goods and/or services and in which government or other government controlled agencies have an ownership state[sic] that is sufficient to ensure their control over the enterprises regardless of how actively that control is exercised.”³⁹ Zeckhauser and Murray Horn see them as business enterprises owned by government.⁴⁰ On the other hand, a private enterprise is one, which is privately owned and controlled by the market.⁴¹ Public enterprises have

³⁸ Sesan Ayodele, *Public Enterprises Reforms in Nigeria*, in I.B. BELLO-IMAM, A.A. ADUBI AND A.A. FAJINGBESI (EDS), *PERSPECTIVES ON NATIONAL ECONOMIC MANAGEMENT AND ADMINISTRATION IN NIGERIA*, 128 (NCEMA, Ibadan, 2004)

³⁹ See Ayodele, *supra* note 38 at 128

⁴⁰ See Richard J. Zeckhauser & Murray Horn, *The Control of State-Owned Enterprises*, in PAUL W. MACAVOY & ORS, (ED), *PRIVATIZATION AND STATE OWNED ENTERPRISES*, 7, 9-11, Kluwer, Boston, (1989) (quoting Aharoni (1986 P.6) to the effect that SOEs have three distinguishing characteristics: “First... they must be owned by the government. Second ... (they) must be engaged in the production of goods and services for sale... Third, sales revenues of SOEs should bear some relationship to cost.”) Although this is not a definition of art, it does underline the requirement that an SOE to be such must of course belong to the public and must at the barest minimum aim to do business even if profit making is not the sole objective. The Nigerian Bureau of Public Enterprises defines a SOE as “government-owned or government controlled economic entities that generate the bulk of their revenues from selling goods or services. It may also include enterprises established to provide commercial activities in which government controls management by virtue of its ownership stake. It encompasses enterprises directly or indirectly through other federal and state government entities.” See bpeng.org

⁴¹ Sonny Nwankwo, *Privatization and Organizational Taxonomy: The Case of the National Enterprise*, in C.P. RAO (ED), *GLOBALIZATION, PRIVATIZATION AND FREE MARKET ECONOMY*, 28, 31 (Greenwood Publishing Group, Inc., Westport, CT, USA, 1998) (also noting that: “two crucial factors have been applied in explaining the private enterprise: (1) ownership and (2) management of benefits (Ramanadham, 1984). The crucial point of the private enterprise is that the organization and its

three defining characteristics. They are government owned and controlled, are engaged in commercial activities and also have sociopolitical goals alongside the primary economic goals.⁴² Ramanadham⁴³ has tried to analyze the public and commercial aspects of a public enterprise. He notes that three elements are encapsulated in the word "public". First, it means the non-private accretion of the net benefits. In other words, the proceeds, profits or capital appreciation of the enterprise do not go to the enrichment of a private group of individuals standing in the position of owners. Second, it involves public decision-making so that entrepreneurial and other major decisions are made at some public level devoid of personal interest. Finally, it involves social accountability, thus the public enterprise has to be accountable to the public for its performance.⁴⁴ On the notion of enterprise, Ramanadham identifies two components, (i) financial viability and (ii) cost price equation.⁴⁵ He implies that a synthesis of the two concepts, "public" and "enterprise", is required for an entity to qualify as "public enterprise." He

management are solely answerable to the owners via the board of directors. As a consequence, management activities reflect the supremacy of shareholders' interests.")

⁴² Sonny Nwankwo, *supra* note 41 at 31

⁴³ See V.V. RAMANADHAM, *THE NATURE OF PUBLIC ENTERPRISE*, 5-19 (Croom Helm, Kent, England, 1984)

⁴⁴ RAMANADHAM, *THE NATURE OF PUBLIC ENTERPRISE*, *supra* note 43 at 15-19

⁴⁵ RAMANADHAM, *THE NATURE OF PUBLIC ENTERPRISE*, *supra* note 43 at 15-19

argues that an excessive shift towards "public" would make the entity what he calls a "public non-enterprise", while an excessive shift towards "enterprise" would result in what he terms a "non-public enterprise."⁴⁶ The difficulty associated with the private –public dichotomy has also led to a suggestion that a third variant be included in the categorization.⁴⁷ But the prevalent model has been the categorization of enterprises into private and public ones. A narrow definition of SOEs would require that they be owned by the government and be run as business ventures. While many SOEs engage in business activities, a prescription of profit motive would exclude many such entities because there are some which perform socioeconomic functions even though they are ostensibly business oriented. This is the contradiction that is at the root of the criticisms and reservation toward SOEs. Yet, much of the literature take a broad view of SOEs, and some writers include agencies, which perform regulatory aspects of business.⁴⁸

⁴⁶ RAMANADHAM, THE NATURE OF PUBLIC ENTERPRISE, *supra* note 43 at 15-19

⁴⁷ See Sonny Nwankwo, *supra* note 41 (arguing that the test of ownership might not fully capture the essence of an enterprise as there might be enterprises privately owned but publicly controlled, just as there might be enterprises publicly owned but privately controlled; He therefore suggests the concept of a "national enterprise", which he defines as an "enterprise that is privately owned but still publicly controlled or publicly owned but controlled primarily by the market." See P. 33)

⁴⁸ See for example, Adebayo O. Olukoshi, *The Historic Significance of the Policy of Privatisation in Nigeria*, in R. OMATAYO OLANIYAN AND CHIBUZO N. NWOKE (EDS), STRUCTURAL ADJUSTMENT IN NIGERIA, 103, 107-108 (Nigerian Institute of International Affairs, Lagos, 1989) (identifying four broad groups of public enterprises in Nigeria, as follows: (1) those that could be described as public utilities; (2) those that can be described as financial institutions; (3) those that could be described as commercial and industrial companies; and (4) those that carry out regulatory duties or act as service boards)

The origin or development of SOEs in Nigeria dates back to the colonial period. It has been noted that pre-colonial Nigeria was essentially pre-capitalist and the colonial authorities were faced with the task of commencing the process of capital accumulation.⁴⁹ One way of dealing with this situation was the introduction, by the colonial authorities, of certain agencies for consolidating the colonial economy.⁵⁰ The Public Works Department and the Native Authority were some of the agencies responsible for the provision of roads, installation of electricity generators and provision of pipe borne water,⁵¹ while concerns such as coal mines at Enugu, saw mills at Ijora and stone quarry at Aro were some of the early public enterprises during the colonial period.⁵²

⁴⁹ Olukoshi, *supra* note 48 at 105-106

⁵⁰ Olukoshi *supra* note 48 at 106

⁵¹ Olukoshi, *supra* note 48 at 106

⁵² Tom Forrest, *State Capital, Capital Development and Class Formation in Nigeria*, in PAUL M. LUBECK (ED), *THE AFRICAN BOURGEOISIE: CAPITALIST DEVELOPMENT IN NIGERIA, KENYA AND THE IVORY COAST* 307, 309 (Lynne Rienner Publishers, Boulder, CO, 1987); Other entities were the West Africa Produce Control Board, which were later reorganized to create marketing boards, the Nigerian Government Collieries, and the West African Currency Board. See Olukoshi *supra* note 48 at 106

Following World War II and the increased tempo of the agitation for independence, the colonial government increased its welfare and developmental programs in the country.⁵³

Thus the 1950s saw the establishment of many federal statutory corporations.⁵⁴ After independence more corporations were created. And the end of the civil war, in 1970, with the consequent need for reconstruction coupled with the oil boom of the 1970s led to an explosion in public enterprises and the public sector.⁵⁵ It has been asserted that during the 1960s and 1970s, SOEs became the rule rather than the exception in sub-Saharan Africa.⁵⁶ This would appear to be the direct consequence of the nationalistic and independent fervors that were prevalent in that part of the world at that

⁵³ Olukoshi supra note 48 at 106

⁵⁴ These included the Electricity Corporation of Nigeria (1951); the Nigerian Coal Corporation (1951); The Railway Corporation (1955); the Nigerian Ports authority (1955); the Nigerian Broadcasting Corporation (1958); and the Nigerian Airways (1959). See Forrest supra note 52 at 313

⁵⁵ Forrest notes that: "in the 1970s, the range of public corporations and companies was extended with the addition of the Nigerian National Oil Corporation (1971), the Nigerian Steel Development Authority (1971), the Nigerian Mining Corporation (1972), the Nigerian National Supply Company (1972), the National Freight Company (1976), the National Cargo Handling Company (1977), and the Nigerian Airports Authority (1978)."

⁵⁶ ERNST & YOUNG, *PRIVATIZATION: INVESTING IN STATE OWNED- ENTERPRISES AROUND THE WORLD*, 35 (John Wiley & Sons, Inc., NY, 1994); See also Peter M. Lewis, *State, Economy, and Privatization in Nigeria*, in EZRA SULEIMAN & JOHN WATERBURY (ED), *THE POLITICAL ECONOMY OF PUBLIC SECTOR REFORM AND PRIVATIZATION*, 211 (1990) Westview Press, Boulder (noting that throughout the 1950s and 60s Nigerian government's economic role was interventionist and tutelary, but limited to the state acting as a "catalyst" for private sector development by creating the physical, institutional and financial environment for economic progress, but that this changed with the military intervention in 1966 and as result the 1970s witnessed a strategy of *de facto* state capitalism.

time.⁵⁷ Indeed, Nigeria's Second National Development Plan, for 1970 – 1975, called for the state to assume the “commanding heights” of the economy.⁵⁸ This plan was followed in 1972 by the government's implementation of a nationalization program under which some foreign owned companies were indigenized.⁵⁹ Although the shares in the nationalized enterprises were available to and acquired by the private sector, the result of the exercise was the co-existence of state and private enterprises in the economy. If sub-Saharan African states embraced direct state interference and participation in the economy, the embrace appeared warmest in Nigeria, and it is claimed that by 1990, the country possessed the largest public enterprise sector in sub-Saharan Africa and one of the most troubled.⁶⁰ The growth of the public sector and of SOEs may be a result of

⁵⁷ ERNST & YOUNG supra note 56; See also Thomas M. Gallagher & Ernest James Wilson III, Africa: Policy, Reality, or Ritual, in RAYMOND VERNON (ed), THE PROMISE OF PRIVATIZATION; A CHALLENGE FOR US POLICY, 179-230 at 183 (1988) (Council on Foreign Relations) (attributing the pronounced state involvement in enterprises to a fall out of the anti colonialist efforts which were in essence anti capitalist and pro socialist)

⁵⁸ Lewis, supra note 56 at 213

⁵⁹ See the Nigerian Indigenization Decree 1972.

⁶⁰ Lewis, supra note 56 at 210-233; Lewis puts the number of such enterprises at 900 as of 1990. Callaghy and Wilson indicate that Nigeria had 107 SOEs in 1981, 36 of which were wholly owned and represented 33.6 per cent of the 107 SOEs. See Callaghy & Wilson, supra note 57... at 184; The number of the SOEs continued to rise in the 1980s and 1990s. By 1993, there were 1500 SOEs. See *Nigeria Federal Public Expenditure*, World Bank Report No. 14447 UNI March 1996 P. 65 (quoting Technical Committee on Privatization and Commercialization: Final Report of Technical Committee on Privatization and Commercialization, May 1993); See also W.A. Isola, *Privatization*, in M. ADEJUGBE (ED), PERSPECTIVES ON NIGERIA'S FLEDGLING FOURTH REPUBLIC, 80 (Malthouse Press, Ltd., Lagos, 2002) (noting that: “the country has a large public enterprise sector, which expanded very rapidly as a result of the implementation of the Indigenisation Decrees of early 1972 and 1977, and the oil boom of the 1970 through 1980. With this development, an increasingly dominant Public Enterprises (PEs) Sector

the nationalization of a number of companies in a particular industry or the transformation of a government department into a public enterprise; acquisition of equity in a profitable enterprise; or setting up of a fresh public enterprise.⁶¹

VI. OBJECTIVES OR RATIONALE FOR STATE OWNED ENTERPRISES

As we have seen, the provenance of SOEs was founded in the need to fill a gap, which had existed in the economy. With the nigh absence of a vibrant private sector during the colonial era and the period immediately thereafter, the state had to take on the task of laying down the basic conditions, including the provision of the necessary infrastructure, to support the development of capital.⁶² It has also been noted that public ownership has most commonly been viewed as a response to market failure and the failure

accounting for about 50% of the Gross Domestic Product (GDP) and 60% of the modern sector/source employment had emerged in Nigeria by 1980s, (FRN, 1986). Concurrently, the number of PEs at the federal level was about 600 enterprises and some 900 smaller ones at the state and local government levels (TCPC 1993)."); According to the World Bank by 1990, Nigeria's public enterprise sector (at both the federal and state levels) accounted for 30 to 35 percent of GDP (excluding petroleum-related parastatals, which accounted for 15 percent and one fifth of modern sector employment). See *Nigeria- Structural Adjustment Program: Policies, Implementation, and Impact*, 30 (World Bank Report, May 1994)

⁶¹ A.S. Mikaila, *Privatisation/Commercialisation and Nigeria Economy*, in EMMANUEL E. UMEBALI AND EPHRAIM N. MADU (EDS), *NIGERIA ECONOMY: ISSUES AND TRENDS*, 26, 28 (Acafor Books, Enugu, Nigeria, 1992)

⁶² Olukoshi supra note 48 at 104

of the private market to secure efficient outcomes.⁶³ It is thus ironic that SOEs are being turned to the market for the same reason that they were formed. Broadly, the role of SOEs has been categorized into four groups.⁶⁴ First is the provision of necessary environment and support for capital accumulation. Essentially, they provide aids to trade and commerce by the construction and management of infrastructure like roads, railways, harbors and other necessary infrastructure. Secondly, they promote local capital accumulation by giving loans to the private sector. An unintended aspect of the SOEs, especially in the developing world, has been the facilitation of primitive capital accumulation. By this is meant the corruption in the manner of kickbacks and other untoward practices through which some SOEs enrich certain individuals. It is noteworthy that some of the captains of industry in the private sector were formerly heads of SOEs. It is not far-fetched to speculate that they accumulated the capital with which they started or improved their private sector enterprises through the SOEs.

Thirdly, it is noted that SOEs perform the function of regulating the accumulation process itself, so as to attempt to correct the manifestations of

⁶³ RICHARD HEMMING AND ALI M. MANSOOR, *PRIVATIZATION AND PUBLIC ENTERPRISES*, 3(IMF, Washington Dc, 1988)

⁶⁴ Olukoshi *supra* note 48 at 109

uneven development at both sectoral and regional levels.⁶⁵ This is an especially important function. Due to scarcity or paucity of private capital, the private sector might not be able or willing to invest in certain sectors of the economy or in certain parts of the country. Thus, SOEs fill the void. The fourth role that SOEs perform is the provision of social services.⁶⁶ This is the most popular role and one with which SOEs are most often identified. The National Electric Power Authority provides electricity in Nigeria while NITEL was at one time the only enterprise providing telephone services in Nigeria.⁶⁷

While the above roles properly belong to SOEs, it is also true that some of them were formed without adequate consideration of their place in the macro economy, but purely out of political considerations or as a source of

⁶⁵ Olukoshi supra note 48 at 109-111; see also JEROME UDOJI, *WHICH WAY NIGERIA?*, 157-159 (Spectrum Books, Ibadan, 1999) (noting that upon independence, the wealth of the country was still in the hands of foreigners and the politicians needed to do something. They had to take control and one way of doing that was by public corporations especially since private firms could not go into some sectors which required large capital and infrastructure.)

⁶⁶ Olukoshi, supra note 48 at 109-111; See also GAMALIEL ONOSODE, *THREE DECADES OF ECONOMIC DEVELOPMENT CRISIS IN NIGERIA - ESSAYS*, 146-157 (Malthouse Press, Ltd., Lagos, 1993); See also MEHDI HARIRIAN, *STATE OWNED ENTERPRISES IN A MIXED ECONOMY; MICRO VERSUS MACRO ECONOMIC OBJECTIVES*, 127 (Westview Press, Boulder CO, 1989) (asserting that: "one of the reasons for creating SOEs in mixed economies is to achieve the ends of socialism, yet retain the framework of capitalism")

⁶⁷ Sometimes the social policy aims and distributional objectives are widened to include creation of employment and prevention of rising unemployment. See RICHARD HEMMING AND ALI M. MANSOOR, *PRIVATIZATION AND PUBLIC ENTERPRISES*, 3-4 (IMF, Washington, DC 1988)

patronage.⁶⁸

VII. PERFORMANCE OF SOES IN NIGERIA

Although the SOEs perform important functions, the verdict is that they are wasteful and hardly make any gains. While these shortcomings or failures were largely ignored during the oil boom period because the country had enough resources to continue to subsidize the SOEs, the economic depression of the 1980s and 1990s laid bare the reality that the country has not received much return from its huge investments in the public sector.⁶⁹

Many have noted that although the public sector in Nigeria has been considerably large it has also been largely unproductive in relation to the sizeable investments undertaken.⁷⁰ Several factors account for such

⁶⁸ See A Etukudo, *Issues in Privatization and Restructuring in Sub-Saharan Africa* (Interdepartmental Action Programme on Privatization, Restructuring and Economic Democracy, Working Paper IPPRED-5) International Labor Organization, <http://www.ilo.org/public/English/employment/ent/papers/ippred5.htm> (last visited march 26, 2007); See also ISHRAT HUSAIN, *PERSPECTIVES ON THE NIGERIAN ECONOMY*, 142 (NIIA, Lagos, 1987) (asserting that : "many public enterprises are established at the virtual whim of a minister or of a donor without due consideration of economic and financial viability.")

⁶⁹ See *Nigeria - Federal Public Expenditure*, World Bank Report No 14447, UNI March 1996 (World bank, West Central Africa Dept, Country Operations Division P. 66

⁷⁰ See Mikaila supra note 61 at 28 ; see also Isola supra note 60 at 80; *Nigeria - Federal Public Expenditure*, World Bank Report No 14447, UNI March 1996 (World bank, West Central Africa Dept, Country Operations Division P. 69 (noting that the returns from the considerable investments in the SOEs have been negligible both in terms of dividends and debt service on loans); *Nigeria- Structural Adjustment Program: Policies, Implementation, and Impact*, 30 (World Bank Report, May 1994) (noting that "in terms of direct investment and impact on the overall economy (most notably in its failure to deliver adequate public services and its displacement of the private sector from profitable activities) sector performance has been uniformly poor. Most of the Government's large-scale capital projects have not proved cost effective:

perceived dismal performance. First, if the measure of performance is only the amount of profit made, many SOEs are inherently primed to fail in so far as their *raison d'être* is essentially social and not commercial. Secondly, even where a SOE would ordinarily do well, it is impeded by the pervasive corruption of its managers. Thirdly, it has been noted that sometimes the objectives for which a SOE is established are not clearly defined, while some projects are non-viable.⁷¹ Besides, sometimes there are bureaucratic and political interference and political patronage.⁷² Similar to these are the twin problems of lack of managerial and financial autonomy and lack of financial responsibility and accountability.⁷³

Yet, SOEs are not without defenders. Many suggest that in criticizing SOEs one should remember their origin. They were initially introduced by the colonial powers to prop up capital base for the private sector.⁷⁴ As Lubeck has observed, "although the contradictions and costs attributable to

they use inappropriate technologies, are built in the wrong locations, have long completion delays, and are overcharged by foreign suppliers.")

⁷¹ UDOJI supra note 65 at 160

⁷² UDOJI supra note 65 at 160

⁷³ UDOJI supra note 65 at 160

⁷⁴ Okwudiba Nnoli, *Introduction: The Intellectual Aspects of the Struggle for Nigerian Development*, in OKWUDIBA NNOLI (ED), *PATH TO NIGERIAN DEVELOPMENT*, 1-5 (Codesria, Dakar, Senegal, 1981)

inefficient state intervention are real enough, it is ironic that these same international agencies and former colonial powers introduced the very state agencies that are now the object of scorn."⁷⁵ Others ask for a balanced assessment of SOEs, taking into account their peculiar circumstances and not rush to compare them with the private sector using the profit standard.⁷⁶ Indeed, it has been argued that the failures of SOEs are those of the private sector because most SOEs' activities are performed by the private sector to which they are contracted.⁷⁷ This is of course an aspect of the corruption malady.

⁷⁵ PAUL LUBECK, *THE AFRICAN BOURGEOISIE: CAPITALIST DEVELOPMENT IN NIGERIA, KENYA AND THE IVORY COAST*, 247 (Lynne Rienner Publishers, Boulder, CO, 1987); See also Olukoshi supra note 48 at 111 (noting that public enterprises played a major role in the emergence of the Nigerian domestic bourgeoisie and that it is significant that this class which relied heavily and directly on the state during its formative years should be at the forefront of the calls for privatization)

⁷⁶ See ONOSODE supra note 66 at (arguing that, "criticism of our public enterprises is of mixed validity. Some of it is patently unfair having been born of ignorance of the nature of the political and social constraints within which they function. Some of these criticisms should, in fact, be directed at the machinery of government and the nature, extent and effectiveness of ministerial control over the operations and affairs of these enterprises.") See also HARIRIAN, supra note 66 at 128 (arguing that: "the comparison of financial accounts between private enterprises and SOEs cannot be used as a reliable measure for performance evaluation because such profitability comparisons are misleading and irrelevant. The use of such a measure results in demonstrable biases against SOEs. Financial accounts consist of cardinal numbers that fail to consider the characteristics and nature of SOE objectives. Comparisons and tradeoffs among competing goals are often necessary. The evaluation of SOEs' performance should, therefore, be based upon a goal attainment model, rather than solely on financial viability.")

⁷⁷ Nnoli supra note 74 at 5 (asserting that: "most of its activities are now performed by private contractors. Public enterprises now hardly execute any of their projects with their own personnel. How then can the failure of their projects be blamed on them rather than the private contractors who execute them? Public enterprises merely retain the form but not the substance of their previous existence. Their failures are today the failures of the private sector.")

CHAPTER 3

MEANING AND RATIONALE FOR PRIVATIZATION

I. MEANING OF PRIVATIZATION

It is always ideal to define concepts involved in any study. This serves a two-fold function. First, it delimits the scope of the inquiry and secondly, it clarifies the perspective from which such concepts are viewed. But, as with every attractive option, there are usually difficulties in circumscribing a study's understanding of concepts. Definitions are not always easy for they require exceptional art and dexterity to delineate the contours of a concept while ensuring that such concept does not become too narrow and technical. This difficulty is especially pronounced in the case of an issue that dovetails into several disciplines. Privatization is a concept essentially suffering from a crisis of identity. Is it an economic, social, legal or political concept? The answer is that it straddles all the aforementioned theoretical and practical landscapes. It touches on the organization of the productive sources of society and as such is economic. It implicates the relationship between the government and the people as well as the relationship among the people, and as such is social. It addresses the jural correlatives of ownership, control and power and also impacts the corporate laws of a country. Consequently, it is also legal. It is political because it is also concerned with the role of the

government in the society. Accordingly, it is susceptible to definition from all these perspectives. And there has not been a shortage of attempts at such definitions. Hence, the literature reveals that privatization can be defined broadly or narrowly.¹

In a broad sense, privatization has been seen "as a term which covers several distinct and possibly alternative means of changing the relationship between the government and the private sector."² It is thus seen as a generic term covering a range of policies, which seek to alter the ownership structure and management of the economy away from the government to the private sector.³ Wiezsacker, Young and Finger view privatization as referring to all initiatives designed to increase the role of private enterprises in using society's resources and producing goods and services by reducing or restricting the roles of governments or public authorities in such matters.⁴ To them, these initiatives include, but are not limited to, transfer of property or

¹ Tamar Frankel, *Symposium: A Recipe for Effecting Institutional Changes to Achieve Privatization: Forward*, 13 B.U. Int'l L. J. 295 (1995); Ronald A. Cass, *Macro-Economic Changes from Centralized to Market Economies: Big Bang Gradual Change: The Optimal Pace of Privatization*, 13 B.U. Int'l L. J. 413 (1995)

² W.A. Isola, *Privatization*, in M. ADE ADEJUGBE, *PERSPECTIVES ON NIGERIA'S FLEDGLING FOURTH REPUBLIC*, 80, 81 (MALTHOUSE Press Ltd, Lagos, 2002) (citing I. Kay and O. Thompson, *Privatization a Policy in Search of a Rationale*, Economic Journal Vol. 96 PP.16-32, 1986)

³ Isola, *supra* note 2 at 82

⁴ Ernst Ulrich von Weizsacker, Oran R. Young and Matthias Finger, in ERNST U von WEIZSACKER (ED), *LIMITS TO PRIVATIZATION: WHEN A SOLUTION BECOMES A PROBLEM*, 4 (Earthscan, Toronto, Canada, 2005)

property rights, partial or total, from public to private ownership. They would also include purchase of goods or services by the government from the private sector and the granting of licenses, permits, franchises, leases or concession contracts by the government to the private sector even though ownership remains in the public.⁵ But they would exclude deregulation from the purview of privatization, even though the latter often comes with the former.⁶ On the other hand, Professor Rose would attach the label of privatization generally to “governmentally sponsored efforts to move assets and economic decision-making away from the political arena and into the hands of individuals or private corporations⁷ and would include such initiatives as recognition, deregulation, divestment and enablement.⁸ In one sense, it is said to be “an array of actions designed to broaden the scope of private sector activity, or the assimilation, by the public sector, of efficiency enhancing techniques generally employed by the private sector.”⁹ This

⁵ WEIZSACKER, *supra* note 4 at 4

⁶ WEIZSACKER *supra* note 4 at 4

⁷ Carol Rose, *Privatization- The Road to Democracy?*, 50 St Louis L.J. 691(2006)

⁸ Rose *supra* note 7 at 694

⁹ Mark Baker, *Privatization in the Developing World: Panacea for the Economic Ills of the Third World or Prescription Overused?*, 18 N.Y.L. Sch. J. Int'l & Comp. L. 233, 237, 238 (1999) (quoting Christopher Adam et al., ADJUSTING PRIVATIZATION: CASE STUDIES FROM DEVELOPING COUNTRIES, 6 (1992); Ernst & Young see privatization as a process and not an event, and note that it applies to all kinds of joint public-private ventures. See ERNST & YOUNG, PRIVATIZATION: INVESTING IN STATE OWNED- ENTERPRISES AROUND THE WORLD, 4 (John Wiley & Sons, Inc., NY, 1994)

definition is broad enough to include not only government's divestment of its interest in any or all enterprises, but also every conscious effort undertaken by the government to reform its public sector and make it more efficient.¹⁰ Understood in this way, privatization should be a constant in the political economy of every state. This is because no state would admit that it is not taking measures to make its public sector as efficient as possible. The dispute has never been on the need for optimization of public enterprises. It is always on the best way to achieve that result. There are myriad other definitions of privatization.¹¹

In a narrow context, privatization has been defined as "a transfer of

¹⁰ See also ERNST & YOUNG, supra note 9 (asserting that privatization is a process not an event); Thomas M. Callaghy and Ernest James Wilson III, *African Policy, Reality or Ritual*, in RAYMOND VERNON, (ED), *THE PROMISE OF PRIVATIZATION: A CHALLENGE FOR US FOREIGN POLICY*, 180 (Council on Foreign Relations, 1988) (asserting that: "in its broader sense, privatization is the introduction of greater market rationality or competitiveness into an arena of economic activity.")

¹¹ See for example, Coskun Can Aktan, *An Introduction to the Theory of Privatization*,

privatization.pdf&w=coskun+aktan+rationale+privatization&d=G7YeMvmdOsCb&icp=1&.intl=us (stating that: "Privatization is frequently used referring to the sale of a publicly owned enterprise (POE)'s asset or shares to the individuals or a private firms. However, this definition gives only a narrow meaning of privatization. In broader meaning, it refers to restrict government's role and to put forward some methods or policies in order to strengthen free market economy. The former meaning of privatization, i.e. the sale of a POE's assets or shares to the private sector is mostly called "denationalization"); Anthony Bennett, *The Measurement of Privatization and Related Issues*, in V.V. RAMANADHAM, *HOW DOES PRIVATIZATION WORK?: ESSAYS ON PRIVATIZATION IN HONOUR OF PROFESSOR V.V. RAMANADHAM*, 3, 4 (Routledge, Florence, KY, USA, 1997)

ownership and control from the public to the private sector, with particular reference to asset sales. It is therefore equated with total or partial denationalization."¹² In this context, it is viewed as "the transfer from the public to the private sector of ownership and/or control of productive assets."¹³ It is the sale of a government-operated enterprise to the private sector.¹⁴ It would seem that the narrower definition is more legal while the broader definition is more economic. Thus, the former focuses on the legal consequence of privatization whereas the latter captures its social and economic benefits.

¹² RICHARD HEMMING AND ALI M. MANSOOR, PRIVATIZATION AND PUBLIC ENTERPRISES, 1 (IMF, Washington, DC 1988)

¹³ Id; See also Stephanie R. Nicolas, *Privatizing South Africa's Industries: The law and Economics of a New Socialist Utopia*, 30 Law & Pol'y Int'l Bus. 721 (1999) (defining privatization as "the sale of a state-owned business to entities other than the state."); Yuliya Mitrofskaya, *Privatization as an International Phenomenon: Kazakhstan*, 14 Am. U. Int'l L. Rev. 1399, 1404 (1999) (quoting Andrei A. Baev, *Civil Law and the Transformation of State Property in Post-Soviet Economies: Alternatives to Privatization*, 12 UCLA Pac. Basin L.J. 131, 150 (1993) to the effect that privatization is "the single act of transferring (by means of buying and selling) the legal title of State property, which was in the possession of State enterprises for restricted purposes of producing certain goods under owner-State control, to individual or associated owners"; Callaghy and Wilson, in VERNON, (ED), supra note 10 at 180 (stating: "narrowly defined, privatization is any action that serves to dilute or eliminate government equity ownership or management control of an enterprise.")

¹⁴ Frankel supra note 1 at 295; See also Cass supra note 1 (defining it as "the sale of a state-owned business to parties other than the state"); Maxwell O. Chibundu, *Law and Political Economy of Privatization in Sub-Saharan Africa*, 21 Md. J. Int'l L. & Trade 1.... (noting that "in the most commonly idealized image of privatization, a state divests itself completely of all interests in a commercial venture, and relegates its involvement in the affairs of the entity solely to that of an impartial regulator, leaving it to the ingenuities of profit-maximizing entrepreneurs to create national wealth.") see also Emeka IHEME, *The Legal Regulation of Privatization in Nigeria*, in EZE ONYEKPERE (ED), READINGS ON PRIVATIZATION, 1 (Socio Economic Rights, Lagos, 2003)

The narrow meaning of privatization is also not without complexity. If divestment is the essence of privatization, then how does one categorize the broader efforts, which diminish or eliminate the role of the state in an enterprise? Yet, some economies have an adjunct to privatization, which they regard as commercialization and by which effort is made to ensure that an enterprise is run purely on business basis and subject to market forces. Similarly, certain divestments are subject to the government retaining what are called "golden shares"¹⁵, which enable the government to intervene in the enterprise and to exercise what essentially is a veto over legitimate managerial decisions.¹⁶ But from a legal perspective the narrow definition is preferable. Privatization presumes the existence of an enterprise owned wholly or partly by the government. The act of the government in divesting itself of such ownership is privatization. It is also possible that government does not transfer all its part or whole ownership. This raises the further problem of how to categorize the resulting enterprise. Does a sale which results in an enterprise in which the government and a private entity have interests still constitute privatization? Does it matter who controls the enterprise? Does it matter who has a majority of the shares? These are all nuances and complexities to which a strict definition of privatization, as a

¹⁵ Chibundu supra note 14

¹⁶ Chibundu supra note 14

sale of government shares in an enterprise, is subject. But these nuances need not detain us. For the purpose of this work, we will regard privatization as simply the divestment of shares owned by the government or government entity. The beneficiary of such divestment would usually be the private sector. The seemingly successful outcome of the British experience, in privatizing otherwise State owned enterprises (SOE), in the 1980s¹⁷, and the collapse of communism, have thrust upon the world a certain urgency for a reduction in direct state involvement in economies.¹⁸

¹⁷ See Ingo Vogelsang, *Micro-Economic Changes from Government Owned and Managed Enterprises to Private Sector Enterprises: Micro-Economic Effects of Privatizing Telecommunications Enterprises*, 13 B.U. Int'l L.J. 313; See also Yair Aharoni, *The United Kingdom: Transforming Attitudes*, in RAYMOND VERNON, (ED), *THE PROMISE OF PRIVATIZATION: A CHALLENGE FOR US FOREIGN POLICY*, 23 - 56, (Council on Foreign Relations, 1988); JOHN VICKERS AND GEORGE YARROW, *PRIVATIZATION: AN ECONOMIC ANALYSIS*, 428-429, (MIT Press, Cambridge, MA, 1988) (giving a favorable review of the British program but expressing reservation about the privatization of monopolies); John Vickers and George Yarrow, *Privatization in Britain*, in PAUL MACAVOY & ORS, (ED), *PRIVATIZATION AND STATE OWNED ENTERPRISES*, 209-245 (Kluwer, Boston, 1989); Gladstone Hutchinson, *Efficiency Gains through Privatization of U.K. Industries*, in ATTIAF F. OTT AND KEITH HARTLEY, (ED), *PRIVATIZATION AND ECONOMIC EFFICIENCY: A COMPARATIVE ANALYSIS OF DEVELOPED AND DEVELOPING COUNTRIES*, 87-107, (Edward Elgar, 1991) (concluding, from a study, that public ownership in the U.K. led to growth in labor productivity while private ownership led to growth in profits); Ronald D. Utt, *Privatization in the United States*, in OTT AND HARTLEY, *supra* at 73 (asserting that the British experience is perhaps the best known and most successful program of privatization where major divestitures occurred over an extended period)

¹⁸ See Otiye Igbuzor, *Privatisation in Nigeria (Critical Issues of Concern to Civil Society)* A Paper presented at a Power Mapping Roundtable Discussion on the Privatisation Programme in Nigeria, Organised by Socio economic Rights Initiative (SERI) Held at Niger Links Hotel Abuja on 3rd September 2003 (asserting that "today, the received wisdom is that the state should recede and that private ownership of the means of production is the only viable approach to efficient production of goods and services, economic growth and development. Consequently, there is a move all over the world to privatize erstwhile public enterprises.")

Privatization is essentially the withdrawal of the government from active and direct participation in the affairs of an enterprise, which it hitherto owned.¹⁹

Privatization is at once an old and a new concept. On the one hand, the notion that business efficiency is best attained in private hands has been around from time immemorial, and could be found in the writings of Adam Smith as early as 1762.²⁰ On the other hand, the conscious adoption of privatization as part of state economic policy is recent. It has been noted that the term first appeared in a dictionary only in 1983.²¹ Privatization is usually done in an effort to affect the economy in a positive manner by removing structural obstacles inherent in the ambiguous (if not self-contradictory)

¹⁹ See L. GRAY COWAN, *PRIVATIZATION IN THE DEVELOPING WORLD*, 6 (Greenwood, Press, NY, 1990) (defining privatization as the transfer of a function, activity, or organization from the public to the private sector); ERNST AND YOUNG, *PRIVATIZATION: INVESTING IN STATE OWNED-ENTERPRISES AROUND THE WORLD*, 4 (John Wiley & Sons, Inc., NY, 1994) (also defining privatization broadly as "the transfer or sale of any asset, organization, function, or activity from the public to the private sector."); PAUL COOK AND COLIN KIRKPATRICK, *PRIVATISATION IN LESS DEVELOPED COUNTRIES*, 3-4 (St. martin's Press, NY, 1988)

²⁰ COWAN, *supra* note 19 at 6; See also VICKERS AND YARROW, *supra* note 17 at 1 (quoting ADAM SMITH'S *WEALTH OF NATIONS* (1776): "In every great monarchy in Europe the sale of crown lands would produce a very large sum of money, which, if applied to the payment of the public debts, would deliver from mortgage a much greater revenue than any which those lands have ever afforded to the crown ... When the crown lands had become private property, they would, in the course of a few years, become well improved and well cultivated."); ERNST & YOUNG, *supra* note 9 at 4; See also STEVE H. HANKE, (ED) *PROSPECTS FOR PRIVATIZATION*, Vol. 36 No. 3 P.2, 1987, NY, Academy of Political Science (asserting that Adam Smith tilled the ground for privatization.)

²¹ COWAN, *supra* note 19 at 6; ERNST & YOUNG, *supra* note 12 at 4 (noting that although privatization is old, it came to worldwide attention with the British experiment in the 1980s); See also HANKE, *supra* note 20 at 2 (noting that although the word, privatization, was not in the dictionary before 1983, its counterpoint, nationalization, was already in the dictionary by then.); RICHARD HEMMING AND ALI M. MANSOOR, *supra* note 12 at 1 (noting that privatization entered popular usage only recently and that the sale of public assets is a recent phenomenon of the 1980s, even though both the word, privatization, and the activities can claim a longer history; further nothing that the word "privatize" appeared for the first time in the Webster Dictionary 1983 edition where its earliest recorded use is given as 1948; they also note that S. Hanke claims responsibility for popularizing the word while serving on the US President's Council of Economic Advisers in 1981 and 1982)

roles of the government in seeking to provide services at the cheapest terms, to the citizenry, whilst at the same time hoping that an enterprise remains a going concern.

Privatization may also be done gradually or with a "big bang"²². While a gradualist or intermediate approach to privatization effects a phased divestment of government's interest in enterprises, a "big bang" or immediate privatization exercise seeks to transfer government's interest, in an enterprise, to the private sector as quickly as possible. It is argued that a gradualist approach spreads the time within which the pains of the exercise may be felt and thereby reduces its impact. On the other hand, proponents of immediate privatization posit that the inherent disruption in services is felt once and for all. Even if its severity is pronounced, the populace would take solace in the fact that it is for a short while.²³ The line between the so-called "big bang" and intermediate approaches may not be so sharp. It is inconceivable that a government would wake up one morning and simply divest its holdings in public enterprises. Usually, preparatory work is done. Moreover, because of the vagaries and uncertainties associated with the

²² See Nicolas, *supra* note 13 at 721 - 722; Mitrofanskaya, *supra* note 13 at 1404

²³ See Kim Reisman, *The World Bank and the IMF: At the Forefront of World Transformation*, 60 *Fordham L. Rev.* 349, 391(1992)

exercise, most states start out gradually on the privatization course.

II. RATIONALE FOR PRIVATIZATION

Privatization is the pet project of neo liberal advocates, and is validated on the same grounds as other free market principles. An attempt at justification of privatization of SOEs is at once a canvassing of the reasons for preferring free market capitalism to a system where the state sits at the commanding heights of the economy. Since privatization overlaps different branches of human existence, the rationale for it cuts across all branches of human endeavor. The reasons for privatization may therefore vary according to the perspective.²⁴

A. Efficiency

First, and most importantly, it is argued that privatization leads to

²⁴ See Bruno Dallago, *The Teaching of Western Experience*, in IVAN MAJOR (ED), *PRIVATIZATION AND ECONOMIC PERFORMANCE IN CENTRAL AND EASTERN EUROPE*, 1, 4 (Edward Elgar, Cheltenham, UK, 1999) {noting that there four main groups of goals of privatization: (a) social, political and ideological goals (these include reduction of political interference, weakening the role of trade unions, increasing number of shareholders and attracting foreign support and capital); (b) financing the state budget; (c) short run micro (efficiency) and macro economic goals (equity and macro economic stabilization); (d) long run economic goals, including the economic system and its functioning and targets for development}

efficiency²⁵ in the erstwhile SOEs. The notion here is that the performance of most SOEs is not measured on the basis of their profitability. Nor are the managers and other staff of the companies necessarily answerable for losses sustained by such entities. Instead, the continuity of their employment may be dependent on other factors.²⁶ On the other hand, the private sector is profit driven. Performance is based on output and profit. Directors are constantly aware of the bottom line and of the need to achieve results. In consequence, it is thought that when the ownership of a SOE is transferred to the private sector, it will be infused with the efficiency that is believed to be standard in the private sector.

Economists are not totally agreed on the relationship between ownership and performance. Instead, conventional wisdom is that efficiency is a function of

²⁵ Mary M. Shirley, *The What, Why, and How of Privatization: A world Bank Perspective*, 60 Fordham L. Rev. 23, 25-28 (1992) (asserting that privatization improves the use of public resources and also improves operating and dynamic efficiencies); Peter Rutland, *Economic, Legal, and Political Dilemmas of Privatization in Russia: Privatization in East Europe: Another Case of Words That Succeed and Policies That fail?*, 5 Transnat'l L. & Contemp. Probs. 1, 5 (1995); John R. Dempsey, *Thailand's Privatization of State Owned Enterprises During the Economic Downturn*, 31 Law & Pol'y Int'l Bus. 373, 374 (2000) (asserting that "privatization is the best route to the development of competitive industries, the deepening of domestic and international capital supplies, and to the continued economic growth in a world fixated on reducing commercial barriers and promoting a free market."); Roger Barrett James, *Information - The Key to Fair Privatization: British Successes and Russian Pitfalls*, 20 Loy. L.A. Int'l & Comp. L.J. 837839, 840 (1998) (stating that "among the most widely espoused reasons are to create an enterprise culture, increase competition, reduce government involvement in industry decision - making, eliminate waste, minimize state dependency, and increase and improve the quality of goods and services")

²⁶ Such as party affiliation and patronage; For example, Nigerian Supreme Court jurisprudence holds that staff of government owned enterprises cannot be terminated at will. They can only lose their jobs for misconduct, and this can only be after a rigorous procedure. Such employees are said to enjoy a status with statutory flavor; See *University of Lagos v Olaniyan*; *Garba v university of Maiduguri*; *Laoye v Federal Civil Service Commission*, S.C. 202/87 (1989) NILR 21

market and incentive structures.²⁷ However, advancing what has been termed the residual claimant theory, it is claimed that for effectiveness and to produce results, a firm needs a monitor to ensure that each member of the firm does not shirk their work. However, such a monitor might have no incentive to do the monitoring, and as a result someone needs to monitor the monitor. This function devolves on the person who is the residual claimant to the profit of the firm and who would thus have an incentive to maximize profits and hence the efforts of the members of the firm.²⁸ An owner-managed firm does not face this problem, but a SOE certainly faces it because public authorities are not residual claimants.²⁹ Even so it is conceded that a mere change of a corporation from SOE to a private owned company, does not, in and of itself, solve this problem. This is because in a large corporation, shareholders may not have an incentive to monitor managers. On the other hand, it is argued that the stock market would indirectly perform the monitoring function, since it would act as a barometer for measuring the health of the company. If the share prices fall, shareholders would notice and may in fact sell their shares. This may ultimately lead to a takeover. Proponents of privatization note that there is

²⁷ See AZIZUL ISLAM AND CAROLINA MONSALVE, *PRIVATIZATION: A PANACEA OR A PALLIATIVE?*, 13 (UN, New York, 2001)

²⁸ ISLAM AND MONSALVE, *supra* note 27 at 14

²⁹ ISLAM AND MONSALVE *supra* note 27 at 14

no mechanism to sanction bad performance and that SOEs are not under the threat of takeover and are free from the danger of bankruptcy.³⁰

Similarly, Hemming and Mansoor,³¹ in discussing the claim to efficiency by a private enterprise as opposed to a public enterprise, distinguish between two forms of public enterprises, namely, SOEs that are not monopolies and which have been exposed to competition, on the one hand, and SOEs that are monopolies on the other hand. In the case of the former, they note that such firms, perhaps, survived competition only with budgetary support. Thus, they should not have been SOEs in the first place, and their privatization should be straightforward. For the latter, they note that large efficiency gains can come from privatization of monopolies, but if they have to remain monopolies, they have to be regulated.³² This is the worst dilemma presented by SOEs. If an SOE is a natural monopoly, and is privatized, it is assumed that the same government which could not manage it effectively to obtain

³⁰ See ISLAM AND MONSALVE *supra* note 27 at 14-16 (also identifying other strands for the superior performance by private sector over the public sector as, the fact that the government is less knowledgeable than private managers or owners with regard to the everyday functioning of the firm and that a change in ownership changes the structure of information incentives and controls affecting operating decisions and thus economic performance; and also the fact that SOEs lack clearly defined goals and objectives); See also Cass note 1 (noting that: "if employees' pay and perquisites were the same whether they produced high quality goods or low quality goods, they tended to produce low quality goods. If their lives were not affected by whether the goods ever got to the market after leaving the factory, they tended not to invest a great deal in making sure that the goods were actually delivered.")

³¹ HEMMING AND MANSOOR, *supra* note 12 at 12

³² HEMMING AND MANSOOR, *supra* note 12 at 12

optimal and balanced social and economic results, would now have both the wherewithal and technical capabilities to regulate the enterprise and prevent it from abusing its market power. It would seem that the factors, which militate against the government's effective management of the enterprise would still constrain its ability to effectively regulate. This is especially the case in the developing countries that do not have effective regulatory systems.

Nevertheless, it argued that a number of reasons suggest that a regulated private monopoly, in place of a public monopoly, will increase productive efficiency. First, it is contended that privatization, even of a monopoly, will reduce or eliminate political interference. And this will be so even where the privatization is partial. In such a situation, Hemming and Mansoor argue that governmental interference would face two constraints; from the regulatory agency and from the other shareholders. Again there may be a divergence between the theory of these constraints and their reality. How would a governmental agency prevent government's interference in the affairs of a privatized firm? The regulatory agency itself may be subject and open to interference by the same government. In all likelihood, the regulators were appointed by the government and answerable to them. In the developing

countries, regulatory agencies are yet to acquire the independence and autonomy necessary to constitute such obstacle to governmental interference. Hemming and Mansoor, themselves, seem to recognize the disparity between the theory and reality of the second constraint. They note that if the shares of the firm are broadly held, then it would be difficult to check the government. Their solution is that if the other shares are held by a financial institution, which of necessity must monitor its investment, then the financial institution would be alive to this responsibility, and, perhaps, at least call attention to it.³³

The second reason a regulated private monopoly is preferred to a public monopoly is that the changing of property rights would act as a check on the performance of the enterprise.³⁴ This is the basic leitmotif of privatization. What belongs to the public or government belongs to no one, whereas an individual owner would pay sufficient attention to what belongs to them individually. Thirdly, it is thought that privatization even of a monopoly would result in withdrawal of government financing and therefore subject

³³ They rightly note that such a scenario would run counter to another rationale for privatization which is to spread and broaden share ownership. See HEMMING AND MANSOOR, *supra* note 12 at 13

³⁴ See HEMMING AND MANSOOR, *supra* note 12 at 13

the enterprise to the discipline of the capital market.³⁵ But, the whole notion of monopoly might actually militate against efficiency. The monopoly status insulates the firm from competition, which is the economic incentive for productivity. And we have seen that the regulation might not be effective because the very constraints, which inhibit the government from being an efficient owner of the enterprise, would still prevent it from effectively regulating the private monopoly.³⁶ On this account, it is doubtful if a so-called regulated monopoly is preferable to a public monopoly.

B. Privatization Yields Revenue to the State

The sale of SOEs yields revenue to the government. But, again this must be viewed in the context of the performance of the SOEs. Obviously, if the SOEs are performing optimally, then, society is better off keeping them. This is because while the government may realize money from the sale, it will also lose money in the nature of future profits. But if the SOE is ailing,

³⁵ See HEMMING AND MANSOOR, *supra* note 12 at 13

³⁶ See John N. Drobak, *A Comment on Privatization and Democratization*, 50 St. Louis L.J. 783, 789 (2006) (noting that natural monopoly goods, public goods and goods with social benefits exceeding aggregate private benefits would not be adequately provided by the market and consequently, it does no harm to the market to have the government provide these goods); See also V.V. RAMANADHAM, *STUDIES IN PUBLIC ENTERPRISE FROM EVALUATION TO PRIVATISATION*, 200-202 (Frank Cass, NJ, 1987) (noting that poor performance is the most powerful factor favoring privatization and that that has two strands – social and financial returns; he argues that the social goals and achievements should be balanced with any poor performance and if the poor performance outweighs the social benefits then a case is made for privatization.)

then, its sale will bring revenue to the government that it can use for other purposes or to reduce any deficits that it is facing. Thus, privatization or divestiture can be used as a means to overcome a short-term financing gap.³⁷

It is also noted that if the driving force of a privatization program is the maximization of proceeds from the sale of SOEs this particular objective might conflict with the more persuasive aim of efficiency. This is because in seeking to maximize the proceeds, the government may not promote measures aimed at increasing competition.³⁸

C. Distributional Equity

Another reason for privatization is said to be the promotion of distributional equity. Ironically, one of the reasons for the existence of SOEs, in developing states, in the first place, was to ensure that the comprador class did not appropriate all the resources of the nation. In other words, most SOEs were created to perform social functions. And it was thought that they would work for the public good since they belong to the public. Following their perceived poor performance or, indeed, their appropriation by the ruling class, the SOEs, in most cases, became instruments of the ruling class

³⁷ ISLAM AND MONSALVE *supra* note 27 at 18

³⁸ ISLAM AND MONSALVE *supra* note 27 at 18

and served their interests. Privatization, which is a reversal of the public ownership, is thus considered to be a remedy for the ills associated with SOEs. But there is a trap in using privatization as a cure for the inequities of society. The government usually handles the privatization programs and oftentimes it is feared that the SOEs might be sold to government officials or their cronies.³⁹

As a way out of this, many programs aim for a broad-based ownership structure for the privatized entities. Two further problems arise. First, not many people would have the funds to purchase shares. So, in reality, some of the masses would buy the shares and resell to other individuals, thereby defeating the purpose of the broad-based ownership. Secondly, the attempt to have a dispersed shareholding runs counter to the basic objective of ensuring efficiency by holding the managers' feet to the fire. Where many individuals hold small fractions of the shares in the entity, the situation is not so different from a government owned enterprise. The result may be that no shareholder has enough interest in the company to be motivated to monitor its activities and ensure that it is being run profitably. In this sense, "the

³⁹ See Frederic Boehm, Juanita Olaya and Jaime Polanco, *Privatization and Corruption*, in ERNST U. von WEIZSACKER, *LIMITS TO PRIVATIZATION: WHEN A SOLUTION BECOMES A PROBLEM*, 263-267 (Earthscan, Toronto, Canada, 2005) (discussing the opportunities for corruption in privatization)

distributional goals of privatization programmes may come into direct conflict with the efficiency objectives.”⁴⁰

D. Privatization Facilitates Foreign Investments

In the era of globalization, privatization is also seen as being beneficial to a state's economy because it attracts foreign capital in terms of foreign investment. Practically, since the SOEs are for sale, they constitute another avenue for foreign investment. This is mostly the case in developing countries where the enterprises may be very gigantic and the purchase price may not be readily available locally. However, while privatization may make SOEs available to foreign investors and therefore increase the avenues for capital inflow into the country, privatization alone may not promote foreign investments.⁴¹ Outside investors are usually aware of the political, social and other dimensions to these enterprises. Such circumstances may

⁴⁰ ISLAM AND MONSALVE supra note 27 at 22; See also Bennett supra note 11 at 12 (noting: “how to reconcile efficiency with equity remains a leading issue in the transitional economies. Equity calls for the distribution of public assets to the people at large, not to those who are able to pay the most for them as a result of their (often illegal) amassing of wealth in an earlier regime.... Efficiency, on the other hand, requires that effective control of assets is in the hands of those possessing entrepreneurial vision of how they can be most productively used.”)

⁴¹ This is one of the stated objectives of the Nigerian exercise; See Article 1(2) of the Guidelines on Privatisation of Government Enterprises (contained in Privatisation Handbook, 3rd edition, published by the National Council on Privatisation) (stating that the government intends to use the privatization program to reintegrate Nigeria into the global economy, as a platform to attract foreign direct investment in an open, fair and transparent manner.)

make foreign investors wary of committing their resources into these ventures. Sometimes, in order to do so, they would seek so many assurances and other guarantees from the government. But on the whole, privatization has always been coupled with democracy.⁴² Another aspect of this rationale is that privatization promotes technological development in the developing world. By opening the SOEs to investment by foreigners, the opportunity is created for the foreigners to bring both their technology and their technical skills. Besides, the competition resulting from privatization would stimulate innovation and development in order to optimize productivity. The firm is therefore likely to invest in methods that would enhance this.

Privatization also helps in the development of the capital market. Depending on the method of privatization adopted, the capital market may prove central to its implementation. If the shares of a SOE are to be sold by public offer, they would be sold through the capital market. In most developing countries, the capital and securities market may still be in infancy. With the surge of the activities associated with privatization, handling the sales might positively impact the capital market. At the same time, such development

⁴² See Rose supra note 7 at 693-694 (arguing that: "the relationship of privatization and democratic governance cannot be seen simply as ancestor - to - successor, where one (privatization) precedes the other (democratization). At most (to continue the family analogy) privatization and democratization are siblings, co-existing in a mixed environment of mutual support, dependence, and occasional rivalry.)

would steer the citizens towards investments.⁴³

Privatization is also said to free the government to do what it is best suited for, which are regulation and the provision of security and other fundamental services encapsulated in its police powers.⁴⁴ Perhaps, this rationale can best be understood on two levels. Since, government is inherently not best suited to run profitable businesses, its direct involvement distracts attention from its other functions. By pulling out of direct involvement in the running of corporations, it can concentrate on its core functions. An analogy to the basic economic concept of specialization is apposite. Privatization results in the government deploying all its resources to the fundamentals of running the country and this will lead to optimum performance in that area, while the private sector engages in directly providing goods and services. This may be a variation on the theme of efficiency. Even where the government retains some enterprises, it is thought that privatization of the others gives it more time and resources to concentrate on the few that it retains.⁴⁵ On another

⁴³ Coskun Can Aktan, *The Rationale for Privatization*, supra note 11

⁴⁴ This is one of the reasons which the Nigerian government gave for embarking on the privatization exercise; See Statement by the Nigerian President, Olusegun Obasanjo, on the occasion of the inauguration of the national Council on Privatization, at the Presidential Villa, Abuja, July 20, 1999 (hereinafter "Presidential Statement")

⁴⁵ HEMMING AND MANSOOR supra note 12 at 6

level, the government is the regulator of the economy. In performing its refereeing role, the government is supposed to be impartial and fair. If at the same time, that it is regulating the conduct of market players, the government is also a market participant, there is an inherent conflict of interest.⁴⁶ This may lead to distortions in the economy and again militate against efficiency. So privatization removes this structural imbalance in the economy.

Some consider the reduction of government involvement in the economy as an end in itself and therefore point to privatization as a positive on this account. Privatization is thus seen as reducing the size of the government.⁴⁷

A corollary is that it limits the opportunity for interference in the enterprise and therefore reduces the avenues available for government corruption.⁴⁸

However, a better analysis, or, rather, a logical conclusion to the argument,

is that privatization facilitates efficiency by reducing governmental

⁴⁶ This is not just a theoretical possibility. There are claims that in some states SOEs may violate regulations and go free; See Shirley, *supra* note 25 at 26 (giving the example of one African country in which the SOEs were several years behind in paying their taxes and their utility bills but were not sanctioned)

⁴⁷ Isola, *supra* note 2 at 83

⁴⁸ Boehm, Olaya and Palanco *supra* note 39 at 263

interference and corruption in the enterprise.

Privatization also reduces the influence of trade unions.⁴⁹ Obviously this would be a controversial advantage, as not every one would agree that a reduction of the influence of trade unions is a good thing. But to advocates of free market, trade unions interfere with the efficient operation of market forces in the labor market, and to the extent that privatization reduces their influence it actually does have a salutary effect on the economy. Another labor related claim made by proponents of privatization is that it eliminates hidden unemployment.⁵⁰ In other words, a SOE retains employees whether it needs them or not, and whether they are productive or not. It leads to a situation of hidden unemployment. But where the SOE is privatized, the new entity is likely to rationalize the workforce to ensure that employees who are redundant are so declared.

There are other reasons⁵¹ for which a state may choose to privatize its public

⁴⁹ HEMMING AND MANSOOR supra note 12 at 6

⁵⁰ Aktan supra note 11

⁵¹ For instance privatization is said to curb inflation. See Aktan supra note 11.; Often times too, privatization is just a policy prescription imposed on a country by the international financial institutions like the World Bank and the International monetary Fund. See Frankel supra note 1; Some cynics believe that in some

enterprises. These may vary with the particular state, but the over arching consideration is usually the attempt to attain economic efficiency.⁵²

III. ARGUMENTS AGAINST PRIVATIZATION

The concept of privatization is not a wholly sweet pill to swallow. It has its critics, who charge that privatization results in increase in prices and hurts the common man. This is the direct antithesis of the advantage of efficiency and market forces. Since the SOEs are not profit driven, they may charge significantly lower prices for their goods or services. Indeed, the subsidies from the government are indirectly passed to the citizens, in the nature of low prices. With privatization, and the need to compete on equal terms with

cases a state may privatize its s just because the level of failure on the part of the enterprises is such that they imperil the position of the state officials. See Mitrofanskaya, supra note 13 at 1403. In that sense the privatization is prompted by the self-interest of such officials. See also Callaghy & Wilson, supra note 10 at 183 (attributing the momentum of the privatization exercise in Africa partly to the fact that African governments ran out of cash)

⁵²But sometimes the touted objectives may conflict. And scholars may disagree on the hierarchy of these rationales. Compare VICKERS AND YARROW, supra note 17 at 425 (arguing that the primary criterion for judging privatization is the improvement of industrial efficiency and that other goals such as extending share ownership, raising revenue and so on, are secondary; they assert that the latter goals can be achieved by other means) with Leroy P. Jones, Pankaj Tandon and Ingo Vogelsang, *Net Benefits from Privatization of Public Enterprises*, in OTT AND HARTLEY, (ED), supra 17 at 2, 53-70 53 (alluding to "the most standard measure of performance" of privatization, as being social welfare; they assume that governments privatize in order to maximize social welfare, and that to assess the success of privatization is to examine the effect of the divestiture on social welfare); Of course the dichotomy between the two reasons is not that sharp. The one inevitably leads to the other. Economic efficiency invariably results in the greatest benefit to the greatest number of individuals, that optimal and utopian state which is not antithetic of social welfare. However, as with every controversial subject, perceptions may differ. The rationales may also vary depending on the stakeholder concerned. This may range from national and local governments, managers of the SOE to employees; See ERNST & YOUNG, supra note 9, 13-14

other participants in the market, the enterprises tend to increase prices. However, advocates of privatization would counter that while the cost of the products may increase, there is a corresponding increase in the quality and standard of services obtained.

Closely related to this are the redundancies and loss of jobs that seem to follow privatization. In a bid to achieve efficiency, the privatized enterprises are wont to streamline operations. This results in loss of jobs.⁵³ The projected positive impact on the over all economy is not immediate and such aspiration may not seem a sufficient counterpoint to the devastating effect the loss of jobs may have on individuals. No wonder that in most developing economies, the stiffest resistance to privatization comes from the labor unions and other workers' groups.⁵⁴ But proponents argue that while the enterprise remained state owned, the unemployment was hidden⁵⁵ and that

⁵³ But see Leroy Jones, *Winners and Losers in Privatization*, in AHMED GALAL AND MARY SHIRLEY (EDs), *DOES PRIVATIZATION DELIVER?* (Highlights from a World Bank Conference) 91-94 (The World Bank, Washington, DC, 1994) (commenting on case studies of privatization in four countries, and noting that employees were not worse off; he attributes this to the fact workers generally have some power to negotiate a favorable deal during privatization and that most public enterprises are reasonably high tech and thus require employees with technical skills and that this gives employees some leverage)

⁵⁴ For example the Privatization agency in Nigeria has been having a running battle with the workers of the state owned electricity enterprise, National Electric Power Authority (NEPA). The workers strongly opposed privatization of NEPA.

⁵⁵ See Aktan supra note 11

privatization is not the cause of the unemployment but rather the solution.⁵⁶

This is because the loss of jobs accompanying the short term restructuring may be compensated by future employment opportunities that will attend an efficient enterprise.⁵⁷ In some cases, the government has to take account of the impact privatization would have on jobs and may obtain a guarantee from the prospective transferees, of its interest, that workers would not be laid off. The issue may also be addressed by dialogue with the employees and by encouraging the employees to participate in ownership.⁵⁸

Similarly, it is contended that privatization exposes the economy to dominance by a few. Only a few rich are in a position to acquire the SOEs. This problem is compounded by the fact that in most developing countries SOEs are monopolies. While the government owned them, political pressures generally would insulate the consumers from the predatory tendencies of the monopolies. But when they are transferred to private hands the few rich folks who can afford them would exploit and indeed abuse their

⁵⁶ CHARLES VUYLSTEKE, *TECHNIQUES OF PRIVATIZATION OF STATE - OWNED ENTERPRISES*, Vol. 1 *Methods & Implementation*, 129- 133 (The World Bank, Washington, DC, 1989)

⁵⁷ VUYLSTEKE *supra* note 56 at 129-133

⁵⁸ VUYLSTEKE *supra* note 56 at 129-133

market dominance.⁵⁹ This will undercut the social and macroeconomic objectives for privatization, because “privately efficient profit seeking can no longer be expected to lead to socially efficient results.”⁶⁰ In a region, such as Africa, reeling from the effects of colonialism, this concern is elevated and may be at the heart of opposition to privatization. Some might see the clamor for liberalization as another mechanism to re-colonize the region of Africa using privatization as the Trojan horse.⁶¹ The panaceas for this shortcoming are few. First, states may take measures to reduce the market power of the privatized enterprise by expanding the scope of competition. This may be achieved by eliminating any barriers to entry into the relevant market so as to increase the scope of actual or potential competition.⁶² Secondly, the enterprise may be restructured so as to eliminate or reduce its market dominance.⁶³ Where monopoly power remains, then, as of necessity, the state has to enact effective competition laws and other regulations.⁶⁴ A caveat is that a cautious balance must be maintained between appropriate

⁵⁹ Thus Vickers and Yarrow argue that “theoretical analysis and empirical evidence support the view that private ownership is most efficient – and hence privatization is most suitable – in markets where effective (actual or potential) competition prevails.” See VICKERS AND YARROW, *supra* note 17 at 426.

⁶⁰ VICKERS AND YARROW, *supra* note 17 at 426

⁶¹ Callaghy & Wilson, *supra* note 10 at 183

⁶² VICKERS AND YARROW, *supra* note 17 at 427

⁶³ *Id*

⁶⁴ *Id*

regulation and over regulation since the latter may defeat the purpose for the privatization.⁶⁵ Ideally, both reduction of market power and regulation, should precede the privatization. However, experience shows that most developing states at best enact regulatory laws, if they do so at all, only as part of the privatization exercise.

This imbalance is more pronounced in developing states, and a scholar⁶⁶ has argued that writers on the subject tend to ignore this tension. Simply put, privatization and “marketization” of the economy would benefit the economically dominant few. It would further entrench their dominance and cause a tension between democracy, as represented by the majority, and market, which is dominated by the rich minority. Chua asserts:

“In developing countries with a market – dominant minority, markets

⁶⁵ Jones, Tandon and Vogelsang, in OTT AND HARTLEY, (ED), supra note 17 at 67 (noting that government should safeguard against price increase by regulating the enterprise after the privatization, but that such regulation should be done carefully in order to maintain a balance between the need to protect against price increase and the need for the enterprise to achieve the objective for its privatization in terms of cost constraint and productivity improvements.)

⁶⁶ Amy L. Chua, Markets, *Democracy and Ethnicity: Toward a New Paradigm for Law and Development*, 108 Yale L.J.1, 79 (1998) (stating: “most developing countries have one or more ethnic minorities who, for varying reasons, have economically dominated the ‘indigenous’ majorities around them. Under certain conditions, the presence of an economically dominant minority will introduce a fundamental tension between markets and democracy. This will be the case whenever the economically dominant minority is also market – dominant, meaning that it tends to be economically dominant under market conditions.”) Of course it is arguable whether such tension is wholly undesirable. To the extent that the market dominant group is in the political minority, that scenario will offer an inherent protection to the consumers, which will invariably be in the political majority. Furthermore, in the peculiar context of developing or undeveloped democracies, the dilemma may be theoretical because political power may tend to track economic power. In other words, those who control economic power, even if they are in the minority, still possess political power. Although this is antithetic of democracy, developing countries especially in Africa have not witnessed true democracy.

and democracy will tend to favor different ethnic groups. Markets (by definition) benefit the market – dominant minority, while democracy will increase the power of the relatively impoverished majority. In these circumstances, markets and democracy will not be mutually reinforcing. Rather, the combined pursuit of markets and democracy will produce a very charged and unstable situation.”⁶⁷

Chua’s thesis assumes a powerful ethnic minority but the thrust of the proposition is equally true even where the minority is not a recognized ethnic group. As long as the economic power resides in the hands of a few, they will tend to coalesce into an association that may be likened to an ethnic group. This triggers a tension where they are in a position to virtually buy all SOEs.

Privatization also results in the loss of a sense of symbolic ownership of the SOEs. Notionally, since the enterprises are owned by the State, they belong to every one. They are the common heritage of the entire citizenry. Therefore, upon sale, it is not only the government that is divested but also the common man. And critics may not be persuaded by the fact that the sale of the enterprises will be for valuable consideration, which will go to the common purse. They see the physical structure of the SOE as a sign of their common ownership. The money realized from the sale may not be so visible

⁶⁷ Chua *supra* note 66 at 79

to them, and indeed, it may be doubtful if it would be used for their common good. Besides, in a system that is not particularly transparent, the valuation and pricing of the enterprises may be tainted or, indeed, be dubious. Similarly, privatization might be seen as a loss of sovereignty especially if the SOEs involved relate to the natural resources of a developing country and is acquired by a multinational corporation or other foreign investor. And fears are expressed that privatization implies a return by the developing world to imperialistic conditions, and that it affects a retreat from national identity and self-determination.⁶⁸

IV. METHODS OF PRIVATIZATION

Various mechanisms are available to a country desirous of privatizing its SOEs. As with the meaning of privatization, these methods are as varied as the perceptions of privatization. But, we shall concentrate on those methods, which result in an ouster of the property rights of the state in the shares in the SOEs.

⁶⁸ John E. Rhea, *Privatization in the International Petroleum Industry: The Interplay Between Politics, Economics, and Reliance*, 33 *Denv. J. Int'l L. & Pol'y* 609, 629-632 (2005)

A. Direct Sale

In a direct sale, the shares of the SOE are sold to a pre-identified single purchaser or group of purchasers.⁶⁹ This may be through a pre-qualification of bidders who then bid for the shares or through direct negotiation. For investors, direct sale represents the most straightforward method of acquiring control over a SOE. For the government, this method has the advantage of enabling it to select strong purchasers with relevant industrial, commercial, financial or other experience.⁷⁰ This method also has the advantage of ensuring a quick completion to the transaction. However, it has been noted that the most effective way of finding the best suited investor and to maximize government revenues from the sale is through competitive tender, and that direct negotiations with a single buyer rarely generate the best possible deal for the government.⁷¹ It has also been noted that privatization by sale to the highest bidder is the preferred method in developed economies because it leads to efficient matching of buyers and

⁶⁹ VUYLSTEKE *supra* note 56 at 16-20

⁷⁰ VUYLSTEKE *supra* note 56 at 16-20; KALLY MEGYERY AND FRANK SADER, FACILITATING FOREIGN PARTICIPATION IN PRIVATIZATION, 14 (World Bank, Washington DC, 1996)

⁷¹ MEGYERY AND SADER *supra* note 70 at 14

assets.⁷² On the downside, where the direct sale is done privately, it opens the process to accusations of lack of transparency.⁷³

B. Public Offering

Under a public offering, the state sells to the general public all or large blocks of stock that it holds in a SOE.⁷⁴ This is usually through the stock exchange. This is usually the preferred mode where the aim is to broaden the share ownership. Usually the SOE is prepared for the privatization to make it attractive to the public and to ensure there is an adequate distribution network for the sale.⁷⁵ Sale through public offering has the advantage of transparency. Any one can buy the shares on the stock exchange. However, it might result in the transfer of the SOE to so large and dispersed a group as to negate the economic or efficiency motive for the privatization. This is because no one investor or group of investors would have a significant

⁷² See John Bennett, Saul Estrin and Giovanni Urga, *Methods of Privatization and Economic Growth in Transition Economies*,

P. 8 (last visited May 17, 2007)

⁷³ VUYLSTEKE supra note 56 at 16-20

⁷⁴ VUYLSTEKE supra note 56 at 11-16; See also Philip M. Nichols, *Creating a Market Along the Silk Road: A Comparison of Privatization Techniques in Central Asia*, 29 N.Y.U. J. Int'l L. & Pol'y 299, 308 (1997)

⁷⁵ MEGYERY AND SADER supra note 70 at 14

interest to warrant the extra effort that might be required to monitor the enterprise. Some countries address this shortcoming by combining the public stock offering with a direct sale. A particular portion of the SOE's shares might be sold to pre-identified investors who have both requisite resources and acumen to turn the entity around, while the remainder of the shares would be sold to the public at large through the public offering.

C. Sale of Government Assets

In this method of privatization, the assets of the SOE are sold usually through private sale.⁷⁶ The distinctive feature of this method is that the purchasers do not receive any shares. Instead they buy the assets of the SOE. But if all the assets are sold, then the SOE is wound up. Sometimes the assets may be transferred to a new company to be formed by the government and private shareholders, and the assets would thus be considered the government's, or part of the government's, contribution to the new company. The advantage this has, for the investor, is that they can acquire

⁷⁶ VUYLSTEKE supra note 56 at 20- 23

the company without the attached liabilities, since they buy only the assets.⁷⁷

D. Reorganization into Component Parts

This involves the breaking up of a SOE into several entities or into a holding company and several subsidiaries.⁷⁸ This might be a prelude to outright sale of some or all of the entities. This is usually preferred where the SOE incorporates many activities that, in the aggregate, are not attractive to potential investors, whereas individual units would be. It may also be used where the SOE is a monopoly and the fragmentation would facilitate competition. This method can be considered as a method of privatization in the broadest sense. To the extent that the breakup of the SOE into several units, entails the elimination of the SOE as it was initially known, it could be said that the act of reorganization extinguished the SOE. But until the several entities are transferred to the private sector, the privatization remains inchoate.

⁷⁷ MEGYERY AND SADER *supra* note 70 at 15; In truth the investors do not technically acquire the company. They only buy its assets. Perhaps a better analysis is that the investors acquire the use of what was once the company but not its liabilities.

⁷⁸ VUYLSTEKE *supra* note 56 at 23-26

E. Private Investment in a SOE

Private investment in a SOE entails the injection of new capital into a SOE.⁷⁹ The result is that of a dilution of the government's interest and the creation of a partially privatized enterprise (that is if there was no private equity involvement in the enterprise in the first place). This method is used where the SOE has capital problems and there is the desire to infuse private capital into it. This is considered a method of privatization not so much because the government parts with its shares in the enterprise but because the private sector now participates in what was previously a wholly government enterprise.

F. Management/Employee Buy-Out

Under this method of privatization, its management and employees acquire the SOE.⁸⁰ Usually, the employees and managers would have to source for the funds to acquire the SOE, and would sometimes use the SOE as collateral for the funds. This method is usually adopted where the SOE is plagued with labor issues and where the alternative is liquidation. The

⁷⁹ VUYLSTEKE *supra* note 56 at 26-29

⁸⁰ MEGYERY AND SADER *supra* note 70 at 16; VUYLSTEKE *supra* note 56 at 29-34

ownership interest becomes an incentive for the management and employees since they now have a direct personal and pecuniary interest in the success of the enterprise.⁸¹ Politically, too, this method is attractive as it avoids the criticism of selling out to foreign or other interests. But the downside is that the enterprise might become undercapitalized because the management and employees might not have enough funds and in some cases the enterprise could even be sold to them on a discount.⁸²

G. Voucher Privatization

Voucher privatization is used where the purpose is to spread the ownership of the SOE. Typically vouchers are given to citizens for free. They can then use these vouchers to "purchase" the shares of SOEs. This is not effective in raising capital for the enterprise, even if it is popular. Besides, it may defeat the purpose of the privatization because of the spread of the shareholding.⁸³

There are other devices which some regard as methods of privatization.

These range from lease and management contracts to introduction of

⁸¹ VUYLSTEKE *supra* note 56 at 29-34

⁸² MEGYERY AND SADER *supra* note 70 at 16

⁸³ MEGYERY AND SADER *supra* note 70 at 15

competitive features to the enterprise.⁸⁴

⁸⁴ See generally VUYLSTEKE *supra* note 56 at 8-9 and 34-40; others included are economic policy reforms such as demonopolization, increased private sector financing of new activities such as contractor equity financing, revenue participation certificates or revenue bonds issued by the state or state bodies and privatization by "attrition" (SOE failing to invest in its monopoly and thereby allowing the private sector to invest in plants and related facilities and take over all or part of the SOE's operations)

CHAPTER 4

PRIVATIZATION: THE NIGERIAN EXPERIENCE

As earlier stated, Nigeria has, for some time now, experimented with the privatization of its SOEs. Two broad episodes are identifiable: the first major attempt was in 1988 under the supervision of the then existing military government while the second, and subsisting effort, was initiated in 1999 and is being managed by the civilian administration. This chapter will be devoted to the first episode. The current exercise will be discussed in Chapter 5.

I. BACKGROUND TO THE PRIVATIZATION PROGRAM

While there might currently be ambivalence about SOEs in Nigeria, the provenance and reason for the state's intervention, in the nature of participation in ownership of SOEs, are undoubtedly clear and free from controversy. At independence, the establishment of SOEs seemed a natural policy for the government to take. The development of the newly independent country of Nigeria was one of the topmost items on the agenda

of the government. Understandably, development of private capital was very low. The First National Development Plan, 1962-1968, thus aimed at the development of an economy in which private capital would be dominant.¹ But certain SOEs were inherited from the colonial administrators and were retained, principally to stimulate the private sector. These enterprises were not profit driven, but instead charged prices, which were statutorily determined.² It was thought that since the outputs of the SOEs constituted inputs in the production of other goods and were also required by households, setting their prices low would attract inflow of foreign capital and reduce disparity in the living standard of the people. But these expectations did not materialize. The inflow of foreign capital was limited and went into commercial rather than the industrial sector. The private sector was not developing fast enough and there was a general lack of expertise, on the part of Nigerians, to occupy the positions left by foreigners after the indigenization program in the 1970s.³ To address this lapse, the Second and Third National Development Plans, 1970-1974 and 1975-1980, respectively,

¹ MIKE OBADAN AND 'SESAN AYODELE, COMMERCIALIZATION AND PRIVATIZATION POLICY IN NIGERIA, 6-7 (NCEMA, Ibadan, 1998) (hereinafter "OBADAN AND AYODELE, COMMERCIALIZATION AND PRIVATIZATION POLICY")

² OBADAN AND AYODELE, COMMERCIALIZATION AND PRIVATIZATION POLICY, *supra* note 1 at 6-7

³ Omawale A. Kuye, *Problems and Prospects of Nigeria's Privatisation and Commercialisation Programme*, The Quarterly Journal of Administration, Vol. XXV No. 1 October 1990, P. 49 at 54-57

witnessed the enlargement of the existing SOEs and the establishment of new ones.⁴ Similarly, the establishment of the SOEs extended, beyond the social services and utilities sector, into unorthodox areas such as manufacturing, agriculture, commerce and banking. Thus from the private sector focus (as the engine of development) of the First National Development Plan, there was a shift in the Third National Development Plan, which relied on the public sector to be the prime mover of the socio-economic development of Nigeria and the SOEs thus became the main engine of growth.⁵

The conventional wisdom was that the SOEs did not perform well although it is an open question what standard was used for measuring their performance. Even as early as 1968, the question of how best to use the SOEs had become topical. Different commissions were set up by different administrations to look into the best way to optimally use SOEs.⁶ The Ani

⁴ Some of the enlarged ones included Nigerian Railway Corporation, Nigerian Airways Limited, the Post and Telecommunications Department and Nigerian Telecommunications, NITEL. The new ones included National Electric Power authority (created from the merger of Electricity Corporation of Nigeria and the Niger dams Authority), the River basin Development Authorities, the Nigerian national Petroleum Corporation, NNPC, (which metamorphosed from the Nigerian National Oil Company). See OBADAN AND AYODELE, COMMERCIALIZATION AND PRIVATIZATION POLICY supra note 1 at 7-8

⁵ OBADAN AND AYODELE, COMMERCIALIZATION AND PRIVATIZATION POLICY, supra note 1 at 7; See also National Centre for Economic Management and Administration (NCEMA), *Public Enterprises Reform*, 29 (Training Programme Report 2000/2001)

⁶ Adebayo Olukoshi, *The Historic Significance of the Policy of Privatisation in Nigeria*, in R. OMOTAYO OLANIYAN AND CHIBUZO N. NWOKE (EDS), STRUCTURAL ADJUSTMENT IN NIGERIA, 103,

Commission was instituted to look into government parastatals in 1968. In 1973, the Udoji Commission was also concerned with an examination of the public sector. This was followed by the Onosode Commission, in 1981, and the Al-Hakim Commission, in 1984. Results from the reports of the commissions showed problems with the SOEs. These problems included misuse of the enterprises' monopoly powers; defective capital structures resulting in heavy dependence on the Treasury for funding; escalating budgetary burden; bureaucratic bottlenecks in relations with supervising Ministries; mismanagement, corruption and nepotism; ill advised investment resulting in costly and inefficient utilization of public resources; and constant political interference in decision making.⁷ The latter two Commissions⁸ were specifically charged with the responsibility of determining the basis for a new funding arrangement that would make the SOEs less dependent, on the treasury, for funding, determine appropriate capital structures and appropriate incentives to enhance productivity and

115 (Nigerian Institute of International Affairs, Lagos, 1989); Technical Committee on Privatisation and Commercialisation Final Report Vol. 1 (Main Report) 1993 (Hereinafter "TCPC Report") P. 8; A.F. Odejide, *A Framework for Evaluating the Performance of Nigerian Public Enterprises: Implications for Privatization*, The Quarterly Journal of Administration Vol. XXI Nos. 3 & 4 April/July 1987P. 190 at 191; National Centre for Economic Management and Administration (NCEMA), *Public Enterprises Reform*, 29 (Training Programme Report 2000/2001); Ekong Emah, *The Change of Baton: From State Control to Privatisation and Commercialisation*, in *Setting the Economy Free* (a publication of Kee Communications Ltd, Lagos, 1993) p.9

⁷ Ekong Emah, supra note 6 at 9

⁸ Onosode Commission set up by the Shagari administration and Al-Hakim Commissions set up by the Buhari administration

efficiency of the staff.⁹ Both recommended a selective privatization of the public sector.¹⁰ Significantly, both the Onosode Commission and the Al-Hakim Commissions were set up at a time of perceptible economic crisis and international pressure for the country to rationalize its public sector. And it is arguable that their recommendations reflected the global trend towards a shrinking of the public sector in favor of private enterprises as championed by the "Washington Consensus". Yet there are those who contend that privatization was not new to Nigeria even in the 1980s.¹¹

Certainly, here and there before the 1980s, the government might have handed over a project or another to the private sector, but it was only in the 1980s that privatization came to be considered as a thrust of government's economic policy. The first documented attempt at privatization was in 1983

⁹ Ekong Emah, *The Change of Baton: From State Control to Privatisation and Commercialisation*, in *Setting the Economy Free* (a publication of Kee Communications Ltd, Lagos, 1993) P.9

¹⁰ Odejide supra note 6 at 190-191; The Al Hakim Commission recommended as follows: (a) the government should embark on a program of selective privatization as a way of prompting the parastatals to be more efficient; (b) in embarking on the program, the government should ensure that the 'national interest' and 'national security' were paramount; (c) four out of eight public utility companies should be fully or partially privatized by making them go public and seek quotation on the stock exchange; (d) the government's privatization exercise should ensure that private interests were allowed to hold between 50 and 70 per cent of the shares of public enterprises put up for sale, the aim being to reduce government interference in their management to the barest minimum; and (e) in undertaking the change from public to private ownership, workers of the affected parastatals should be allowed 10 per cent participation in the equity so as to induce in them a sense of commitment to the organization. See Olukoshi, supra note 6 at 117

¹¹ JEROME UDOJI, *WHICH WAY NIGERIA?* 166 (Spectrum Books Ltd, Ibadan, Nigeria, 1999) (stating that privatization was first practiced in Eastern Nigeria in the early sixties when the government of that region sold its shares in the Nkalagu Cement Company to the public.)

when the Shagari administration, as part of its effort to contain the growing fiscal and payments problems of the country, announced that it had decided in principle to relinquish its ownership, of certain corporations and parastatals, to private interests.¹² Since that administration was terminated that year, it did not have time to fully implement that decision.

That responsibility fell to the succeeding military administration of Muhammadu Buhari, which also had to continue the negotiations with the International Monetary Fund (IMF), an institution that had been demanding governmental economic reforms including privatization of SOEs. That administration instead opted for commercialization, maintaining that it would be unfair to sell the parastatals, with the huge public investments that had gone into them, to a few people.¹³ Nonetheless, the government decided to sell a set of public companies engaged in agro-allied activities to the private sector.¹⁴ However, neither the commercialization to which the government was amenable, nor the privatization of the few enterprises could be completed before the Buhari government was itself sacked by the Ibrahim Babangida military administration.

¹² See Olukoshi, *supra* note 6 at 116

¹³ Olukoshi, *supra* note 6 at 117

¹⁴ Olukoshi, *supra* note 6 at 118

As shown in Chapter 1, the Babangida administration, 1985-1993, was the first to seriously adopt a privatization program in Nigeria. Although such policy prescription was one of the fundamentals of the conditions usually imposed by the IMF and World Bank, two institutions that the government was desirous of working with, the Nigerian version of privatization was also said to have been prompted by so many other factors most of which dovetail with the general rationale usually proffered for privatization any where.

Olukoshi¹⁵ has summarized the prevalent arguments for privatization in Nigeria as follows: The primary concern is the notion of efficiency and performance. The SOEs were considered to be underperforming and to be unprofitable. For instance, it was argued that the electricity enterprise NEPA continued to operate at a loss from 1978-1987.¹⁶ Moreover, the unprofitable SOEs constitute an intolerable drain on the scarce resource of the government because apart from failing to generate revenue for the

¹⁵ Olukoshi supra note 6 at 120-121

¹⁶ OBADAN AND AYODELE, COMMERCIALIZATION AND PRIVATIZATION POLICY, supra note 1 at 61-66; See also A.O. Sanda, *Justification and Strategies for the Selective Privatization of State Owned Enterprises*, The Quarterly Journal of Administration Vol. XXI Nos 3 & 4 April/July 1987 P. 173; JOHNSON A. AKINBADE, PUBLIC ENTERPRISES AND PRIVATISATION IN NIGERIA, 74-75 (Macak Books Ltd, Lagos, 2004)

government, they also depended on the state for subventions.¹⁷ The SOEs were also accused of failing to fulfill the objectives for which they were established, namely large scale physical output of goods and services, and they were also alleged to be characterized by poor billing systems, poor costing and credit control. It was thought that the only way to correct these anomalies was to privatize them. Furthermore, it was argued that privatizing Nigeria's SOEs would generate greater wealth and provide more employment. It was also thought that the corruption endemic in public enterprises would be solved by their privatization, while at the same time the opportunity for political interference and administrative red-tape would be eliminated. Privatization would also yield enormous amounts of money for the government through the proceeds from the sale of the enterprises. This would be in addition to the taxes that would be chargeable on the profits of privatized enterprises and such monies would go a long way in helping to solve the fiscal crisis of Nigeria. Moreover, "even if the SOEs were viable, profitable and efficient, they would perform better if they were privatized because private managers are better than government managers."¹⁸ And finally, privatization would unfetter the market forces to liberate the

¹⁷ Olukoshi supra note 6 at 121

¹⁸ Olukoshi supra note 6 at 121

economy from the burden of unnecessary and obstructive state intervention.¹⁹

Obadan and Ayodele²⁰ would seem to broadly classify these arguments into three groups. First is the efficiency-based justification. Secondly, there is the public finance justification, which relies on the need to relieve the enormous burden, which the SOEs impose on the government. Third is the socio-economic rationale, which itself has three dimensions: to rein in government deficits, to improve efficiency by introducing private sector reward/penalty incentive structure, and to reduce the size of government involvement in economic activities, if only in response to international agencies.

¹⁹ Other writers have also alluded to similar arguments. See A.O. Sanda, *Justification and Strategies for the Selective Privatization of State Owned Enterprises*, The Quarterly Journal of Administration Vol. XXI Nos 3 & 4 April/July 1987 P. 177-17 (noting that the justifications for privatization were (i) the manifestations of underdevelopment; (ii) the limited capacity of the SOEs to perform efficiently; (iii) some SOEs were involved in providing uneconomic services; (iv) phenomenal growth in the number and size of the SOEs; and (v) extreme levels of misallocation of resources in the SOEs); AKINBADE supra note 16 at 74-75 (noting the objectives of the privatization program to be: (i) improvement of economic performance; (ii) resolving management problems; (iii) revenue generation; (iv) discipline of the Trade Unions; (v) promotion of popular capitalism; and (vi) promotion of consumer sovereignty); The government, on its part, justified undertaking the privatization program on grounds that it would: (i) restructure and rationalize the public sector so as to lessen dominance of unproductive investments; (ii) reorient the enterprises for privatization and commercialization towards new horizon of performance improvement, viability and overall efficiency; (iii) ensure positive returns on public sector investments in commercialized enterprises; (iv) check the absolute dependence of commercially oriented parastatals on the Treasury for funding and encourage them to approach the Nigerian capital market for funding; (v) initiate the process of gradual cession to the private sector of such public enterprises that by the nature of their operations are best managed by the private sector; (vi) create a favorable investment climate for both local and foreign investors; (vii) reduce the level of internal and external debts; (viii) provide institutional arrangement and operational guidelines that would ensure that the gains of privatization and commercialization were sustained in the future. See TCPC Report PP. 2-3 (quoting the statement of then Nigerian Chief of General Staff, Augustus Aikhomu, at the inauguration of the TCPC)

²⁰ OBADAN AND AYODELE, COMMERCIALIZATION AND PRIVATIZATION POLICY, supra note 1 at 61-72

The above reasons boil down to the proposition that Nigerian SOEs are being privatized because private sector is more efficient and productive than the public sector and also because the government would have a positive fiscal impact by such privatizations. We shall return to this proposition but it is important to note that certain criticisms were leveled at the introduction of the privatization exercise in Nigeria.

Akinbade summarizes these criticisms.²¹ While privatization reduces the role of the government, it does not reduce its responsibilities. Privatization widens the gap between the rich and the poor. Perhaps, this is because while the rich might afford to buy the SOEs, the poor might not. The lack of transparency that sometimes attends the privatization programs raise doubts about the real motives. Privatization might breed unemployment. This is remarkable because advocates of privatization also argue that privatization improves employment. While privatization yields revenue, the funds, which are realized, are not ploughed back into the economy. In other words, there are no guarantees that the privatization funds would be used for the greater good. This is a very important objection considering Nigeria's experience

²¹ AKINBADE *supra* note 16 at 74 -75

with corruption. The sale of the SOEs entails the loss, on the part of the government, of future revenue, at least in respect of those SOEs that are profitable, and also compromises the developmental objectives of the SOEs. Furthermore, privatization opens the economy to domination by foreign investors and their local proxies. Most of the SOEs are national symbols and heritage and their sale is essentially the sale of national patrimony.

Privatization might well be the fad of the moment and might also appeal to the international community. It is also possible that in terms of profits, the private enterprises make more money than do the SOEs. Yet, to return to the proposition that SOEs should be privatized because they are less efficient and less productive than the private sector, such a conclusion is simplistic. Private enterprises exist for different reasons and answer to different constituencies. SOEs perform a social function. To assess SOEs on the same standard as private companies, which is on the basis of profitability, is to reject the fundamental distinction between the bases for their existence. Indeed, it has been noted that private enterprises have operated mainly in a sellers' market and always enjoy numerous direct and indirect incentives and subsidies from the state.²² They enjoy these without the concomitant social

²² Olukoshi supra note 1 at 122

responsibilities that apply to SOEs. Consumer protection laws are dead letters, if they exist at all, in Nigeria. Besides, it has been noted that, "a comparative analysis of the specific role of the private sector in production vis-à-vis that of the public sector, reveals the relatively poor performance of the private sector in Nigeria's economic development."²³ And this is so even though most of the private sector enterprises have been doing well reporting growing turnovers and annual profits.²⁴

The failure of the SOEs is merely symptomatic of the failure of governance in Nigeria. Most countries of the west, which are admittedly market oriented and profess economic liberalism, do retain social safety nets, be it in health care, unemployment benefits or other similar cushions, against market failures and the other vagaries of capitalism. In Nigeria, and most developing countries, especially in Africa, such safety nets are lacking. Perhaps, if the argument is framed in terms of an option between doling out unemployment benefits and having service oriented public enterprises, which, while providing needed social services, also provide employment

²³ OBADAN AND AYODELE, COMMERCIALIZATION AND PRIVATIZATION POLICY, *supra* note 1 at 45

²⁴ OBADAN AND AYODELE, COMMERCIALIZATION AND PRIVATIZATION POLICY, *supra* note 1 at 49

opportunities to the people, the choice would not easily be privatization. The perceived failures of the SOEs are those of the government. And such failures are not limited to the SOEs. They pervade the broad gamut of government functions. The seeming readiness, willingness and ability of the government to embark on the privatization program is in essence a shirking of the responsibility to instill in the SOEs whatever good or business management that are considered fit. But because the so-called leaders and those in government, in most cases, are usurpers who seize the reins of government through illegal means, they become captives to the unsavory machinery by which they come to office. The SOEs thus become sources for appeasing and patronizing that same machinery. This is the crux of the problem of SOEs. Government is always able, if it is willing, to demand accountability from the SOEs. But it is unwilling because it is compromised. The standard argument of efficiency is a smokescreen to mask what is in essence the failure of government. Privatization might result in increased profits for the enterprise, but as Olukoshi asserts: "what does it matter if the owners of a privatized NEPA or water corporation record fantastic annual profits but a majority of Nigerians continue to suffer darkness as a result of an inability to pay for electricity and do not have access to portable water for

the same reason."²⁵ Whatever the merits or demerits of privatization in Nigeria, the military government introduced the policy in 1988, and it has continued since then.

II. THE LEGAL FRAMEWORK FOR THE PRIVATIZATION PROGRAM IN 1988

A feature of the military administrations that dominated the political landscapes in Africa in general, and in Nigeria in particular, from the 1960s to the late 1990s, was the ease with which they enacted laws. Being dictatorships, laws in most cases required only the assent of the head of state or military president, whatever the chosen appellation. Some adopted a semblance of legislative bodies, populated by military subordinates and other cronies, some of whom were civilians. In reality, these bodies were, at best, advisory to the military ruler. The result was that most laws did not enjoy detailed examination and scrutiny as would be the case in a normal democracy. Most laws, too, were terse, in most cases containing few, but sometimes broad, provisions. Usually the government could amend any of the laws as easily as it could make them. The Babangida administration legislated through the instrumentality of decrees. The decree introducing the privatization program was thus issued with the ease with which the

²⁵ Ohukoshi, *supra* note 1 at 129

government regularly passed its laws. It is noteworthy though that to the extent that the privatization program is a part of the structural adjustment program, the government could claim that the country sanctioned it when, in a national debate, it rejected the IMF loan and instead "chose the local variant." We had adverted, in Chapter 1, to the quaint interpretation, which the government applied to the popular rejection of the IMF package.

That decree was the Privatisation and Commercialisation Decree.²⁶ The scheme enunciated by the 1988 decree was the categorization of enterprises into four groups. These were those to be partially privatized, fully privatized, partially commercialized and fully commercialized.²⁷ Partial privatization, under the decree, implied the divestment of part only of governmental holding in the affected enterprise. Government still exercised some influence over the partially privatized SOEs but only to the extent of its representation on the board of directors.²⁸ Full privatization entailed the divestiture of all the proprietary interest held by the government in the affected firm.²⁹ Such

²⁶ Privatisation and Commercialisation Act, Vol. XXI Cap 369, Laws of the Federation of Nigeria (formerly Privatisation and Commercialisation Decree No 25, 1988)

²⁷ See Sections 1 and 12 of Decree No 25, 1988. (The former dealt with partial and full privatization while the latter dealt with partial and full commercialization.)

²⁸ Kuye Problems and Prospects supra note 3

²⁹ By the provision of Section 14 of the Decree the word "enterprises" was given an expansive connotation to mean: "any corporation, board, company or parastatal established by or under any enactment in which

enterprises would cease to be operated by the government but instead would now be owned and run by the private sector. Similarly, full commercialization meant the reorganization of the enterprises with the result that they operate as profit making ventures and without subvention, of any kind, from the government.³⁰ For partially commercialized entities, the government was to still fund capital projects but not recurrent ones. As with most decrees promulgated by the military administrations, the 1988 decree was brief and contained scant substantive provisions.³¹ It established a Technical Committee on Privatisation and Commercialisation (TCPC), with responsibilities for advising on the capital restructuring needs of enterprises coming under the purview of the decree and generally implementing the provisions of the decree.³²

the Federal Military Government, or any of its Departments, Ministries, or agencies has ownership or equity interest and shall include a partnership, joint venture or any other form of business arrangement or organisation."

³⁰ See Section 14 of Decree No 25, 1988.

³¹ It contained 14 sections divided into three parts.

³² See Sections 3 and 4 of Decree No 25, 1988.

The TCPC was given the function of conducting the privatization program.³³

Although the TCPC was charged with implementing the privatization exercise, it did so under the general supervision and guidance of the Federal Military government.³⁴

The 1988 decree introduced the novel concept of commercialization as an adjunct to the policy of divesting government's interests in the SOEs. It defines privatization as "the relinquishment of part or all of the equity and other interests held by the Federal Military Government or its agency in enterprises whether wholly or partly owned by the Federal Military Government", and similarly construes the word "privatise".³⁵ On the other hand, it defines commercialization as "the reorganization of enterprises

³³ The specific functions were to: (a) advise on the capital restructuring needs of enterprises to be privatized or commercialized in order to ensure a good reception in the Stock Exchange market; (b) carry out all activities required for the successful issues of shares of the enterprises to be privatized including appointment of issuing houses, stockbrokers, solicitors, trustees, accountants and other experts to the issues; (c) approach through the appointed issuing houses the Securities and Exchange Commission for a fair price for each issue; (d) advise the Federal Military Government after consultations with the Securities and Exchange Commission and the Nigerian Stock Exchange, on the allotment pattern for the sale of the shares of the enterprises concerned; (e) oversee the actual sale of shares of the enterprises concerned by the issuing houses in accordance with the guidelines approved by the Federal Military Government; (f) submit to the Federal Military Government from time to time, for the purpose of approval, proposals on sale of Government shares in such designated enterprises with a view to ensuring a fair price and even spread in the ownership of the shares; (g) ensure the success of the privatization exercise taking into account the need for balance and meaningful participation by Nigerians and foreign interests in accordance with the relevant laws of Nigeria; (h) ensure the updating of the accounts of all commercialized enterprises with a view to assuring financial discipline. See Section 4 (1) of Decree No. 25 1988.

³⁴ Decree No. 25 contains several provisions in which the TCPC could act only with the approval of the Federal Military Government to which it submitted periodical reports. For example Sections 4 (4), 9, and 10.

³⁵ Section 14 of Privatisation and Commercialisation Decree No. 25 1988

wholly or partly owned by the Federal Military Government in which such enterprises shall operate as profit making commercial ventures and without subventions from the Federal Military Government.” It also requires that the word “commercialise” be accordingly construed.³⁶ The TCPC regarded privatization as the transfer of government owned shareholdings in designated enterprises to private shareholders and broadly as an umbrella term to describe the variety of policies, which encourage competition and emphasize the role of market forces in place of statutory restrictions and monopoly power.³⁷ It noted that such broad definition applies in countries such as Nigeria, where privatization is an integral part of the structural adjustment program, while the narrow definition applies to developed countries where the privatization program is not necessarily coupled with structural adjustment. The agency saw commercialization as the reorganization of an enterprise wholly or partially owned by the government, such that they would operate as profit making ventures, without subvention from the government. Its main thrust were: (a) to provide enhanced operational autonomy at enterprise level; (b) to provide competitive remuneration; (c) to evolve a more result-oriented and accountable

³⁶ Section 14 of Privatisation and Commercialisation Decree No. 25 1988

³⁷ See Technical Committee on Privatisation and Commercialisation, Final Report Vol. 1 (Main Report) 1993 (TCPC Final Report) P.13

management based on performance contracts; (d) to strengthen financial and accounting controls at the enterprise level; (e) to upgrade information management system of affected enterprises; (f) to ensure financial solvency of the public enterprises through effective cost recovery, cost control and prudent financial management; (g) to remove bureaucratic bottlenecks and political interference through clear role definitions between the supervising ministry, the board of directors and the management of the enterprises.³⁸

In most countries, the common reform policy is that of privatization.³⁹ The tacking of the policy of commercialization to the privatization exercise indicated the ambivalence towards total surrender to the market forces. It would seem that the government was concerned that even though the SOEs deserved a total revamping in terms of their ownership outlook, there were those, which could not just be abandoned to the private sector. In another sense, it was perhaps a reflection of the gradualist approach to Nigeria's privatization program. Such approach did not want to sell the SOEs in one fell swoop, but rather preferred to privatize some first and others later. In a subsequent chapter, we would notice that some of the SOEs, which are

³⁸ TCPC Final Report P. 13

³⁹ See TCPC Final Report P. 13 (noting that Nigeria was the only country carrying out a hybrid program of privatization and commercialization simultaneously)

subject to privatization under the current exercise, are those that were commercialized under the regime of the 1988 decree.

Similarly, in curtailment of any notion of unbounded free market, the 1988 decree sought to ensure that a few individuals did not hijack the SOEs. It provided that in the event of over subscription for the shares of the enterprises, no individual should be allowed to hold more than 1 per cent equity in any one enterprise.⁴⁰

And, in an attempt to placate the most fervent critics of privatization, namely workers of the affected SOEs, Section 7 of the Decree provided that not more than 10 per cent of the shares in any SOE to be privatized should be reserved for the staff of the SOE. It is obvious that the section intended to give the implementing agency the discretion to determine the percentage of shares to be given employees of the enterprise even though the decree put a cap on such percentage. The provisions of Section 7(5), as couched, enabled the implementing body to set aside a percentage for the staff, provided such percentage did not exceed ten. But did the discretion enable such agency to not allot any percentage at all to the employees? In other words, could the

⁴⁰ Section 7(6) of Decree No 25 of 1988

agency set aside zero percentage for the said staff? This would seem an academic question, but it could certainly have arisen under the section. Obviously, zero is not more than ten per cent and since the section prescribed no minimum percentage, it could be argued that a failure to set aside any number, at all for the workers, would be in compliance with the decree. This was more so when the subsection is juxtaposed with Section 7(2), which prescribed that a maximum of twenty percent and a minimum of ten per cent was to be set aside for associations and interest groups.⁴¹ On the other hand, it is also arguable that not setting aside any percentage at all would have negated the intention of the decree, which was clearly to guarantee some stake for the employees in the enterprise. Happily the implementing body, the Technical Committee on Privatisation and Commercialisation (TCPC), exercised the discretion by following the spirit of the section, which was apparently to give priority to the workers in the sale of the SOEs.⁴²

⁴¹ Section 7(2) provided: "Not less than 10 per cent and not more than 20 per cent of the total shares shall be allotted to associations and interest groups such as, but not limited, to State investment agencies, workers, trade unions, market women organizations, universities, friendly societies, local and community associations: provided that in the case of an over-subscription not more than 1 per cent of the shares on offer shall be allotted to each State through its investment agency."

⁴² See I.N. Chigbue, *Legal Framework for Privatisation and Commercialisation*, in GODSON O. MONEKE (ED), *PRIVATISATION AND COMMERCIALISATION OF PUBLIC ENTERPRISES: THE ROLE OF PROFESSIONALS*, 187 (Nigerian Institute of Quantity Surveyors, Lagos, 2000) (also noting that the the Bureau of Public Enterprises Decree 1993, which replaced the Privatisation and Commercialisation Decree 1988, clarified the position by stating that ten per cent of the shares were to be reserved for the staff.

In similar vein, and in a comparable bid to ensure widespread sale of shares, Section 7 went further to require a mandatory allocation of shares to associations and interest groups.⁴³ All these provisions were aimed at ensuring that the privatization exercise benefited a wide spectrum of the society and the resulting acquisitions were not limited to the top echelons of society but instead cut across all strata of the public from the affluent, the middle class to the poor.

Section 2 seemed to be directed at the main source of the problems of the SOEs. It prescribed that “notwithstanding the provisions of any enactment and without prejudice to the generality of 1 Section 1 (dealing with the categorization into partial and full privatization and the power of the president to modify those classifications)⁴⁴ the control, management and composition of the Boards of Directors of privatised enterprises shall as from the date of privatization reflect the ownership structure of the enterprises.” Many commentators considered this provision to be

⁴³ Such as State investment agencies, workers, trade unions, market women organizations, universities

⁴⁴ Brackets mine

monumental and even controversial.⁴⁵ However, the section was not that monumental. It was a declaration or affirmation of what ordinarily should be the case. The prevailing company laws even at the time of the passing of the decree had several rules governing the appointment and control of corporate bodies. And usually, ownership and management generally belonged to equity shareholders. Technically, control might differ from ownership as where majority ownership is dispersed resulting in the effective control by minority shares concentrated in one individual or a group of individuals who are able to coordinate. However, the question of control is usually a question of fact, which is perceptible from the circumstances of a company. It is hardly amenable to legislative prescription. It is a *de facto* situation, which may not necessarily tally with a *de jure* stipulation. Certainly, a law, or a company's constitutive documents, could specify the composition of the Board of Directors or of management. And notionally, the Board controls the day-to-day running of the company whilst the overall control and default powers lie in the general meeting, which retains the power to appoint and

⁴⁵ See, for example, Eyimofe Atake, *The Legal Aspects of the Implementation of the Privatisation and Commercialisation Programmes*, in H.R. ZAYYAD (ED), *ECONOMIC DEMOCRATISATION*, 57 (TCPC, Lagos, 1992); Kiser D. Barnes' Comments on Atake's Paper; Udoji supra note 11 at 169 (observing that one bank had interpreted the provision to mean that owners of the enterprise would have their own representatives at the general management level of the privatized companies in proportion to their equity holding, but noting that Section 2 should have applied only to the Board of Directors and not to management. See also Bolaji Owasanoye and T.A.T. Yagba, *Legal Framework for Privatisation of Banks in Nigeria*, in I.A. AYUA AND BOLAJI OWASANOYE, *PRIVATISATION OF GOVERNMENT OWNED BANKS AND THE ISSUE OF OWNERSHIP AND CONTROL*, 5 (Nigerian Institute of Advanced Legal Studies, Lagos, 1996)

remove directors. It did not seem that Section 2 was meant to be strictly interpreted. Were it so intended, the further question would have arisen as to the basis for the allocation of the control of management or the Board especially where the shares were vested in a dispersed group as was contemplated by the widespread share ownership envisaged under the decree. Instead, Section 2 was an admonition, to the government officials in the affected Ministries, to desist from intermeddling and trying to control the enterprises. They were to respect the corporate structure enunciated by the privatization of the SOEs. The proper and normal functioning of corporate management was to be allowed vis-a- vis the privatized entities. The point being made is that pre- privatization, the same officials were not supposed to meddle in the affairs of the SOEs, some of which were set up as companies, and therefore were subject to the normal rules of corporate management. But they did so anyway, because they, in fact, could get away with it. Thus, the legal prescription that the control of the enterprises would be vested in the ownership of the enterprises, did little to prevent the same officials from intermeddling because the source of their ability to interfere was not necessarily the prevailing law but a *de facto* situation in which, in reality, they could do so.

The 1988 decree also stipulated the methods of privatization to be adopted. It required the shares of the SOEs to be offered for sale in the Nigerian capital market and that the offers should be by public issues.⁴⁶ However, the Federal Military Government could decide that the shares should be sold by private placements. This would be on the advice of the implementing agency.⁴⁷

III. INSTITUTIONAL FRAMEWORK

Most government policies are benign. They become good or bad, depending on the implementation. Thus, the fate of the privatization program depended so much on the character, ability and effectiveness of the implementing body. The literature reveals three universal alternatives available to a country intent on privatizing its SOEs.⁴⁸ First, there is the ministerial or decentralized approach. Under this approach, the Ministries, which had been supervising the SOEs, are charged with implementing the privatization program. Each Ministry conducts the sale or transfer of the government shares in the SOEs under its supervision. This approach has the advantage

⁴⁶Section 8 of the 1988 Decree

⁴⁷Section 6 of the Decree

⁴⁸Chigbue supra note 42 at 187-188

that since the Ministry has been supervising the SOE, it is familiar with all its ramifications, and, all things being equal, is in a good position to assess it both in terms of the appropriate purchaser of the shares and in terms of the price to be charged for them. This was certainly not an appealing option for Nigeria. First, the civil servants in the Ministries always viewed the SOEs as areas over which they could exert influence. They probably would have scuttled or slowed down the privatization program. Secondly, given the reality of Nigeria's political life, especially under the military administrations, with the leadership vesting in one institution, indeed one individual (the head of state), and the colossal nature of most of the SOEs, the president, and indeed any Nigerian president, would like to keep a tight reign over the exercise. Besides, it is arguable that, even the privatization program would be an avenue for patronage and the ruling class would be very reluctant to let civil servants oversee such exercise.

The second approach is what is called the treasury approach. Here the Treasury or Ministry of Finance privatizes all the SOEs. The advantage is that the treasury department is intimately involved in fiscal and sometimes economic policies and since privatization is somehow connected to the overall policy of the country, the treasury department would be in a good

position to implement it. The downside is the same as under the ministerial or decentralized approach, which is that civil servants might not be keen to effect the privatization.

The third and most popular approach is the independent focal point approach. Under this method an entirely new agency is constituted, with the purpose of implementing the privatization program. The agency would normally be independent and have direct channel to the highest quarters of government. The upside to this approach is that since the main purpose of the agency is to undertake the privatization of the SOEs, it would embark upon that purpose with zeal. It would also serve as one stop shop for all SOEs, so that any one desirous of acquiring interests in the SOEs would have to deal, for the most part, with only the agency. The downside is that if not properly managed, the agency could become additional government bureaucracy with its members being tempted to transform it into a permanent bureaucracy.

Nigeria adopted the independent focal point approach in both the first exercise and in the ongoing program. The 1988 decree established a

committee known as the Technical Committee on Privatisation and Commercialisation (TCPC).⁴⁹

The TCPC's membership was drawn from both the private and public sectors of the economy and was made up of persons with detailed knowledge and experience.⁵⁰ The members were appointed on such terms and conditions as the president might deem fit in the circumstances.⁵¹ Besides the specific functions contained in Section 4(1)⁵² of the decree, the TCPC was also charged with performing such other functions as the president might, from time to time, assign to it.⁵³ It was also subject to such directions as the president might deem necessary.⁵⁴ Similarly, the TCPC was to report to the federal government through the office of the president.⁵⁵ The TCPC was funded by grants from the federal and state governments and was required to maintain a fund, which consisted of such moneys as was, from

⁴⁹ Section 3 of the 1988 Decree

⁵⁰ Section 3(3) of the 1988 Decree

⁵¹ Section 3(4)

⁵² Ibid

⁵³ Section 4(2)

⁵⁴ Section 4(5)

⁵⁵ Section 4(6)

time to time, provided by the federal and state governments.⁵⁶ Its expenses were defrayed from such fund.⁵⁷ It was also required to keep proper accounts and records of its receipts, payments, assets and liabilities and to prepare, in respect of each financial year, a statement of accounts in such form as the federal government might direct.⁵⁸ Its accounts were to be audited within 3 months after the end of the financial year to which the accounts related.⁵⁹ It is reported that "from 1988 to 1993, activities of TCPC were funded from three main sources, viz Federal government grants (74.2%), United Nations Development Programme (1%) and "other receipts" typified by interest incomes (24%)",⁶⁰ for a total of N43.8 million.

It was to submit a report of its overall activities every 6 months,⁶¹ and a yearly report within 3 months after the expiration of the year.⁶² Consistent with efficiency and, perhaps, because of the complexity involved, the TCPC

⁵⁶ Section 8(1)

⁵⁷ Ibid

⁵⁸ Section 8(2)

⁵⁹ Section 8(3)

⁶⁰ See N.M. OGUBUNKA, ELEMENTS OF PRIVATISATION IN NIGERIA, 103 (Rhema Enterprises, Lagos, 2000) (noting further that the federal government provided grants to TCPC for only two years 1988/89 and 1989/90) and that the grants from UNDP came in for two years too, 1989/90 and 1990/91)

⁶¹ Section 9

⁶² Section 10

was authorized to have standing and ad hoc sub-committees and to co-opt non-members into the sub-committees provided such sub-committees were presided over by members.⁶³

IV. CLASSIFICATION OF ENTERPRISES FOR THE PURPOSE OF THE PRIVATIZATION PROGRAM

The scheme of the first privatization program was the classification of enterprises into those to be partially privatized, fully privatized, partially commercialized and fully commercialized.⁶⁴ Experts suggest that for such classification to be meaningful there need be bases for placing a SOE into one or the other of the groups.⁶⁵ Some suggest that indeed the decision to privatize a particular SOE should be based on whether the perceived market failure, in the sector in which the SOE operates, has been solved. If it has, then, the SOE should be privatized, whereas if it has not, the government should retain ownership.⁶⁶ Others, such as Sanda,⁶⁷ opine that privatization

⁶³ Section 11

⁶⁴ See Section 1 of the 1988 Decree.

⁶⁵ See for example the comments of Professor V.V. Rhamanadan on H.R. Zayyad, *Implementation of the Nigerian Privatisation and Commercialisation Programme*, in H.R. ZAYYAD (ED), *ECONOMIC DEMOCRATISATION*, 44 (TCPC, Lagos, 1992) (stating that : "the question which is necessary to be raised and answered by the Government is: in which sectors have market failure been completely solved? In that case, let us divest or privatise. Secondly, we will ask the question; in which sector is market failure still in existence? In conditions of market failure, the enterprise may have to remain in the public sector for sometime, but at the same time we have to make the enterprise operate under market discipline.")

⁶⁶ See Prof Rhamanadan's comments supra note 65

should be selective based on the following criteria: (i) extent of strategic significance of each SOE; (ii) level of government equity participation; (iii) the empirical records of performance of the SOE for an interval of time (example five years or more); (iv) level or extent of government administrative capacity; (v) the availability of investors, entrepreneurs and local associations to take over the divested shares.⁶⁸ It is not clear what criteria informed the placement of the SOEs into the different classifications.⁶⁹ It is not exactly the case that the SOEs were established as a result of perceived market failure in certain sectors of the economy, and therefore Professor Rhamanadan's formulation,⁷⁰ on the choice of enterprises to be privatized, might not have been appropriate to Nigeria. As has been shown above, the SOEs were formed following independence and mainly because the private sector was not yet developed, and not because of any market failure in the private sector. Perhaps, a variant on Rhamanadan's

⁶⁷ See A.O. Sanda, *Justification and Strategies for the Selective Privatization of State Owned Enterprises*, *The Quarterly Journal of Administration* Vol. XI Nos 3 and 4, April/July 1987 (published by the Faculty of Administration, Obafemi Awolowo University, Ile-Ife, Nigeria) P. 173

⁶⁸ Sanda supra note 16 at 179-180

⁶⁹ A.F. Odejide, supra note 6 at 191 (noting that the decision of the government on the enterprises to be privatized or commercialized was not arrived at as a result of any critical or dispassionate evaluation."); See also Udoji supra note 11 at 171-172 (noting that it is difficult to discover the criteria government used for the classification of enterprises into those to be privatized fully, those to be partially privatized and those to be commercialized fully or partially, but guessing that the government wanted to retain ownership and control of viable enterprises and strategic industries like steel. He further observes that whilst retention of strategic industries might be justified, retention based on the fact that particular SOEs are viable might not be justified.)

⁷⁰ See supra note 65

theme would be to ask the question, in what fields the private sector had become developed. This overlaps with the criteria articulated by Sanda above. Certainly, the privatization program could have benefitted from an *apriori* examination of all enterprises before their placement into one or other category of the four-pronged reform, and the TCPC could have been empanelled even before the allocation of the enterprises into those categories.

Nonetheless, while the government did not specify the exact bases for the classification into the full privatization, partial privatization, partial commercialization and full commercialization categories, a plausible rationale could be detected from the types of enterprises placed in each group, and it did not seem that the government was trying to retain viable enterprises whilst selling unprofitable ones. The first category contained those SOEs, which were partially privatized. These included development, commercial and merchant banks; oil marketing companies; steel rolling mills; air and sea traveling firms; fertilizer companies; motor vehicle assembly plants; paper mills; sugar companies; and cement companies.⁷¹ It could be speculated that these were areas of the economy in which although

⁷¹ See Section 1(1) Part I of Schedule 1 to Privatisation and Commercialisation Decree No 25 of 1988; TCPC Report P. 11

the private sector was fairly developed, because of their impact on the economy the government did not want to fully divest. It still desired to be involved in some ways,⁷² especially as the private sector could not be said to have attained the level of development suitable for an economy such as Nigeria's. For instance, whereas there were private oil marketing companies, the downstream sector could not just be left for the private sector in 1988, as there were not enough of such concerns to effectively serve the country. Similarly, steel rolling mills, motor assembly plants and fertilizer companies involved substantial amounts of capital outlays that could still be considered fairly substantial for private concerns. In these, and similar industries, it could be surmised that the government chose to "partner" the private sector, under the auspices of partial privatization, in the continued effort to develop those segments of the economy. Of course, it also reflected the ambivalence or, if you are more charitable, the cautious approach, of the government towards privatization.

A similar analysis attends those SOEs placed under the category of fully privatized enterprises. For the most part, these were enterprises involved in: hotels and tourism; textiles; transportation; food and beverages; agriculture

⁷² Kuye assert that "Enterprises to be partially privatized are those which the government considers 'strategic' because of the greater 'public' nature of their goods." See Kuye supra note 3 at 65

and livestock production; salt; wood and furniture; insurance; film production and distribution; flour milling; cattle ranching; construction and engineering; dairy; and others.⁷³ It could be conjectured that the government felt that its total withdrawal from these sectors would not have a negative impact on the overall economy. Compared to the kinds of enterprises in the partially privatized group, it is arguable that the kinds of companies in the fully privatized group were more widespread and commonplace, and also more easily operated by the private sector. They also involved less capital outlays.

The clearest manifestation of the government's hesitation, or carefulness, is in the coupling of commercialization to the privatization program. The choice of the enterprises for commercialization seemed to be informed by the need to guard against imperiling the public utilities and those other enterprises that are not only strategic but, indeed, central to the economy.

These included: the Nigerian Railway Corporation; Nigerian Airports Authority; Nigerian Power PLC; Nigeria Security Printing and Minting Company; National Provident Fund; Ajaokuta Steel Company Limited; Nigerian Machine Tools Limited; Federal Housing Authority; Federal Radio

⁷³ See Section 1(2) and Part II of Schedule 1 to Privatisation and Commercialisation Decree No 25 of 1988; TCPC Report P. 11

Corporation of Nigeria; Nigerian Television Authority; News Agency of Nigeria; Kainji Lake National Park; and the River Basin Development Authorities. These were partially commercialized, which meant that government stopped giving them money for recurrent expenses even though it could fund their capital projects.⁷⁴ On its face, the list boasted enterprises, which were significantly important to the economy nay the nation. And while the government was not entirely satisfied with their performance it was not ready to turn them entirely and immediately to the private sector. Instead, it tried to gradually set them on the path to market forces.

The last category, under the 1988 Decree, consisted of those SOEs, which were fully commercialized. Again, the government considered these to be central to the economy, but perhaps what distinguished them from the SOEs that were only partially commercialized was that unlike the latter, they were inherently commercial from the beginning, even though they also contained a social or public utility aspect. In other words they seemed to have less public utility content than the partially privatized group. The partially commercialized group included: the Nigerian National Petroleum Corporation; the Nigerian Telecommunications PLC; the Associated Ore

⁷⁴ See Section 12(1) and Part I of Schedule 2 to the Privatisation and Commercialisation Decree No. 25 of 1988; TCPC Report PP. 59-61

Mining Company Limited; the Nigerian Mining Corporation; the Nigerian Coal Corporation; the National Insurance Corporation; the Nigerian Reinsurance Corporation; National Properties Limited; and Nigerian Ports PLC.⁷⁵ The commercialized enterprises were empowered to fix the rates, prices and charges for goods and services, which they provided and to capitalize their assets.⁷⁶ They were also empowered to borrow money and issue debenture stocks, as well as to sue and be sued.⁷⁷

V. PRIVATIZATION METHODS USED BY TCPC

The TCPC utilized several methods in privatizing the SOEs.⁷⁸ Thirty-five of the SOEs were privatized through public offer of shares in the Nigerian Stock Exchange. Those enterprises were required to satisfy the requirements prescribed by the Securities and Exchange Commission (SEC). Such conditions included the requirement that the SOE must show strong evidence of historic and futuristic profit and must, at the time of sale, show

⁷⁵ See Section 12(2) and Part II of Schedule 2 to the Privatisation and Commercialisation Decree No 25 of 1988; TCPC Report PP. 62-63

⁷⁶ Section 13

⁷⁷ Ibid

⁷⁸ TCPC Final Report PP. 22-23; MIKE I. OBADAN AND A'SESAN AYODELE, COMMERCIALISATION AND PRIVATIZATION POLICY IN NIGERIA, 89 (NCEMA, Ibadan, 1998)

evidence of five years maintainable profit and a strong net asset base.⁷⁹ TCPC refrained from selling weak shares to the public. Thus, it required that such SOEs should be in a position to pay attractive dividend to shareholders, and that it should also be possible to recover the cost of floatation of any SOE privatized by public offer.⁸⁰ Seven SOEs were privatized through private placement. This method was adopted where TCPC felt that a SOE had a lot of profit potentials but would entail a high cost of floatation if it was sold by public offer.⁸¹ Obviously, sale by private placement presents the worst possible opportunity for corruption, in that the privatizing agency if it was not careful could transfer the SOEs to a few individuals. But the TCPC adopted a policy of first offering such SOEs, to be sold by private placement, to state investment institutions, because it considered them to reflect the generality of the Nigerian society. Secondly, such practice accorded with the declared policy of spreading share ownership.⁸² However, the SEC was still involved in determining the price of the shares. Eight SOEs were disposed of by the method of selling their assets, the so called

⁷⁹ Omowale A. Kuye, *Problems and Prospects of Nigeria's Privatisation*, Quarterly Journal of Administration, Vol. XXV No 1 October 1990 P. 49 at 58

⁸⁰ Kuye supra note 3 at 58

⁸¹ Kuye supra note 3 at 58

⁸² Kuye supra note 3 at 59

asset stripping. This approach was adopted for the SOEs that were characterized by serious losses that it was thought that they could not be turned around. Essentially, the assets of the SOEs were sold off. The River Basin Development Authorities were disposed of in this way.⁸³ One SOE was sold in a management buy out. Four were handled through a system called deferred public offer. This meant that the government sold the shares, in the applicable SOE, to a group of private investors on condition that a certain percentage (40%) would, in turn, be sold to the public within five years.⁸⁴ The reasoning was that the concerned SOE was not very viable at the moment but could be turned around. The group of investors essentially was to turn it around within the prescribed period, and then sell a portion of the stake in the enterprise to the Nigerian public.

For commercialization, the TCPC's approach was to detail a committee of experts to undertake a diagnostic exercise, covering many aspects of the

⁸³ Kuye supra note 3 at 59-60

⁸⁴ Nigeria - *Structural Adjustment Program: Policies, Implementation, and Impact*, (World Bank Report, May 1994) P. 32; Shamsuddeen Usman, *Monitoring and Regulatory Aspects of Privatization in Nigeria*, in V.V. RAMANADHAM (ED), *PRIVATIZATION AND AFTER: MONITORING AND REGULATION*, 92, 95 (Routledge, London, 1994) (noting the deferred public offer method was adopted for enterprises which, though viable, were such that their privatization by public offer would not raise revenue commensurate with the real value of their underlying assets)

enterprise.⁸⁵ These included its organizational and management structure of the enterprise, development of scientific measurement criteria for assessing the performance of the enterprise, the design of appropriate capital structure and expenditure policies. Other areas covered by the detailed analysis were the revenue generation and collection system, evolving staff remuneration programs commensurate with the revenue generated by the enterprise; and a review of the management information system of the enterprise in terms of its relevance.⁸⁶ Then the enterprise would be commercialized either partially or fully. An important feature, indeed, the most revolutionary aspect of the commercialization program, was the performance contract, which SOEs signed with the government and which also included the TCPC. We shall return to this reform device later in this chapter.

VI. ASSESSMENT OF THE FIRST PRIVATIZATION PROGRAM

An assessment of the first privatization program would reveal some positive developments or that it had salutary impact on the economy. It is noted that

⁸⁵ Kuye supra note 3 at 69

⁸⁶ Kuye supra note 3 at 69

the exercise reduced the number of the SOEs⁸⁷, and, presumably, by that token reduced the problems associated with SOEs with which the government had to contend. While such a reduction might be a primary outcome of the privatization effort, it is not, in and of itself, significant. This is because it is merely a corollary of the exercise and does not *per se* show benefit to the economy. The sale of the shares in the SOEs also yielded enormous revenue to the government. It is claimed that the government realized 3.3 billion Nigerian naira from the sale of the enterprises which enterprises had an original investment of 652 million Nigerian naira. This translated to a 2.6 billion Nigerian naira capital gain accruing to the government.⁸⁸ Moreover, the government realized additional funds from corporate taxes, accruing as a result of the increased efficiency on the part of the enterprises.⁸⁹ Again, *prima facie*, these proceeds would seem to have justified the privatization, but this might not present a full picture. First, proper account must be taken of the hyper-inflationary trend that characterized the Nigerian economy during the period. Perhaps, reckoning

⁸⁷ MIKE OBADAN AND A' SESAN AYODELE, COMMERCIALIZATION AND PRIVATIZATION POLICY IN NIGERIA, 169-173 (NCEMA, Ibadan, 1998) (noting that the public enterprise sector was reduced by the number of the 88 SOEs which were privatized under the first program); See also MIKE OBADAN, PRIVATIZATION OF PUBLIC ENTERPRISES IN NIGERIA (ISSUES AND CONDITIONS FOR SUCCESS IN THE SECOND ROUND), 55 (NCEMA, Ibadan, 2000)

⁸⁸ TCPC Final Report PP 14-15

⁸⁹ TCPC Final Report PP 14-15; OBADAN, PRIVATIZATION OF PUBLIC ENTERPRISES IN NIGERIA (ISSUES AND CONDITIONS FOR SUCCESS IN THE SECOND ROUND) *supra* note 87 P.55

with inflation might reveal that the so-called capital gain, was actually a loss or, at least, not as much as it seemed. Besides, if adequate account is taken of the potentials of the SOEs, and the government's loss of potential future profits, the short term cash realized from the sale of the SOEs would not appear as significant as the 2.6 billion naira capital gains might first suggest. Yet, having said that, it must be noted that since the conscious decision had been taken to privatize the SOEs, essentially because they were not performing well, it was encouraging that so much was realized from the sale.

A noteworthy beneficial effect of the privatization program is the investment consciousness, which it seemed to engender in the populace. It is claimed that prior to the commencement of the privatization program the awareness of the capital market was at a low level, and that no serious efforts were made to arouse the financial consciousness of Nigerians and to redirect their consumptive habits to investment habits.⁹⁰ But as soon as the exercise began, the implementing agency, TCPC, began to undertake national tours to enlighten the people on the need to invest their money in business activities that are more rewarding to them in the long run, instead of committing them

⁹⁰ Omowale A. Kuye, *Problems and Prospects of Nigeria's Privatisation*, Quarterly Journal of Administration, October 1990 P. 66

to activities, which are consumptive in nature.⁹¹ The result was an increase in personal share ownership in Nigeria. Over 800,000 shareholders were created as a result of the privatization program, almost twice as many as there were in 1988 when the program was commenced.⁹² The increase was such that the TCPC could proclaim that: "the cold hands of Treasury control have been replaced by the warm hands of the Capital Market which are as stimulating as they are invisible."⁹³

An upshot of the increase in acquisition of shares is the perceived redistribution of national wealth implicit in the newfound interest of the low-income group in becoming shareholders. Using data from the subscriptions from three enterprises, Kuye noted that 74.3% of the shares on offer in Flour Mills Nigeria Limited were allotted to people of the low income group. In the case of African Petroleum 68.02% was allotted to the low income group, while 92% of the shares on offer in National Oil and Chemicals Marketing Company Limited were allotted to that group.⁹⁴

⁹¹ Kuye, *supra* note 3 at 66

⁹² TCPC Final Report 14-15

⁹³ TCPC Final Report P 15

⁹⁴ Kuye *supra* note 3 at 67 (asserting that "within a short time TCPC has contributed more to the redistribution of national wealth than economic policy measures had achieved in the past.")

It is also claimed that the privatization program led to improvement in the efficiency of the enterprises.⁹⁵ A number of enterprises gained solvency and began to make profits following the privatization and commercialization policy.⁹⁶ In a World Bank study on the privatization of banks and performance, spanning the period 1990 to 2001, the researchers found that, "while privatized banks performed significantly worse than privately owned commercial banks before privatization, this gap was effectively closed by privatization."⁹⁷ It also found evidence of the poor performance of banks that continued with minority government ownership during the sample period.⁹⁸ In another study, that measured the impact of privatization on the private

⁹⁵ TCPC Final Report P. 14-15

⁹⁶ Shamsuddeen Usman supra note 84 at 101 (noting that the most notable of these enterprises was the Nigerian telecommunications PLC (NITEL)); See also *Commercialisation of Public Enterprises: A Case study of NEPA*, in SETTING THE ECONOMY FREE, supra note 6, P. 72 at 81 (noting that between 1990 and 1992, following the commercialization of NEPA, there was an improvement in the financial performance of NEPA and in the supply of electricity nationwide as well as in revenue/debt collection and in quality of staff's performance); and *Commercialisation of Public Enterprises: A Case Study of NITEL*, in SETTING THE ECONOMY FREE, supra note 6, 83 at 88 (stating that following commercialization; TCPC Final report PP. 14-15 (noting improvement in the internal efficiency of the enterprises as well as improvement in the allocative efficiency of the economy and that a number of public utilities regained solvency)

⁹⁷ Thorsten Beck, Robert Cull and Afeikhena Jerome, *Bank Privatization and Performance Empirical Evidence from Nigeria*, World Bank Policy Working Paper 3511, February 2005, P. 4

⁹⁸ Thorsten Beck et al supra note 97 at 4; But the study also noted that the Nigeria case was difficult to classify as a success or failure, and that the performance improvement related only to profitability and portfolio quality. It further asserted that: "since other tests indicate that privatization did not bring about cost reductions, at least not in the first years thereafter, profitability improvement is only attributable to increased revenue generation." (See P. 25) Thus the study seemed to suggest that while the banks increased their revenue generation, it could not be conclusively stated that their improved fortunes translated into substantial welfare improvement. This was because "the mix of profit generating activities for Nigerian banks was tilted away from private lending." (See P. 25)

sector, it was found that privatization led to some improvement in the economic and financial position of the enterprises.⁹⁹ It also found that the operational efficiency measures and earnings per share showed significant improvement. The study was of seven fully privatized firms and covered a period of five years prior to privatization and five years after privatization.¹⁰⁰ It also found that the wage income of workers increased, and that contrary to expectation, privatization did not lead to unemployment in some enterprises. On the public revenue rationale, it was also found that the government subsidies did not continue after the privatization, while, on the other hand, the firms recorded a significant increase in the payment of taxes to the government.¹⁰¹

The privatization program also had a positive impact on the Nigerian capital market. By all accounts the program led to a growth of the Nigerian capital market from a capitalization of N8 billion in 1988 to over N30 billion in

⁹⁹ See A. Soyibo, Kolawole Olayiwola and Babatunde Alayande, *A Review of Nigeria's Privatisation Programme*, in E. REMI AIYEDE, BABATUNDE ALAYANDE AND AZZEZ MABAWONK (EDS), READINGS IN DEVELOPMENT POLICY AND CAPACITY BUILDING IN NIGERIA, 211, 224-232

¹⁰⁰ The firms were: (i) Okomu Oil Palm Plc; (ii) United Nigerian Insurance Co. Plc. (UNIC); (iii) Royal Exchange assurance; (iv) Aba Textiles Mills Plc.; (v) Flour Mills of Nigeria; (vi) National salt Company of Nigeria Plc. (NASCON); (vii) Nigerian Yeast and Alcohol manufacturing Plc. (NIYAMCO). See A Soyibo *supra* note ... at 224

¹⁰¹ A Soyibo, *supra* note 97 at 231-232

1992.¹⁰² Given that the economy was still young relative to the developed countries, the privatization program helped to stimulate development and exposed the capital market to complexities. It has been stated that: "the money and capital markets, until privatisation programme was put in place, were characterized by dullness."¹⁰³ The privatization program created awareness in the capital market. The Securities and Exchange Commission and the Nigerian Stock Exchange earned increased incomes from the fees arising from the floatation of shares by the implementing agency, the TCPC, and by those in the private sector who followed the example of the TCPC.¹⁰⁴ Similarly, the withdrawal of subventions in commercialized enterprises meant considerable savings to the government.¹⁰⁵

VII. PERFORMANCE CONTRACTING

If the concept of commercialization is a compromise between advocates of privatization and those who are dubious about government's divestment of

¹⁰² TCPC Final Report, PP.14 - 15; OBADAN AND AYODELE, COMMERCIALIZATION AND PRIVATIZATION POLICY IN NIGERIA, supra note 1 at 169 - 173 (. that the floatation of shares through, and borrowing from the capital market raised the market capitalization of the Nigerian Stock Exchange from N12 billion in 1989 to N285 billion in 1996); Usman supra note 84 at 95

¹⁰³ Kuye supra note 3 at 68

¹⁰⁴ Kuye supra note 3 at 69

¹⁰⁵ TCPC Final Report PP. 14-15

its shares in SOEs, such compromise poignantly finds expression in the concept of performance contract. This is a mechanism, which is intended to inject efficient management into public enterprises, by using the instrumentality of a contract. A linchpin of the commercialization program is the use of this mechanism to instill performance-based standard into the SOEs. Performance contracts are "negotiated, written agreements between governments and the managers of state enterprises that specify targets that management pledges to achieve in a given time frame and define how performance will be measured at the end of a specified period."¹⁰⁶ They are sometimes called other names such as, contract plans, memorandums of understanding, signaling system, program contracts, performance agreements, statements of intent, or public utility licenses.¹⁰⁷

The origin of performance contracting is traced to Europe, especially France in the 1960s and 1970s in the context of high inflation and unemployment, which prevailed in those times.¹⁰⁸ Corporatist governments, such as France

¹⁰⁶ Mary Shirley, *Why Performance Contracts for State-Owned Enterprises Haven't Worked*, Public Policy for the Private Sector, Note No 150, August 1998

¹⁰⁷ Mary Shirley, *supra* note 106; PERFORMANCE CONTRACTING FOR PUBLIC ENTERPRISES, (Papers presented at an Expert Group Meeting Held in New York, 24-27 April 1994, United Nations, NY, 1995) P. 11

¹⁰⁸ PERFORMANCE CONTRACTING FOR PUBLIC ENTERPRISES, *supra* note 107 at 8

and the United Kingdom, used public enterprises to counter those problems.¹⁰⁹ The first performance contract signed in a developing country was in Senegal with the National Railway in 1980.¹¹⁰ Since then, other African countries have followed.¹¹¹

They are aimed at the common purposes of clarifying the objectives of service organizations and their relationship with government, and to facilitate performance evaluation based on results instead of conformity with bureaucratic rules and regulations.¹¹² Most SOEs are criticized because of the entanglement with supervising Ministries, which exert a lot of interference in what should be business decisions. Besides, it is contended that the governments' control of SOEs places emphasis on the input into the SOEs and their procedures. Performance contracts try to shift this paradigm to results-oriented controls.¹¹³ It serves to clarify the relationship between the government and the enterprise, by delimiting their respective roles,

¹⁰⁹ PERFORMANCE CONTRACTING FOR PUBLIC ENTERPRISES, supra note 107 at 8

¹¹⁰ PERFORMANCE CONTRACTING FOR PUBLIC ENTERPRISES, supra note 107 at 9

¹¹¹ for instance, Cote d'Ivoire used it in 1985; Benin from 1987; Ghana from 1989; Guinea from 1990; the Gambia from 1987; Malawi from 1990 and Nigeria in 1992; see PERFORMANCE CONTRACTING FOR PUBLIC ENTERPRISES, supra note 107 at 9. We shall discuss the Nigeria experience with performance contracting shortly.

¹¹² *Public Sector Management Reforms in Africa: Lessons Learned*, 20, Development Policy Management Division, Addis Ababa, Ethiopia, (Published by the Economic Commission of Africa, Dec 2003)

¹¹³ Public Sector Management Reform supra note 112 at 20

intentions and problems.¹¹⁴ In order to achieve its objective a performance contract addresses three of the key problems commonly facing public enterprises.¹¹⁵ These are "ill-defined and unreconciled goals, political and bureaucratic interventions in operational decision-making, and management rewards which are fixed irrespective of efforts or results."¹¹⁶

A basic and conceptual problem with performance contracts is the nomenclature, or rather its exact legal nature. Although known as performance contract, the agreement does not lend itself to enforceability in the normal way contracts are enforced. It is said to be only a metaphor for the relationship between cooperators rather than a legally enforceable document.¹¹⁷ Of course, it will not be realistic to expect that a government that owns an enterprise, and therefore can exercise all the incidents of ownership including the ability to hire and fire the management of the enterprise, would instead be suing the enterprise or its management for a violation of a performance contract. A more pragmatic remedy, where the government is not satisfied with the enterprise or its management, would be

¹¹⁴ PERFORMANCE CONTRACTING FOR BUSINESS ENTERPRISES supra note 107 at P.12

¹¹⁵ PERFORMANCE CONTRACTING FOR PUBLIC ENTERPRISES, supra note 107 at P.14

¹¹⁶ PERFORMANCE CONTRACTING FOR PUBLIC ENTERPRISES, supra note 107 at P.14

¹¹⁷ PERFORMANCE CONTRACTING FOR PUBLIC ENTERPRISES, supra note 107 at P. 13

to exercise those powers to hire and fire or to discipline. Similarly, it will require an unnatural audacity on the part of management to sue the owners, in this case the government, for a violation of a performance contract. A fear of retribution, in terms of exercise by the government of the rights attaching to ownership, might discourage management from seeking judicial enforcement of the performance contract. Some performance contracts provide for arbitration as an enforcement mechanism. But, even arbitration, to the extent that it contemplates a mandatory submission thereto, may not offer a meaningful solution. This is because a government might still not be easily amenable to such process. Thus, the efficacy of performance contracts depends, in large measure, on the commitment of the parties, especially the government, to the enterprise objectives and other terms contained in them. And it would, perhaps, be more appropriate to refer to these so-called contracts for what they are: mere understandings between governments and enterprises. In a sense, it would seem to corrupt the term "contract", which has a standard and widely known legal connotation and denotation, and to reduce the respect often attached to it, to apply it to understandings that, from the get-go, are known to lack judicial enforceability, which is an essential characteristic of the term, especially in legal parlance.

Notwithstanding the conceptual difficulty associated with performance contracts, many countries utilize them as yet another reform tool in dealing with public enterprises.

Under the first privatization and commercialization program, the TCPC adopted the use of performance contracts in commercializing those enterprises, which were still to be owned by the government. According to TCPC, the performance contracts were introduced in order to ensure that the increased autonomy granted public enterprises was not misused or abused and that the public enterprises act consistently with the goals of the owner (government) and also to instill a culture of accountability within the public enterprise sector.¹¹⁸ The performance contract was intended to formalize the business relationship between the government and the enterprise specifying the obligations and responsibilities of the government and of the enterprise; It was also meant to identify and specify the overall mission of the enterprise, and specify the business strategies and actions the enterprise would take to attain its mission; Similarly, it was expected to provide appropriate incentives for performance, while providing a basis for fair

¹¹⁸ TCPC Final Report P. 54

evaluation of the enterprise; Finally it was meant to provide an independent monitoring process through the TCPC, which was authorized under the contract to monitor the compliance of the parties to the contract.¹¹⁹ In simple terms, the board and management of the enterprise guaranteed the attainment of certain stated levels of performance in return for operational autonomy.¹²⁰ Each such contract was intended to have an initial tenure of three years during which no material modification was to be made to it. The TCPC was to monitor its effectiveness during such period.¹²¹ An essential part of the performance contract was the corporate plan, which identified the enterprise's mission, provided an assessment of its current performance, as well as determined what its long-term objectives were. Furthermore, the corporate plan identified the strategies that the enterprise would use to achieve its objectives and the resources that that would require. Having adopted the language of contract it was important for the performance contract to prescribe duties or obligations of the parties. The performance contracts were in essence tripartite contracts involving the government, the enterprise and the privatization and commercialization program implementing agency, the TCPC. The Federal Government's obligations

¹¹⁹ TCPC Final Report P. 54

¹²⁰ TCPC Final report P. 55

¹²¹ TCPC Final Report P.55

were, in the main, to allow the enterprise to operate with autonomy and not to hinder the enterprise in its implementation of its corporate plan.¹²² For their part, the Board and Management of the enterprise undertook to manage the enterprise efficiently.¹²³ The TCPC's obligations were to monitor due performance by the parties of their obligations under the contract and to compile and publish operational data on the activities of the enterprise. It was also to generally facilitate the process of negotiations between the Federal Government and the enterprise.¹²⁴ It could demand that any party in default of its obligations under the contract remedy the default and, failing that, could refer the matter to the Public Enterprises Arbitration Panel.

¹²² Other obligations of the government were: not to subject the commercialized enterprises to civil service circulars relating to conditions of service; to allow the enterprises the freedom to, (i) pursue their corporate mission and take normal business decisions without let or hindrance, (ii) hire and fire their personnel at all levels and to reward on a competitive basis, with the exception of the Chief Executive and executive Directors, (iii) determine their tariff structure so as to recover their production cost plus adequate margin to earn reasonable return on investments subject to consultation with the supervising ministries, (iv) operate their own budget and to allocate their resources and raise funds within the capacity of their balance sheets to finance their operations, without government guarantees, (v) acquire and dispose of their capital assets as the needs arise, and (vi) take such business decisions as will promote the enterprise's survival and growth. See TCPC Report P. 56

¹²³ The specific obligations were as follows to: (a) manage the enterprise efficiently to achieve the objectives in the corporate plan and faithfully implement the approved TCPC reform measures; (b) ensure financial prudence by the adoption of efficient management techniques for cost reduction and maximization of revenue; (c) at all times during the continuance of the performance agreement maintain and keep in proper working order and condition of the plant, machinery and equipment, buildings belonging to the enterprise; (d) insure and keep insured all its insurable property and equipment against all risks in accordance with sound commercial practices; (e) keep proper books of accounts in line with sound commercial principles which shall give a true and fair view of the enterprise's finances and operations; (f) publish its annual report and accounts within three months of the end of the financial year to which they refer; (g) make contributions to the staff pension fund; (h) do all that is reasonable and consistent with the other provisions of the agreement to achieve the level of performance specified in the corporate plan, annual budget and detailed performance targets. See TCPC Report P. 56 – 57

¹²⁴ See TCPC Final report P. 57

It could be asserted that the performance contract system adopted by the TCPC did not work to achieve the touted objective of insulating the enterprises from governmental interference and also enabling them to perform efficiently. And such failure is not unique to the Nigerian commercialization program. As Shirley notes, "the logic of performance contracts is persuasive, but the reality has been disappointing."¹²⁵ Citing two empirical studies probing the link between performance contracts, on the one hand, and profitability and productivity, on the other hand, she noted that both found no evidence that performance contracts had improved efficiency.¹²⁶ She attributed the failure to three problems, which she suggests a performance contract must address for it to improve performance. First, it must reduce the information advantage that managers enjoy over owners. Secondly, it must motivate managers through rewards or penalties to achieve the contract's targets; and thirdly, it must convince managers that government's promises are credible.¹²⁷ One of the critical problems of the divorce of ownership from management is the fact that the owner might not have as much technical and other information as the manager. As a result, the owner might not be in the best position to superintend the manager. In

¹²⁵ Shirley, *supra* note 107

¹²⁶ Shirley, *supra* note 107

¹²⁷ Shirley, *supra* note 107

the context of the performance contract, Shirley notes that managers are able to use their information advantage to negotiate targets that are either hard for outsiders to evaluate or easy for the firm to achieve.¹²⁸ In such circumstances, the performance contract will hardly conduce to efficiency. Similarly, if the performance contract does not properly provide incentives for the managers or other workers, then it might not achieve its objective of promoting efficiency. The mistrust toward government and the absence of enforcement mechanism also militate against the utility of performance contracts.

Apart from these inherent problems associated with performance contracts, the Nigerian performance contracts, which TCPC and its successor, the Bureau of Public Enterprises (BPE), orchestrated with commercialized enterprises also encountered the problem of lack of adequate monitoring. Under those contracts, the performance of the enterprises was to be evaluated every year. But, more than a decade after the "contracts" were made, most of the enterprises were yet to be evaluated.¹²⁹ And the

¹²⁸ Shirley *supra* note 107

¹²⁹ MIKE OBADAN AND SESAN AYODELE, COMMERCIALIZATION AND PRIVATIZATION POLICY IN NIGERIA, *supra* note 1 at 156

enterprises have been no less subject to interference from governmental ministries and department, than they were prior to privatization.¹³⁰

Performance contracting is one more illustration of a penchant for pseudo legalism - a declaration of readiness to abide by law while in actuality remaining above it. The Boards or Managements of the enterprises could not sue the government on these contracts. Indeed, TCPC had the power to unilaterally review or vary the performance contracts. For all of its formalities, performance contracts create no legally or judicially enforceable relationship. They are so broad and ambitious resembling more such policy documents as budgets and statement of objectives. It is in some respects a misnomer to regard them as contracts, and in a fledgling democracy with fragile institutions, it might be better to use other terms so as to avoid confusion and also in order not to detract from the aspiration towards respect for contract and agreements. Prior to commercialization, the intermeddling of the Ministries in the affairs of the enterprises was not legal. Such interference was not normally in the nature of formal official actions. Most

¹³⁰ See Usman, *supra* note 84 at 101 (arguing that the failure can be attributed to a number of factors: (i) the basic human problem of resistance to change; (ii) inadequate staff and training at the TCPC (or BPE) to undertake fully the monitoring exercise; (iii) inadequate or tardy records of the activities of the enterprises greatly hinder the monitoring activities; (iv) the enterprises have been very slow in implementing certain areas of the reform program; (v) the government 's failure in ensuring the stability in the boards and managements of the enterprises as required under the performance agreement; (f) government's failure to give the enterprises the freedom to review their tariffs as provided for in the performance agreements.)

times, it was informal and subtle. Essentially, it took the nature of political pressure, intimidation and other pressures, which could not be classified as wholesome or even legal. So the solution did not lie in a formal contract such as the so-called performance contract. It lay in punishing or otherwise legally redressing the actions of the erring officials of the Ministries and of the enterprises. One dares say that it lay in criminal sanctions in some cases. No wonder the officials continued to interfere in the affairs of the enterprises notwithstanding the existence of the performance contracts.¹³¹

Besides, there is a measure of contradiction in the TCPC or BPE monitoring the performance of the enterprises. Granted, TCPC and BPE were and are, respectively, manned by professionals, but they are essentially government agencies not dissimilar to the Ministries. And they constitute another layer of bureaucracy.

¹³¹ TCPC Final Report P. 58

CHAPTER 5

THE NIGERIAN PRIVATIZATION AND COMMERCIALIZATION PROGRAM 1999 – DATE

I. INTRODUCTION

Although the privatization program introduced by the 1988 decree was mainly successful in the sense discussed in Chapter 4, it was also beset by numerous problems. The erudite Professor Mike Obadan has summarized the problems encountered in the execution of the first privatization program.¹ According to him those who were ideologically opposed to privatization mounted significant opposition to it.² Similarly, some public officials and enterprise managers and staff resisted the policy. Public officials saw the program as diminishing their areas of influence because it sought to sell the SOEs over which they exercised a lot of influence, and, in the case of commercialization, it sought to grant the SOEs autonomy from those officials. The opposition from the public officials, even though subtle,

¹ MIKE OBADAN, PRIVATIZATION OF PUBLIC ENTERPRISES IN NIGERIA, 58-62 (NCEMA, Ibadan, 2000)

² See also A Soyibo, Kolawole Olayiwola and Babatunde Alayande, *A Review of Nigeria's Privatisation Programme*, in E. REMI AIYEDE, BABATUNDE ALAYANDE AND AZEEZ MABAWONK (Eds), READINGS IN DEVELOPMENT POLICY AND CAPACITY BUILDING IN NIGERIA, 211, 221 (Development Policy Centre, Ibadan, 2003)

was more effective because the privatization agency required their cooperation. Organized labor, especially in the SOEs that were to be privatized, vehemently opposed the program, which they feared would lead to retrenchment and other forms of unemployment.

The program was also hamstrung by the absence of market competition and effective regulatory framework. "And so, commercialized PEs that were planned to operate in a competitive environment in order to allow for the emergence of economic efficiency in all its ramifications, continuously retained their monopoly statuses in an evolving market-oriented economy. Consequently, the tariffs of social services and utilities skyrocketed while the associated services remained poor and undesirable."³ Of course this problem was always at the core of misgivings about privatization. The fear was that public monopolies could be turned to private monopolies. The Utilities Charges Commission, which was supposed to regulate the tariffs of commercialized enterprises proved weak in doing so, with the result that commercialized enterprises hiked their tariffs. Another consequence of an

³ OBADAN, PRIVATIZATION OF PUBLIC ENTERPRISES IN NIGERIA, supra note 1 at 59; See also Sesan Ayodele, *Public Enterprises Reforms in Nigeria*, in I.B. BELLO-IMAM, A.A ADUBI AND A.A. FAJINGBESI, PERSPECTIVES ON NATIONAL ECONOMIC MANAGEMENT AND ADMINISTRATION IN NIGERIA, 128, 134 (NCEMA, Ibadan, 2004) (noting that: "it may be recalled that up till 1994, except for air transportation and the postal services, a truly competitive market environment as envisaged in the Decree which legalized the reform, remained elusive.")

unchecked monopoly, or a poorly regulated one, was that the efficiency, which was the aim of privatization and commercialization, was compromised.

Furthermore, there was the problem of inaccessibility to credit. Many prospective shareholders did not have enough money to acquire the shares, and the banks did not heed the government's directive to extend credit facilities to those desirous of acquiring shares. Besides, some of the shares were oversubscribed, because of the activities of institutional investors. Small individual investors were thus obstructed from acquiring shares. Other problems were that there were "imbalances in equity shareholder distribution among income groups and geo-politically"⁴, and there were unanticipated delays in the commencement of the privatization program and in the processing of the equity share application forms.⁵

⁴ OBADAN, PRIVATIZATION OF PUBLIC ENTERPRISES IN NIGERIA, supra note 1 at 61

⁵ Other problems associated with the program were: political interference in the operations of the PEs and also traces of bureaucracy causing delays; arbitrary fixture of products and services tariffs; supply cum demand imbalances in utilities market. See Sesan Ayodele, *Public Enterprises Reforms in Nigeria*, in I.B. BELLO-IMAM, A.A ADUBI AND A.A. FAJINGBESI, PERSPECTIVES ON NATIONAL ECONOMIC MANAGEMENT AND ADMINISTRATION IN NIGERIA, 128, 134 (NCEMA, Ibadan, 2004) and A. Soyibo, Kolawole Olayiwola and Babatunde Alayande, *A Review of Nigeria's Privatisation Programme*, in E. REMI AIYEDE, BABATUNDE ALAYANDE AND AZEEZ MABAWONK (Eds), READINGS IN DEVELOPMENT POLICY AND CAPACITY BUILDING IN NIGERIA, 211, 221 (Development Policy Centre, Ibadan, 2003)

As a result of these problems, the first privatization program was heavily criticized. And some suggest that these criticisms led to its suspension in 1994.⁶ Before the abandonment, the government had already made modifications. It passed the Bureau of Public Enterprises Decree No 78 of 1993 (to replace the Privatisation and Commercialisation Decree No 25 of 1988) and replaced the Technical Committee on Privatisation and Commercialisation with the Bureau of Public Enterprises as the agency responsible for the privatization and commercialization of SOEs.⁷ While the issue of the problems might have been one consideration in suspending the program, it was not necessarily the only reason. Nigeria's political experience has been marked by frequent and oftentimes unplanned changes in government. And any incoming administration would always try to discredit the policies of its successor. It would be recalled that the Babangida administration, which started the privatization program, ended in August 1993.

The Abacha administration, which succeeded it, was not as enthusiastic

⁶ Soyibo & others, *supra* note 2 at 221; Ayodele *supra* note 3 at 134

⁷ See J.J. Bala, *The Impact of Commercialization in Nigeria*, in V.V. RAMANADHAM, HOW DOES PRIVATIZATION WORK? ESSAYS ON PRIVATIZATION IN HONOUR OF PROFESSOR V.V. RAMANADHAM, 63, 75 (Routledge, Florence, KY, 1997)

about privatization as its predecessor. Instead, it introduced the concept of contract leasing in 1995.⁸ This involved leasing SOEs to both local and foreign entrepreneurs on as-it-were basis.⁹ The lessees were to be firms with proven track records and must possess the managerial and technical skills peculiar to the enterprise as well as financial resources needed to manage the enterprise. The leases were to be for a period of ten years with an option for renewal on a mutually agreed upon basis.

The trial with contract leasing did not really gain ground before the government reverted to what it called "guided privatization." The aim of guided privatization was to privatize one enterprise at a time, so that the lessons learned in that one privatization would be applied to subsequent privatizations. It also sought to limit the share acquisitions to core strategic investors with relevant expertise to participate in the ownership of the enterprise¹⁰

To underscore the point that the fate of the privatization program was tied to

⁸ See OBADAN supra note 1 at 63; Bala supra note 7 at 75; Ayodele supra note 3 at 134; Soyibo & others supra note 2 at 221

⁹ Soyibo & others supra note 2 at 221

¹⁰ See generally OBADAN supra note 1 at 63-68; Ayodele supra note 3 at 134-135; Soyibo & others supra note 2 at 222-223

the disposition of the administration for the time being, the interest in the privatization program was fully revived in 1999 during the tenure of a new head of state. The military administration of Abdulsalami Abubakar passed the law that has formed the legal basis for the current wave of privatization and commercialization of SOEs.¹¹ It must be noted that although that administration passed the law and, in essence, jump started the program again, the country was returned to democratic rule in May 1999, and since then there have been two civilian administrations, both of which have continued with the efforts to reform the economy and particularly to privatize or commercialize the SOEs.

A further illustration of the penchant on the part of the government to pretend to make a clear break with the past, especially in the areas of reforms, is that although the law enacted to effect what may be called the second wave of privatization and commercialization is for the most part similar to the 1988 decree, the government also sought to articulate its own reasons for the privatization program.¹² Those reasons are not dissimilar to

¹¹ Upon coming to office Abubakar reaffirmed his government's commitment to privatization and announced that the government would privatize its investment in telecommunications, electricity, petroleum refineries, petrochemical and bitumen production and tourism in addition to spillovers from the first round of privatization, ie the one that began in 1988. See OBADAN supra note 1 at 69.

¹² The objectives are stated to be the following: (i) to redefine the role of government in order to allow it concentrate on the essential task of governance which includes the creation of sound legal and

the original motivations that informed the earlier efforts. The over arching fiscal constraints that plagued the economy in 1988 were still present. Indeed, they were aggravated by the instability that characterized the politics of the 1990s in Nigeria.

II. CONSTITUTIONALITY OF THE CURRENT PRIVATIZATION PROGRAM

An issue, which assumed a measure of prominence in the discourse of the pros and cons of privatization, under the second program, was the constitutionality of the policy of privatization and commercialization. Again this was peculiar to the second phase because it was to be implemented by a

macroeconomic frameworks among others; (ii) to restructure and rationalize the public sector in order to lessen the dominance of unproductive investments in the economy; (iii) to re-orientate the enterprises slated for privatization and commercialization towards a new horizon of performance improvement, viability and overall efficiency; (iv) to promote efficiency by fostering well structured markets and competition; (v) to create more jobs, acquire new knowledge and technology and expose the country to international competition; (vi) to raise funds for financing socio-economic development in such areas as health, education and infrastructure; (vii) to ensure positive returns on public sector investments in commercialized enterprises through more efficient management; (viii) to check the absolute dependence on the treasury funding by otherwise commercially oriented parastatals and so, encourage their approach to the Nigerian capital market to meet their funding requirements; (ix) to initiate process of gradual cession to the private sector, such public enterprises that are better operated by the private sector; (x) to reduce the fiscal burden of loss-making in public enterprises which undermine fiscal control and macro-economic stability; (xi) to mobilize domestic resources for developing and deepening financial development; (xii) to spread and democratize share ownership with the benefits of positive change in labor attitudes and enhanced productivity; and (xiii) to lead to fairer pricing. See PRIVATISATION HANDBOOK (Published by the Bureau of Public enterprises, National Council on Privatisation, 3rd Edition 2001) (Hereinafter simply "PRIVATISATION HANDBOOK" PP. 40 - 41; See also Eze Onyekpere, *Challenges for the Privatisation Programme*, in EZE ONYEKPERE (ED), READINGS ON PRIVATIZATION, 24, 26 (Socio Economic Rights Initiative (SERI), Lagos, 2003) (hereinafter simply "READINGS ON PRIVATIZATION"); But see JOHNSON A. AKINBADE, PUBLIC ENTERPRISES AND PRIVATISATION IN NIGERIA, 95 (Macak Books Ltd, Lagos, 2004) (suggesting that the major concern of the government under the Obasanjo privatization program was fiscal, ie to raise revenue and that a secondary objective was to remove price distortions in the economy)

democratically elected government operating under a constitution that was regarded as the supreme law of the land.¹³ It is an elementary proposition that any law or policy inconsistent with the constitution is void to the extent of the consistency.¹⁴ Theoretically, the constitutional jurisprudence that prevailed during the first privatization program, discussed in Chapter 4, recognized the primacy of the constitution, or what was left of it. However, the manner of amending the Constitution was simple. Whereas the current constitution is fairly rigid, the one operated by the military in 1988, and thereabouts, was flexible. The government could easily modify it. Indeed, no affirmative act of amendment was required. It was deemed amended by any subsequent law, usually called decree, passed by the military administration. As a result, the 1988 decree, on privatization and commercialization, did not necessarily have to pass constitutional muster because its provisions prevailed over what was left of the then prevailing constitution.¹⁵

To return to the current exercise, which is subject to the constitution, many people faulted its constitutional validity. This protestation of constitutional

¹³ See Constitution of the Federal Republic of Nigeria, 1999, Section 1(3).

¹⁴ Section 1(3) of the Constitution of the Federal republic of Nigeria

¹⁵ Constitution of the Federal Republic of Nigeria 1979 as modified by the Constitution Suspension and Modification Decree No 1 1983.

infirmity was especially loud in the activist civil society and was rooted more in its liberal conception of the role of government than in strict constitutional analysis. For instance, much of the argument¹⁶ is centered on the provisions of Section 16 of the 1999 Constitution, which provides, among other things, that the state shall “manage and operate the major sectors of the economy.”¹⁷ Major sectors of the economy are defined as “such economic activities as may, from time to time, be declared by a resolution of each House of the National Assembly to be managed and operated exclusively by the government of the Federation.”¹⁸ But “until a resolution to the contrary is made by the National Assembly, economic activities being operated exclusively by the Government of the Federation on the date immediately preceding the day when”¹⁹ Section 16 came into force, “whether directly or through the agency of a statutory or other corporation or company, shall be deemed to be major sectors of the

¹⁶ See for example Kalu Onuoha, *The Legal Regulation of Privatisation - A Critique*, in READINGS ON PRIVATIZATION, 9, 10-13 (arguing that: “the practice of having core/strategic investors particularly in those SOEs providing essential services/utilities is unconstitutional”); Chom Bagu, *Efficient Allocation of Resources or Looting the Patrimony: A Critical Review of Privatization in Nigeria*, in READINGS ON PRIVATIZATION, 43, 47-48 (arguing that Sections 16 and 17 make the current privatization program unconstitutional); Otive Igbuzor, *Privatisation in Nigeria: Critical Issues of Concern to Civil Society*, in READINGS ON PRIVATIZATION, 36, 40 (suggesting that the privatization program appears to “abuse” Section 16 of the Constitution)

¹⁷ The full provisions of Section 16 are:

¹⁸ Section 16(4) of the Constitution of the Federal Republic of Nigeria 1999

¹⁹ *Ibid* section 16(4)

economy.”²⁰ The argument then is that to the extent that the public utilities and other enterprises hitherto owned and operated by the Federal Government are sold to the private sector that would be an abnegation of Section 16 of the Constitution and therefore be void.

However, neither the text nor the spirit of Section 16 compels such a conclusion. The section enables the State to manage the major sectors of the economy, but it does not state that such management should be to the exclusion of any participation by the private sector. On the contrary, it recognizes in Section 16(1)(d) “the right of any person to participate in areas of the economy within the major sectors of the economy.” It is also arguable that management of the major sectors could be achieved by the State simply by maintaining robust regulations over those sectors whilst allowing private individuals to participate in them as envisaged by Section 16.²¹ Besides, Section 16 is a statement of aspirations, and, just like other parts of Chapter II of the constitution of which it is a subset, it is not meant to be a precise constitutional command admitting of no variation. In legal or judicial

²⁰ Ibid section 16(4)

²¹ See also Emeka Iheme, *The Legal Regulation of Privatisation*, in READINGS ON PRIVATISATION, 1 at 3 (arguing that “privatization, no doubt, is one way in which the government may enable individuals to ‘participate’ in a sector of the economy”, and further that “on the whole, however, the Constitution does not oblige the government either to maintain public enterprises or to privatize them. The question is one of policy to be addressed by each government in its own wisdom.”)

parlance, it is said to be non-justiciable.²² This means that the normal judicial remedies available in the event a constitutional breach are not available in any alleged violation of Chapter II. The Courts do not have jurisdiction over disputes founded on violations of that part of the Constitution and, as a result, will not entertain actions to redress any such violations.

However, one must agree with IHEME that there are aspects of the Public Enterprises (Privatisation and Commercialisation) Act 1999 that might not comport with the 1999 Constitution.²³ The Act confers enormous powers on the National Council on Privatisation (NCP) to add to, delete from, alter or amend the list of enterprises to be privatized.²⁴ IHEME²⁵ rightly argues that to the extent that NCP's powers enable it to add a statutory corporation (not otherwise included in the list for privatization) to such list, such powers may be unconstitutional if the addition implies an amendment or repeal of the statute that established the enterprise. Since the designation of such statutory corporation involves an amendment or repeal of the statute, only the

²² See Section 6(6)(c) of the Constitution

²³ IHEME supra note 21 at 4

²⁴ Section 1(3) of the Act

²⁵ IHEME supra note 21 at 4

National Assembly, in the exercise of its constitutional legislative functions, is competent to designate it for privatization.

III. LEGAL FRAMEWORK OF THE CURRENT PRIVATIZATION PROGRAM

The currently operative legislation, which provides the legal framework for privatization, is the Public Enterprises (Privatisation and Commercialisation) Act 1999²⁶ (hereinafter "Privatisation and Commercialisation Act" or "the Act"). The Act enacts a gradualist approach²⁷ to privatization. In doing so, it follows the 1988 model of placing SOEs into four categories: (i) partially privatized²⁸, (ii) fully privatized²⁹, (iii) partially commercialized³⁰ and (iv) fully commercialized.³¹

²⁶ There was also the Bureau of Public Enterprises Decree 1993 but this was repealed by the Privatisation and Commercialisation Act

²⁷ It is gradualist or intermediate if you take the entire exercise as a whole, otherwise it is arguable that for the enterprises to be fully privatized the approach is immediate or the so-called big bang.

²⁸ Section 1(1) of the Act and Part I of the First Schedule thereto.

²⁹ Section 1(2) of the Act and Part II of the First Schedule to the Act.

³⁰ Section 6(1) of the Act and Part I of the Second Schedule to the Act.

³¹ Section 6(2) of the Act and Part II of the Second Schedule thereto.

PARTIAL PRIVATIZATION

According to the Act, partial privatization means that the government does not fully divest its interest in the concerned SOE. Instead, in the exercise of the powers vested in it, the NCP introduces a scheme whereby fifty one per cent of the shares in such enterprise are sold to what they call "core" or "strategic" investor. The government retains twenty nine percent³² of the equity, while twenty percent is available for subscription by Nigerian individuals. Out of the twenty percent available to individuals, ten percent³³ (i.e. half) will be allotted to the staff of the affected enterprise.³⁴

Significantly, the notion of "core investor" has been central to the ongoing privatization program. The Act does not specifically provide for it, although it would seem to tacitly recognize it in the provisions of Section 4 thereof which states that "a privatized enterprise which requires participation by strategic investors may be managed by the strategic investors as from the effective date of the privatization on such terms and conditions as may be

³² The distribution was formerly forty percent to core investor and forty percent to the government. The National Council on Privatisation (NCP) Amended Schedule.

³³ Section 5(3) of the Act; Originally this was one percent, but pursuant to powers which the Act has vested in it the NCP increased it to ten percent.

³⁴ This appears to be an attempt to woo employees and to reduce their opposition to the exercise.

agreed upon." As a policy matter, it has been driven by the NCP and the BPE in the exercise of the enormous powers and wide latitude given to NCP in respect of administering the privatization program.

The concept of "core investor" appears to be an indirect appeal to foreign investors. This is because such an investor "must not only possess the technical know-how in relation to the activities of the enterprises they wish to invest in but also possess the financial capacity to pay competitive price for the enterprise and increase their capital base."³⁵ Given the paucity of both resources locally, it appears the dual requirements would work in favor

³⁵ Presidential Statement supra not 14; See also Section 34 of the Act (which defines "strategic investor" as "a reputable core investor or group of investors having the requisite technical expertise, the managerial experience and the financial capacity to effectively contribute to the management of the enterprises to be privatized"). The Guidelines on Privatisation issued by the NCP has the following provisions on core investors: "Core Investors or Strategic Investors can be described as formidable and experienced groups with the capabilities for adding value to an enterprise and making it operate profitably in the face of international competition. They should possess the capabilities of turning around the fortune of such an enterprise, if by the time of their investment, the enterprise is unhealthy. The major characteristics that distinguish strategic/core group investors are:-

(a) They must possess the technical know-how in relation to the activities of the enterprises they wish to invest in. For example, a Core Investor into a Cement Company must have access to cement production expertise with regards to optimal use of the machinery, maintenance of such machinery and other technical aspects of Cement Production such as procurement of raw materials, etc.

(b) The Core Investors must also possess the financial muscle, not only to pay competitive price for the enterprise they wish to buy into but also to turn around its fortune, using their own resources without relying on the Government for funds. Each Core/Strategic Investor is expected to prepare a Short/Medium/Long term plan for the development of the enterprise and indicate how it will be financed.

(c) The Core Investor must have the management know-how to run a business profitably in a competitive environment where market forces dictate the business environment.

13.2 Given the magnitude of investment level in the utilities earmarked for Privatisation, the limited absorptive capacity of the Nigerian Capital Market, our low technological level among other reasons, it is quite obvious that there is need to utilise the services of core investors in the new dispensation.

13.3 In consonance with S(4) of the Privatisation Act, privatised enterprise which requires participation by Strategic Investors may be managed by the Strategic Investors as from the effective date of Privatisation on such terms and conditions as may be agreed upon. On the other hand, strategic investors will work hand in hand with the existing Management for a certain transition period."

of foreign investors. This is consistent with the general intendment of the exercise to attract foreign investments. It is also pertinent to mention that the sale of the shares available to Nigerians shall be done on the basis of equality of Federal Constituencies.³⁶ And where there is an over-subscription, no individual subscriber shall be entitled to hold more than 0.1 per cent of the equity shares in the enterprise.³⁷ Significantly, the critical enterprises are in the list of entities to be partially privatized.³⁸ This reflects the ambivalence with which many still view privatization. The government is yet to wholeheartedly embrace it.³⁹ Whether this approach is beneficial is an open question. On the one hand, considering the strategic nature of these

³⁶ Section 5(2) of the Act; again this result is consequent on the amendment effected by the NCP. Originally, the emphasis was on equality of States.

³⁷ Section 5(4) of the Act; It is arguable whether this is an adequate safeguard against monopoly.

³⁸ Examples are: the telecommunications sector (Nigerian Telecommunication PLC (NITEL)); the electricity sector (National Electric Power Authority (NEPA)); the petroleum sector (the Refineries); gas sector (Nigerian Gas Company Ltd); others are machine tools (Nigerian Machine tools Company Ltd); steel and aluminum sector (Jos Steel Rolling Mill Ltd; Katsina Steel Rolling Mill Co. Ltd; Oshogbo Steel Rolling Mill Co. Ltd ; Ajaokuta Steel Co. Ltd; delta Steel Co. Ltd; Aluminum Smelter Co. Ltd); insurance companies (NICON Insurance PLC, Nigerian Reinsurance PLC); transport and aviation companies (Federal Airports Authority of Nigeria, Nigerdock PLC, Nigeria Airways Ltd); paper companies (Nigerian National Paper Manufacturing co. Iwopin, Nigerian Newsprint Manufacturing Co. Ltd Oku Iboku, Nigerian paper Mills Ltd Jebba); sugar companies (Sunti Sugar Co. Ltd, Lafiagi sugar Co., Nigeria Sugar Co. Bacita) and other miscellaneous companies. See generally Part I of the First Schedule to the Public Enterprises (Privatisation and Commercialisation) Act No 28, 1999.

³⁹ Herbst attributes the ambivalence to the political roles SOEs play in Africa. As a result, he argues, governments would not wholeheartedly commit to privatization. He thus suggests a more realistic and lasting solution that would involve incremental reforms to improve public sector operations along with selected divestment. See Jeffrey Herbst, *The Politics of Privatization in Africa*, in EZRA SULEIMAN & JOHN WATERBURY (ED), *THE POLITICAL ECONOMY OF PUBLIC SECTOR REFORM AND PRIVATIZATION*, 234-254, 251 (Westview Press, Boulder, 1990); Indeed the control of these huge SOEs is seen as one of the attractions of governance and many politicians factor them in their political calculations.

enterprises, there may be a need for the government to retain some form of interest in them. However, experience has shown that once the government is involved, it may in fact call the shots irrespective of the amount of its shareholding.⁴⁰ As a result, such an arrangement may not augur well for attracting the much needed foreign capital. Foreign investors are usually particular about stability and some form of certainty. And they are aware of the legal, political and other constraints in redressing governmental intermeddling in enterprises. One suspects that it is this incongruence that caused the National Council on Privatisation⁴¹ (NCP) to amend the ratio of percentage ownership in partially privatized SOEs, from 40: 40 to 51: 29, in favor of core investors. It is doubtful if such enhanced and clear majority provides a sufficient assurance that the government will allow the core investors the required free hand to turn the ailing partially privatized enterprises around.

⁴⁰ For instance in the past government has been known to appoint and remove directors of companies in which it had an interest without reference to constitutive documents of such companies; See also ERNST & YOUNG, *PRIVATIZATION: INVESTING IN STATE OWNED- ENTERPRISES AROUND THE WORLD*, 35 (John Wiley & Sons, Inc., NY, 1994) (alluding to the unwillingness or inability of government to relinquish control completely, but noting that private investors and governments usually make uncomfortable bed partners.)

⁴¹ A body created under the Privatisation and Commercialisation Act

B. FULL PRIVATIZATION

Full privatization entails the divestment of the entirety of government's share holding in the enterprise. In most of the companies involved, the government is only part holder of the stocks. Thus, privatization, in this sense, is the transfer to the private sector, of the government's already limited interest in the companies. The firms in this category are not as strategic as those for partial privatization.⁴² As in the partially privatized companies, the shares available for sale are to be allocated on an equitable geographical spread using the equality of Federal Constituencies as a basis, and ten percent of such shares are to be made available to employees of the enterprises.⁴³

⁴² The prominent firms here may be some of the operators in the downstream sector of the oil industry (such as Unipetrol PLC, National Oil and Chemical Company PLC and African Petroleum PLC); others are cement companies (such as Ashaka Cement Company PLC, Benue Cement Company PLC, Northern Nigeria cement Company PLC; Nigerian Cement Company Limited Nkalagu,, Calabar Cement Company Ltd, West African Portland Cement); Commercial and Merchant Banks (Afriland Nigeria PLC, Assurance Bank PLC, FSB International bank PLC; NAL Merchant Bank PLC); Agro-Allied Companies (Ayip-Eku Oil Palm Company PLC, Opobo Boat Yard, Nigeria Romania wood Industries Ltd, Ihechiowa Oil Palm Co. PLC); Motor Vehicles and Truck Assembly Companies (such as ANAMCO Ltd, Leyland Nigeria Ltd Peugeot Automobile of Nigeria Ltd, Volkswagen of Nigeria); Hotels (Nigeria Hotels Ltd, Festac 77 PLC, Abuja International Hotel Ltd) etc. See generally Part II of the First Schedule to the Public Enterprises (Privatisation and Commercialisation) Act No 28, 1999.

⁴³ Section 5(2) and (3) of the Act, respectively

C. COMMERCIALIZATION

As we saw earlier, privatization, in the broad sense, encapsulates commercialization. This is because, in its wide connotation, privatization encompasses every attempt by the state to make the SOEs operate with the same level of efficiency found in the private sector. This is at the heart of the Nigerian approach to commercialization, which at the same time distinguishes commercialization from privatization. For firms to be partially commercialized, the implication is that "such enterprises so designated will be expected to generate enough revenue to cover their operating expenditures. The government may consider giving them grants to finance their capital projects."⁴⁴ On the other hand, full commercialization "means that enterprises so designated will be expected to operate profitably on a commercial basis and be able to raise funds from the capital market without government guarantee. Such enterprises are expected to use private sector procedures to run their businesses."⁴⁵

⁴⁴ See Article 6(d) Guidelines on Privatisation

⁴⁵ See Article 6(c)

The strict or narrow interpretation of privatization may exclude both forms of commercialization because the legal ownership of the enterprises or equities therein, remains vested in the government. However, commercialization effects the removal of the subsidies they hitherto enjoyed from the government. These enterprises are, therefore, not available for foreign direct investment. But the bulk of the enterprises in both categories provide social and other important services⁴⁶ to the economy. And to the extent that they operate at their optimum, they definitely would contribute to an environment that is very attractive to foreign investors.

IV. INSTITUTIONAL FRAMEWORK

The Privatisation and Commercialisation Act creates two bodies directly charged with implementing the privatization program. The first is the NCP⁴⁷, which is composed of persons holding certain important portfolios in the government and others appointed by the President. Its functions⁴⁸ are

⁴⁶ Examples of companies to be partially commercialized are: the River basin development authorities, the Nigerian Television Authority, the parks etc while examples of those subject to full commercialization are: Nigerian National Petroleum Corporation, Federal Mortgage Bank of Nigeria, the development banks etc. See generally Parts I and II of the Second Schedule to the Public Enterprises (Privatisation and Commercialisation) Act, No 28, 1999.

⁴⁷ Section 9 of the Act

generally policy related and supervisory. It determines the broad guidelines for effectuating the privatization program.⁴⁹ It can indeed change the classification of an enterprise from one to the other of the four categories of full privatization, partial privatization, full commercialization or partial commercialization.⁵⁰ The second body is the BPE or Bureau,⁵¹ which is headed by a person designated Director General.⁵² The Bureau's functions are essentially to execute the policies set by the NCP and to provide secretarial support to the NCP. Both bodies are to work in tandem to ensure

⁴⁸ Section 11 of the Act enumerates the functions as follows: (a) to determine the political, economic and social objectives of privatization and commercialization of public enterprises; (b) to approve policies on privatization and commercialization; (c) to approve guidelines and criteria for valuation of public enterprises for privatization and choice of strategic investors; (d) to approve public enterprises to be privatized or commercialized; (e) to approve the legal and regulatory framework for the enterprises to be privatized; (f) to determine whether the shares of a listed public enterprises should be by public or private issue or otherwise and advise the Government of the Federation accordingly; (g) to determine the time and when a public enterprise is to be privatized; (h) to approve the prices for shares or assets of the public enterprise to be offered for sale; (i) to review, from time to time, the socio-economic effect of the programme of privatization and commercialization and decide on appropriate remedies; (j) to approve the appointment of privatization advisers and consultants and their remuneration; (k) to appoint as and when necessary committees comprising persons from private and public sectors with requisite technical competence to advise on the privatization and commercialization of specific public enterprises; (l) to approve the budget of the Council; (m) to approve the budget of the Bureau; (n) to supervise the activities of the Bureau and issue directions on the implementation of the privatization and commercialization programme; (o) to receive and consider, for approval, the audited accounts of the Bureau; (p) to submit to the President of the Federal Republic of Nigeria in each year a report on the activities of the Council and the bureau; (q) to receive regular and periodic reports from the Bureau on programme implementation and give appropriate directions; and (r) to perform such other functions as may from time to time be necessary to achieve its objectives.

⁴⁹ Section 31 provides that it "may make regulations generally for the purpose of giving effect to the provisions" of the Privatization and Commercialization Act.

⁵⁰ See Sections 1(3) and 6(3) of the Act

⁵¹ Section 12 of the Act

⁵² Section 17 of the Act; the Director General is a member of the NCP.

that all aspects of the privatization program are carried out effectively and properly.⁵³

For all intents and purposes, the BPE is like an agent of the NCP, albeit a statutorily appointed one. This is because the BPE is to carry out the decisions of the NCP, although the former may make recommendations to the latter. Yet, in a curious departure from established drafting tradition in the country, the Bureau is statutorily made a body corporate and invested

⁵³ Sections 13 and 14 of the Act respectively deal with the functions of the BPE in respect of privatization and commercialization. Section 13 provides as follows: "The Functions of the Bureau with respect to privatization are to: (a) implement the Council's policy on privatization; (b) prepare public enterprises approved by the Council for privatization; (c) advise the Council on further public enterprises that may be privatized; (d) advise the council on the capital restructuring needs of the public enterprises to be privatized; (e) carry out all activities required for the successful issue of shares and sale of assets of the public enterprises to be privatized; (f) make recommendation to the Council on the appointment of consultants, advisers, investment bankers, issuing houses, stock brokers, solicitors, trustees, accountants, and other professionals required for the purposes of privatization; (g) advise the Council on the allotment pattern for the sale of the shares of the public enterprises set out for privatization; (h) oversee the actual sale of the shares of the public enterprises to be privatized, by the issuing houses, in accordance with the guidelines approved, from time to time, by the Council; (i) ensure the success of the privatization exercise taking into account the need for balance and meaningful participation by Nigerians and foreigners in accordance with the relevant laws of Nigeria; and (j) perform such functions with respect to privatization as the Council may, from time to time, assign to it." Similarly Section 14 provides that "the functions of the Bureau in respect of commercialization are to: (a) implement the Council's policies on commercialization; (b) prepare public enterprises approved by the Council for commercialization; (c) advise the Council on further public enterprises that may be commercialized; (d) ensure the updating of the accounts of all commercialized enterprises to ensure financial discipline; (e) ensure the success of the commercialization exercise and monitor, on a continuous basis for such period as may be necessary, the operations of the public enterprises after commercialization; (f) review the objectives for which public enterprises were established in order to ensure that they adapt to the changing needs of the economy; (g) ensure that public enterprises are managed in accordance with sound commercial principles and prudent financial practices; (h) interface with the public enterprises, and the supervising ministries, to ensure effective monitoring and safeguard the public enterprises managerial autonomy; (i) ensure that the board and management of each commercialized enterprise and the Government of the Federation, keep to the terms and conditions of the Performance agreements, if any, between the public enterprise concerned and the Government of the Federation; and (k) evaluate and recommend to the Council whether or not a public enterprise is eligible for funding through grants, loans, subventions or equity; and (l) perform such functions with respect to commercialization as the Council may, from time to time assign to it."

with perpetual succession.⁵⁴ It does also have a common seal and may sue and be sued.⁵⁵ What makes this provision the more significant is that the Act is silent on whether the NCP has similar attributes. The anomaly is that the principal may not ordinarily⁵⁶ be amenable to suits while the agent is. An overly ambitious Director General of the Bureau may also exploit this apparent oversight to flout the directives of the NCP. The availability of the Bureau as the clearinghouse, and with authority to bind the government on issues of privatization is salutary. It provides the one-stop shop for the foreign investor interested in the privatization program.⁵⁷

V. PUBLIC ENTERPRISES ARBITRATION PANEL

The Act creates an ad-hoc body known as the Public Enterprises Arbitration Panel, which is responsible for effecting prompt settlement of any dispute between an enterprise and the National Council on Privatization ("NCP" or "the Council") or the Bureau of Public Enterprises ("BPE" or "the

⁵⁴ Section 12(2)

⁵⁵ Id

⁵⁶ It is arguable that the Provisions relating the Public Enterprises Arbitration Panel enable NCP to bring, and to be subject to, proceedings in that panel.

⁵⁷ However under the Nigerian Investment Promotion Commission Act 1995 every enterprise in which a foreigner has an interest has to register with the Commission.

Bureau”)⁵⁸. This is by virtue of Section 28, which provides:

- (1) The Panel shall have power to arbitrate -
 - (a) in any dispute raising questions as to the interpretation of any of the provisions of a Performance Agreement; or
 - (b) in any dispute on the performance or non-performance by any enterprise of its undertakings under a Performance Agreement.
- (2) A dispute on the performance or non-performance by any of the parties to the Performance Agreement shall, in the case of a commercialised enterprise, lie to that Panel providing that such reference may be made after all reasonable efforts to resolve the dispute have been made and have not been proved.
- (3) The ruling of the Panel shall be binding on the parties and no appeal shall lie from a decision of the Panel to any court of law or tribunal.”

This is interwoven with the practice of making commercialized enterprises sign performance agreements. The Public Enterprises Arbitration Panel is thus the mechanism for resolving any disputes that might arise in connection with the performance agreements. Two perceivable flaws exist in this dispute settlement mechanism. First, it envisages that NCP could be a party to proceedings before the Panel, since it represents the government. Yet, NCP appoints members of the Panel.⁵⁹ The basic question of the fairness of any proceedings undertaken by such Panel may be implicated by this method of appointment. And this is not mitigated by the requirement of Section

⁵⁸ Section 27(1) of the Act

⁵⁹ Section 27(4)

27(2) that "the Panel shall consist of five persons who shall be persons of proven integrity one of whom shall be the Chairman." Absent a more stringent and objectively verifiable qualification, or indeed a more independent method of appointment, the Panel, if it is ever constituted, would be dogged with questions of its impartiality. A better arrangement would have been to subject disputes, relating to performance contracts and other aspects of the privatization and commercialization program, to the regular disputes settlement procedures including recourse to arbitration under existing arbitration and other alternative dispute resolution systems. Instead, curiously, the 1999 Act provides that "the provisions of the Arbitration and Conciliation Act or any other enactment or law relating to arbitration shall not be applicable to any matter which is the subject of Arbitration under this (1999) Act."⁶⁰ One feature of the military governments, which initially passed the 1999 Act, is the distrust they had for existing judicial institutions. As a result, they were wont to introduce parallel judicial or quasi-judicial machinery. The Public Enterprises Arbitration Panel and the provisions of the 1999 Act thereon are a relic of that predilection on the part of the military. Yet, if it was meant to signal a quick

⁶⁰ See Section 30 of the 1999 Act; but brackets mine

and simple dispute resolution mechanism, it also exhibits a tentativeness that may not be attractive to outsiders like foreign investors.

Besides, the provision that the ruling of the Panel shall be binding on the parties and no appeal shall lie from a decision of the Panel to any court of law or tribunal⁶¹ is constitutionally suspect. While the Public Enterprises (Privatisation and Commercialisation) Decree remained a decree under the military administration, which first passed it, such an ouster of the right to appeal to the courts could be sustained. But with the transition to civilian administration, and the automatic modification and even re-christening of the law as an "Act", deemed to have been passed by the National Assembly, such ouster of recourse to the courts is unconstitutional.

Secondly, it will prove to be redundant because very few enterprises, if any, would invoke its jurisdiction. This will be an extension of the shortcoming associated with performance contracts, to which we alluded in Chapter 4. It will be rare for Managers of enterprises to drag the owner of the enterprise, the government, to the Panel.

⁶¹ Section 28(3)

VI. METHODS OF PRIVATIZATION AND COMMERCIALIZATION USED UNDER THE CURRENT PROGRAM

Utilizing the flexibility, which the Act has given NCP and, by extension, BPE, the agencies have adopted several methods in the current privatization program. The most popular method has been the core investor sale. This is an innovation of the current program in the sense that it was not used in the first exercise. Figure 1 shows that of about 101 privatizations conducted by BPE, from 2000 to July 2006, 41 were done by the core investor sale method.⁶² The next popular method adopted by NCP and BPE is concession. This is not really a privatization method *strictu sensu*. It is similar to a long lease and does not involve divestiture. As applied by BPE, "it is a contract that confers the right to use services of an asset over a defined period usually ranging from 10-25 years."⁶³ The concessionaire uses the asset at an agreed fee. They also undertake to grow the asset over that period. About 22 enterprises were dealt with in this fashion. (Figure 1) Another method that has enjoyed a fair amount of use by BPE is asset sale. About 9 enterprises have been dealt with in this fashion. This is applied

⁶² Examples of SOEs privatized in this manner are: Benue Cement Co Plc to core investor Dangote Industries Ltd (May 2000); Ashaka Cement Co. Plc. to core investor Bluecircle Industries Ltd (March 2001); Cement Co. of Northern Nigeria to core investor Scancem (July 2000); West African Portland Cement Co. Plc to core investor Bluecircle Industries Ltd (October 2000)

⁶³ See Bureau of Public Enterprises, *Privatisation Procedures Manual* (March 2006) P. 22

where the prospects for the enterprise do not look bright and it is deemed to be more beneficial to sell its assets than to sell the enterprise as a whole.⁶⁴ Thus, the enterprise might be broken up into various parts, which are sold individually.⁶⁵ Also adopted by BPE is the method of public offer. This is done through the Stock Exchange. Figure 1 shows that one enterprise⁶⁶ was sold by Management Buyout method.

LIST OF ENTERPRISES PRIVATIZED (2000 TO JULY 2006)

S/ N	NAME OF ENTERPRISE	METHOD OF DIVESTITURE	DATE OF SALE	NAME OF INVESTOR	REMARKS
1	FSB International Bank	Share Flotation	April 2001	Nigerian individual and institutional investors	Transaction concluded. Enterprise handed over
2	NAL Merchant Bank	Share Flotation	April 2001	Nigerian individual and institutional Investors	Transaction concluded. Enterprise
3	International Merchant Bank	Share Flotation	April 2001	Nigerian individual and institutional	Transaction concluded

⁶⁴ Privatisation Manual supra note 63 at 22

⁶⁵ Privatisation Manual supra note 63 at 22

⁶⁶ Niger Insurance PLC

				investors	Enterprise
4	Ashaka cement Co. Plc	Core investor sale	March 2001	Bkuecircle Industries Ltd	
	Ashaka cement Co. Plc	Share Flotation	April 2001	Nigerian individual and institutional investors	Transaction concluded Enterprise
5	Benue Cement Co. Plc.	Core investor	May 2000	Dangote Industries Ltd (Nigeria)	Transaction concluded Enterprise
	Benue Cement Co. Plc	Share Flotation	January 2001	Institutional investors	
6	Cement Co. of Northern Nigeria Plc.	Core investor sale	July 2000	Scancem (Norway)	
	Cement Co. of Northern Nigeria Plc.	Share Flotation	April 2001	Nigerian individual and institutional investors	Transaction concluded Enterprise
7	West African Portland Co.	Core investor sale	October 2000	Bluecircle Industries Ltd	Transaction concluded Enterprise handed over
	West African Portland Cement Co. Plc	Share Flotation	January 2001	Nigerian individual and institutional investors	
	Unipetrol Nigeria Plc	Core investor sale	May 2000	Ocean and Oil Nigeria Ltd	

	Unipetrol Nigeria Plc.	Share Flotation	April 2001	Nigerian Individual and institutional investors	Transaction Concluded. Enterprise handed over
9	African Petroleum Plc	Core Investor Sale	October 2000	Sadiq Petroleum Nigeria Ltd	
	African Petroleum Plc	Share Flotation	May 2001	Nigerian Individual and Institutional Investors	Transaction Concluded. Enterprise handed over
10	National Oil & Chemical marketing Co. Plc (now CONOIL Plc)	Core Investor Sale	October 2000	Conpetro Nigeria Ltd	
	National Oil & Chemical Marketing Co. Plc (now CONOIL Plc)	Share Flotation	April 2001	Nigerian Individual and Institutional investors	Transaction Concluded. Enterprise handed over
11	Nigerdock Nigeria Ltd	Core Investor Sale	December 2001	Global Energy Co.	Transaction Concluded. Enterprise handed over
12	Assurance Bank Plc	Core Investor Sale	March 2002	Parmex/Gensec Consortium Ltd	Transaction Concluded.

					Enterprise handed over
13	Calabar Cement Co. Ltd	Liquidation	August 2002	Flour Mills and Holcim of Spain	Transaction Concluded. Enterprise handed over
14	Niger Cement Plc	Core Investor Sale	October 2002	Nigerian Individual and institutional Investors	Transaction concluded. Enterprise handed over
15	Niger Insurance Plc	Management Buy-Out	December 2002	Management Alliance Group	Transaction Concluded. Enterprise handed over
16	Capital Hotels Plc (Abuja Sheraton Hotel)	Core Investor Sale	October 2002	Hans Gremlin Limited	Transaction Concluded. Enterprise handed over
17	Festac Hotel 77	Asset Sale on Competitive basis	January 2002	UAC Properties Plc	Transaction Concluded. Enterprise handed over
	Nigeria Hotels	Sale of Assets to			

	Limited:	different investors			
18	(a) Ikoyi Hotel Limited	Asset Sale on Competitive basis	October 2002	Beta Consortium	Transaction Concluded. Enterprise handed over
19	(b) Caterers' Court, Lagos	Asset Sale on Competitive basis	December 2002	Reliance Estates	Transaction Concluded. Enterprise handed over
20	(c) Houses No. 8 & 9 Lease Road, Ikoyi, Lagos	Asset Sale on Competitive basis	April 2003	Chyzob Enterprises	Transaction Concluded. Enterprise handed over
21	(d) Audit Section, Lagos	Asset Sale on Competitive basis	April 2003	Dangote Group	Transaction Concluded. Enterprise handed over
22	(e) Central Hotel, Kano	Asset Sale on Competitive basis	July 2004	Broadfields and NAL Assets Management	Transaction Concluded. Enterprise handed over
23	(f) NPA Quarters, Lagos	Asset Sale on Competitive basis	October 2004	Labana Glover Ventures	Transaction Conclude

					d. Enterprise handed over
24	(g) Magajin Rumfa, Kano	Asset Sale on Competitive basis			Transactio n Conclude d. Enterprise handed over
25	Electricity Metre Company of Nigeria, Zaria	Core Investor Sale	Decembe r 2002	Dantata Investments Limited	51% acquired. Transactio n Conclude d. Enterprise handed over
	Electricity Metre Company of Nigeria, Zaria	Core Investor Sale	Decembe r 2002	Dantata Investments Limited	An additional 17% acquired
26	Savannah Sugar Company Limited	Core Investor Sale	Decembe r 2002	Dangote Industries Limited	Transactio n Conclude d. Enterprise handed over
27	National Trucks Manufacturer s, Kano	Core Investor Sale	Decembe r 2002	Art Engineering Limited	51% acquired. Transactio n Conclude d. Enterprise handed over

	National Trucks Manufacturers, Kano	Core Investor Sale	April 2005	Art Engineering Limited	An additional 24% acquired
28	Nigeria Reinsurance Corporation	Core Investor Sale	December 2002	Reinsurance Acquisition Group	Transaction Concluded. Enterprise handed over
29	MV Abuja (Vessel of Nigeria Unity Line)	Asset Sale on Competitive basis	April 2003	Simatech Offshore International, Panama	Transaction Concluded. Enterprise handed over
30	West African Refinery Company Limited, Sierra Leone	Core Investor Sale	April 2004	Majestic Oil Services Limited	Transaction Concluded. Enterprise handed over
31	Daily Times of Nigeria Plc	Core Investor Sale	June 2004	Folio Communications Limited	Transaction Concluded. Enterprise handed over
32	Ore-Irele Oil Palm Company Limited	Core Investor Sale	September 2004	CPL Agric Limited	Transaction Concluded. Enterprise handed over
33	Peugeot	Sale to	July	Kaduna State	.36% sold

	Automobile Nigeria Limited	existing shareholder	2004	Investment Co.	to investor
34	Delta Steel Company Limited	Core Investor Sale	February 2005	Global Infrastructure	Only 30% of bid price has been received. Balance of 70% outstanding
35	Leyland Nigeria Limited	Revalidation of Sale	April 2005	Eba-Odan Commercial and Industrial	Transaction Concluded. Enterprise handed over
36	Central Packaging Limited	Core Investor Sale	June 2005	Gobesh (West Africa) Limited	Transaction cancelled as preferred bidder could not complete payment. Negotiation ongoing with other bidder to be concluded by September
	Nigeria Bricks and Clay Companies	Core Investor Sale			

37	(a) Ikorodu Bricks	Core Investor Sale	June 2005	Terracorp Limited	Only 10% of bid price paid. Balance of 90% to be paid as agreed in terms of sale
38	(b) Ibadan Bricks and Clay	Core Investor Sale	June 2005	Realstone Company Limited	Transaction Concluded. Enterprise handed over
39	(c) Enugu Bricks and Clay	Core Investor Sale	June 2005	Siljay Concept Limited	Transaction Concluded. Enterprise handed over
40	(d) Kaduna Bricks and Clay	Core Investor Sale	June 2005	Rahman Brothers Limited	Transaction Concluded. Enterprise handed over
41	(e) Kano Bricks and Clay	Core Investor Sale	June 2005	Associated Partners Limited	Transaction Concluded. Enterprise handed over
42	Ihechiowa Oil Palm	Core Investor Sale	July 2005	Agrico Multiservices Limited	Transaction cancelled

					as preferred bidder could not complete payment. Negotiation ongoing with other bidder to be concluded by September
43	Afribank Plc	Share Flotation	June 2005	Various Individual Nigerian Investors	Transaction Concluded
44	National Fertilizer Company of Nigeria (NAFCON)	Liquidation	August 2005	O'seul Nigeria Limited	Transaction Concluded. Enterprise handed over
45	Federal Superphosphate Fertilizer Company Limited	Core Investor Sale	September 2005	Nigerian Individual and Institutional Investors	Transaction Concluded. Enterprise handed over
	Nigerian Ports	Concessions			
	Apapa Port Terminals				
46	(a) Apapa Container Terminal	Concession	May 2005	AP Moller	Entry fees paid. The concession fees are

					to be paid annually and spread over the duration of the concession 25 years. Enterprise handed over in line with agreement
47	(b) Apapa Port (Terminals C)	Concession	May 2005	ENL Consortium	Entry fees paid. The concession fees are to be paid annually and spread over the duration of the concession 10 years. Enterprise handed over in line with agreement
48	(c) Apapa Port (Terminals D)	Concession	May 2005	ENL Consortium	Entry fees paid. The concession fees are to be paid annually

					and spread over the duration of the concession 10 years. Enterprise handed over in line with agreement
49	(d) Apapa Port (Terminals A)	Concession	October 2005	Flour Mills of Nigeria	Entry fees paid. The concession fees are to be paid annually and spread over the duration of the concession 25 years. Enterprise handed over in line with agreement
50	(e) Apapa Port (Terminals B)	Concession	October 2005	Flour Mills of Nigeria	Entry fees paid. The concession fees are to be paid annually and spread

					over the duration of the concession 25 years. Enterprise handed over in line with agreement
51	(f) Apapa Port (Terminal E)	Concession	October 2005	Dangote Group Industries of	Entry fees paid. The concession fees are to be paid annually and spread over the duration of the concession 25 years. Enterprise handed over in line with agreement
	Port Harcourt Terminals				
52	(a) Port Harcourt Terminal A	Concession	May 2005	Ports and Terminal Operators Limited	Entry fees paid. The concession fees are to be paid annually and

					spread over the duration of the concession 15 years. Enterprise handed over in line with agreement
53	(b) Port Harcourt Terminal A	Concession	May 2005	BUA International Limited	Entry fees paid. The concession fees are to be paid annually and spread over the duration of the concession 20 years. Enterprise handed over in line with agreement
	Tin-Can Island Port				
54	(a) Terminal A	Concession	September 2005	Joseph Dam & Sons Limited	Negotiating terms of concession still in progress
55	(b) Terminal B	Concession	September 2005	Tin Can Island Container	Entry fees paid. The

				Terminal Limited	concession fees are to be paid annually and spread over the duration of the concession 15 years. Enterprise handed over in line with agreement
56	(c) Terminal C	Concession	September 2005	Sifax Nigeria Limited	Entry fees paid. The concession fees are to be paid annually and spread over the duration of the concession 10 years. Enterprise handed over in line with agreement
57	(d) Roro Terminal	Concession	September 2005	AP Moller	Negotiating terms of concession still in

					progress
	Other Ports Terminals				
59	(a) Onne FLT B	Concession	October 2005	Intels Nigeria Limited	Entry fees paid. The concessio n fees are to be paid annually and spread over the duration of the concessio n 25 years. Enterprise handed over in line with agreement
60	(b) Onne FOT B	Concession	October 2005	Intels Nigeria Limited	Entry fees paid. The concessio n fees are to be paid annually and spread over the duration of the concessio n 25 years. Enterprise handed over in line with

					agreement
61	(c) Warri Old Terminal A	Concession	October 2005	Intels Nigeria Limited	Entry fees paid. The concession fees are to be paid annually and spread over the duration of the concession 25 years. Enterprise handed over in line with agreement
62	(d) Warri New Terminal B	Concession	October 2005	Intels Nigeria Limited	Entry fees paid. The concession fees are to be paid annually and spread over the duration of the concession 25 years. Enterprise handed over in line with agreement
63	(e) Calabar	Concession	October	Intels Nigeria	Entry fees

	New Terminal A		2005	Limited	paid. The concession fees are to be paid annually and spread over the duration of the concession 25 years. Enterprise handed over in line with agreement
64	Federal Superphosphate Fertilizer Company	Core Investor Sale	September 2005	Hekio Consortium	Transaction Concluded. Enterprise handed over
	Quarry Companies				
65	(a) Kuru Quarry, Jos	Core Investor Sale	September 2005	Afrimines Nigeria Limited	Negotiation to be concluded with preferred bidder by September
66	(b) Suleja Quarry, Suleja	Core Investor Sale	September 2005	Setraco (Nigeria) Limited	Transaction Concluded. Enterprise handed

					over
67	Nicon Hilton Hotel	Core Investor Sale	October 2005	Capital Consortium	Transaction Concluded. Enterprise handed over
68	Nicon Insurance Plc	Core Investor Sale	October 2005	Assurance Acquisition	Transaction Concluded. Enterprise handed over
69	Volkswagen Nigeria Limited	Core Investor Sale	October 2005	Barbedos Ventures	Transaction Concluded. Enterprise handed over
70	Ayip-Eku Oil Palm Company Limited	Core Investor Sale	October 2005	Interstate Investment	Negotiation ongoing with bidder to be concluded by September
71	Nigeria Sugar Company, Bacita	Liquidation	October 2005	Joseph Dam & Sons Limited	Transaction Concluded. Enterprise handed over
72	Oshogbo Steel Rolling Company	Liquidation	November 2005	Kura Holdings Limited	Transaction Conclude

	Limited				d. Enterprise handed over
73	Jos Steel Rolling Mill	Liquidation	November 2005	Zuma Steel West Africa Limited	Transaction Concluded. Enterprise handed over
74	Katsina Steel Rolling Mill	Liquidation	November 2005	Nigeria-Spanish Engineering Limited	
75	National Aviation Handling Company	Public Offer	November 2005	Various Individual and Institutional Investors	Transaction Concluded. Enterprise handed over
76	Eleme Petrochemicals Company Limited	Core Investor Sale	December 2005	Indorama Group	Transaction Concluded. Enterprise handed over
77	Nigeria Unity Line	Core Investor Sale	December 2005	Seaforce Shipping Company Limited	Transaction Concluded. Enterprise handed over
78	Nigeria Machine Tools	Core Investor Sale	December 2005	Miramar International Limited	Preferred bidder Miramar could not

					pay. Reserve bidder have increased their bid to N1 billion and have so far paid about 40%. To be concluded by August
79	Steyr Nigeria Limited	Core Investor Sale	December 2005	Kaura Motor	Transaction concluded as preferred bidder could not compete payment. Negotiation ongoing with other bidder
80	Sunti Sugar Co. Ltd	Liquidation	March 2006	Supertek Ltd	Transaction Concluded. Enterprise handed over
81	Niger Paper Mill, Jebba	Liquidation	May 2006	IMNL Ltd	NCP approval received 29 th July 2006.

					Payment to be concluded September 2006
	Other Ports Terminals				
82	Koko Port	Concession	May 2006	Gulftainer Bel Consortium	Negotiating terms of concession still in progress. To be concluded in September
83	Calabar Port	Concession	May 2006	Ecomarine Consortium	Negotiating terms of concession still in progress. To be concluded in September
84	Warri Port	Concession	May 2006	Associated Marine Services	Negotiating terms of concession still in progress. To be concluded in September

Source: The Privatization act, with forward by Irene Chigbue, Director General of BPE, <http://www.bpeng.org/rdonlyres/DA361996-D953-45CE-BF95-32ACC753AE61/0/PrivatizationAct.doc> (visited 09/24/07)

The main thrust of the current commercialization program is to provide the enterprises with operational autonomy.⁶⁷ As under the first program, the current commercialization program employs the device of performance contracts, which is designed to govern the relationship between the government and the commercialized enterprise. We had, in Chapter 4,⁶⁸ explored the limitations of performance contracting as a reform tool in the management of SOEs. Those constraints also apply to the use of performance contracts in the current exercise of commercialization. The point must be made however that commercialization seems to be a step in an enterprise's journey towards privatization.⁶⁹ For instance, some of the enterprises privatized or slated for privatization under the current exercise were those commercialized under the first exercise.⁷⁰

⁶⁷ Others are to provide competitive remuneration system to be able to attract, recruit and retain suitably qualified personnel; evolve a more result oriented and accountable management based on performance contract; strengthen financial/accounting controls at the enterprise level; upgrade the management information system of the affected enterprises; ensure financial solvency of public enterprises through effective cost recovery, cost control and prudent financial management; remove bureaucratic bottlenecks and political interference through clear role definitions between the supervising Ministry, the Board of Directors and the Management of public enterprises. See Privatisation Procedures Manual published by BPE, March 2006 PP. 253-255. These are the exact objectives of the 1988 decree with respect to commercialization.

⁶⁸ See Chapter 4

⁶⁹ See Privatisation Procedures Manual, P.253 stating that: "Commercialization, whether full or partial, is a dynamic process, which ultimately leads to eventual privatization or some form of public-private partnership (PPP)."

⁷⁰ These enterprises would include NITEL Plc., NEPA, Nigerian Power, Nigerian Marine Corp., NICON Insurance Plc., and Nigerian Reinsurance.

III. ASSESSMENT OF THE CURRENT PRIVATIZATION PROGRAM

The strengths of the current privatization program are similar to the benefits that accrued from the earlier one. The government has realized money from the sales of its interests in the SOEs.⁷¹ The capital market continues to grow. The explosion in the number of telephone service providers is, perhaps, the most visible benefit from the reforms of which privatization is a part. The number of people who have access to telephones rose exponentially from the early 2000s.

A criticism that can be leveled against the current privatization program is that those running it have still not been able to carry the majority of the people along. There is still considerable opposition to the program, several years after its commencement. For instance several suits have been instituted, mainly by labor, challenging different aspects of privatization or the privatization of different enterprises.⁷² Secondly, there have been allegations of cronyism. The names of certain individuals, or of companies associated with certain individuals, have been recurring in relation to

⁷¹ See generally JOHNSON A. AKINBADE, PUBLIC ENTERPRISES AND PRIVATISATION IN NIGERIA, 98 –100 (Macak Books Ltd, Lagos, 2004)

⁷² For example see a story, by Nkechi Onyedika and Florence Oretade, titled: *Govt, workers clash over sale of Urban Development Bank*, Guardian Newspaper June 06, 2007.

acquisitions of the SOEs. This is actually one of the reasons that the objections to the program have endured. Recently, the outgoing administration sold the interest in the petroleum refineries,⁷³ which are like the crown jewels of the country, to entities that were alleged to lack the technical competence in the area of petroleum refining and at a price that some considered a give away. The protestation against the sale was so pronounced and loud that the administration that took over from the prior government was forced to *revisit* the sale. In the end, and sensing that the government might reverse the transaction, the purchasers of the interest decided to withdraw from the transaction.

Thirdly, one of the pitfalls of the earlier privatization program, and one of the criticisms of privatization generally,⁷⁴ was that it was not coupled with robust and effective regulations. While governmental regulation has been strengthened in certain sectors, such as communication, there is still no comprehensive competition or antitrust regime in the country, and this almost twenty years since the inception of privatization in 1988. NCP and

⁷³ See story, by Yakubu Lawal and Mathias Okwe, titled: *Dangote, Otedola, Rivers buy Port harcourt Refinery*, Guardian Newspaper May 18, 2007; story, by Okey Ndiribe, titled: *Uproar over FG's last minute privatization*, Vanguard Newspaper May 25, 2007.

⁷⁴ See Eze Onyekpere, *Challenges for the Privatisation Programme*, in READINGS ON PRIVATISATION P. 24 at 31

BPE have attempted to formulate a competition bill, but such bill has not seemed to be a priority for the legislature. So there is the real danger that public monopolies could become private monopolies, which are indeed more deleterious to the economy.

Fourthly, the conception of the privatization program as a gradual process, even though beneficial, has had the effect of drawing out the exercise. This has had two effects. It has enabled the introduction of additional bureaucracy. The NCP and BPE, even if they are effective, have assumed a *defacto* permanence with all the trappings of a sustained bureaucracy. In another vein, the gradualism has made the process so flexible that successive governments see it AS another avenue for patronage. Thus we have had the spectacle of enterprises, which were thought to have been privatized or commercialized, but are still subject privatization or commercialization by new administrations. Such administrations arrogate to themselves the power to review and reverse what was done by prior administrations in that respect. For instance, the Nigerian National Petroleum Corporation, was supposed to have been privatized under the first program. It was also listed for privatization in the 1999 decree. As if that confusion was not enough, the current administration of Musa Yar'adua, which came to office in May

2007, recently announced that it would unbundle NNPC and certain committees of the National Assembly are gearing to pass new laws to validate the "new policy".⁷⁵ No reference was made to the fact that the NNPC is one of the SOEs slated for commercialization under the ongoing program. Granted that NCP has the powers under the 1999 Act to modify the lists for partial or full privatization and of partial or full commercialization. Yet, it does not seem that the new government's announcement and the legislature's seeming preparedness to pass a new law took cognizance of the fact that NNPC is already covered under the existing reform framework. NNPC is a national treasure and any government would like to, indeed device a pretense, to meddle in it even if it is to provide for commercialization already covered in existing law. A more worrisome aspect of this tendency is the preparedness to reverse completed privatization transactions.⁷⁶ It is doubtful if the government actually has the right to reverse these transactions. Absent collusion in fraud on the part of the Purchaser of the interest, it would seem that a new administration is

⁷⁵ See story, by Paschal Nwigwe, titled: *Reps prepare legal backing for new gas policy, unbundling of NNPC*, Guardian Newspaper September 14, 2007; In another report, the new Chairman of the Senate Committee on Privatisation alluded to a decision to probe BPE following petitions from "concerned Nigerians". He stated further: "if in the course of our investigation we found out that the process was not transparent, such exercise could be reversed. If we also discover that the benefiting organisation did not pay the right money for these enterprises, then they could be made to pay more. We have received some petitions from interested Nigerians asking us to examine the privatization of these enterprises. The one on my table right now is asking us to examine the privatization of NITEL." See story, by Azimazi Momoh Jimoh, titled: *Sale of Refineries inevitable, says Senate Panel*, Guardian Newspaper September 11, 2007.

⁷⁶ See story, by Azimazi Momoh Jimoh, titled: *Sale of Refineries inevitable, says Senate Panel*, Guardian Newspaper September 11, 2007 cited in footnote 75.

bound by a sale made by a previous administration, and any attempt to reverse such sale is like compulsory acquisition or taking. At least that is how it could legally be viewed, even though in actual fact the Purchaser may be helpless.

That is the more reason that caution must be exercised by the government in reversing sales of its interests in SOEs. These enterprises are usually big and cost a lot of money. If purchasers of government's interests cannot be confident on the security of the interests they are getting they would be discouraged. This is especially the case with foreign investors. At a minimum, the completed privatization of an enterprise should be immune from challenge based merely on the fact that a new administration would prefer different purchasers. And even in cases of egregious misconducts on the part of the privatization agency, any reversal should be preceded by due process and the courts should retain the jurisdiction to adjudicate such matters. The government is also better advised to adopt the process of legal challenges if it must reverse any sale.

Another problem is that for all the orchestration about privatization, the enterprises scheduled for privatization in the most strategic aspects of the

economy have not been fully dealt with, almost a decade after the current program started. Although NEPA has been unbundled, not all the spin off entities from NEPA have been sold.⁷⁷

⁷⁷ See story by Chidi Nnadi and Omodele Adigun, titled: *BPE doubts completion of privatization in power sector before may 29*, Daily Sun Newspaper January 29, 2007.

CHAPTER 6

FOREIGN INVESTMENTS IN NIGERIA

I. MEANING OF FOREIGN INVESTMENT

Foreign investment is broadly defined as “the institutional, individual, or governmental acquisition of assets in a foreign country. It includes both direct investment and portfolio investment and encompasses both public authorities and private firms.”¹ There is a tendency to distinguish this broad understanding from the narrower context of foreign direct investment, which some see as “any investment in another country which is carried out by private companies or individuals as opposed to government aid.”² Besides, different countries may define foreign direct investment differently. But the internationally accepted standard definitions of foreign direct investment are rather technical and are contained in the Balance of Payments Manual³ and

¹ Osaheni Victor Iyayi, *Foreign Investors' Perceptions of Nigerian Public Policy on Foreign Investment*, 9, 1988, Ph.d Dissertation submitted to the Golden Gate University, San Francisco, on file with the Golden Gate University Library; See also Adebayo O. Olukoshi, *Foreign Investment in the Nigerian Economy: Problems and Prospects*, 14 (Nigerian Journal of Policy and Strategy, Vol. II No. 2, December 1987, Published by the Nigerian Institute of Policy and Strategic Studies, Kuru) (defining foreign investment as: “the act by which capital is exported by some persons or organization resident in one country to another country for the purpose of earning a profit.”)

² Iyayi supra note 1 at 10 (citing and quoting DAVID W. PEARCE, *MACMILLAN DICTIONARY OF MODERN ECONOMICS*, 159 (1986), London, Macmillan)

³ Fifth Edition (BPMS) (Washington, D.C., International Monetary Fund, 1993)

the Detailed Benchmark Definition of Foreign Direct Investment.⁴ According to the former, foreign direct investment refers to investment made to acquire lasting interest in enterprises operating outside of the economy of the investor.⁵ The World Trade Organization sees foreign investment in similar light.⁶ The foreign entity or group of entities that makes the investment is called the "direct investor", while the unincorporated or incorporated enterprise in which the direct investment is made is referred to as a "direct investment enterprise."⁷ The direct investor's purpose is to gain an effective voice in the management of the enterprise. Both the Balance of Payments Manual and the Detailed Benchmark Definition of Foreign Direct Investment suggest a threshold of 10% equity ownership as the stake significant or sufficient to give effective voice in the management.⁸ The

⁴ Third Edition (BDS) (Paris, Organization for Economic Co-operation and Development, 1996)

⁵ See World Investment Directory Definitions, *Descriptions and Discrepancies in the Data*, http://r0.unctad.org/en/subsites/dite/fdistats_files/WIDdefinitions1_a.htm (hereinafter "World Investment Directory")

⁶ See M.O.KAYODE AND O.A. OYERANTI, ATTRACTING FOREIGN INVESTMENT THROUGH PRIVATE SECTOR PARTNERSHIP: WHAT HOPE FOR NIGERIA, 8 (Development Policy Centre, Ibadan, 2002) (Research Report No. 37) (stating: "The World Trade Organisation (WTO) (1996) observes that FDI occurs when an investor based in one country (the home country) acquires an asset in another country (the host country) with intent to manage the asset.")

⁷ World Investment Directory Definitions, *Descriptions and Discrepancies in the Data*, http://r0.unctad.org/en/subsites/dite/fdistats_files/WIDdefinitions1_a.htm (hereinafter "World Investment Directory")

⁸ World Investment Directory Definitions, *Descriptions and Discrepancies in the Data*, http://r0.unctad.org/en/subsites/dite/fdistats_files/WIDdefinitions1_a.htm (hereinafter "World Investment Directory"); The percentage of the stock held by foreigners is a mere guide. It is not conclusive of control. In fact in the Nigerian industrial Policy of 1988 foreign direct investments included those with foreign

BD3 of the OECD would exclude any 10% ownership if it can be proven that it does not allow the investor an effective voice in the management of the direct investment enterprise. Similarly, it would include a holding of less than 10% ownership if the direct investor nonetheless maintains effective voice in the management.⁹ It is pertinent to note that effective voice in the management of the direct investment enterprise does not tantamount to control of the enterprise. Of course it is doubtful if ownership of 10% interest in an enterprise is sufficient to vest control of the firm, unless the other 90% is totally diluted, in terms of lack of homogeneity or cohesion among its holders. The test is that of ability to have a voice. In most cases, possession of 10% ownership would constitute the holder into a block that cannot be easily ignored. Ownership of the requisite interest may be in the nature of equity capital, the reinvestment of earnings and the provision of intra-company loans.¹⁰

equity ranging from 4million Nigerian Naira. See Akomaye V. Agba, *Foreign Direct Investment and National Development: An Appraisal and Diagnosis*, in I.B. BELLO-IMAM, A.A. ADUBI AND A.A. FAJINGBESI, PERSPECTIVES ON NATIONAL ECONOMIC MANAGEMENT AND ADMINISTRATION IN NIGERIA, 56, 58 (NCEMA, Ibadan, 2004)

⁹ See World Investment Directory Definitions, *Descriptions and Discrepancies in the Data*, http://r0.unctad.org/en/subsites/dite/fdistats_files/WIDdefinitions1_a.htm (hereinafter "World Investment Directory")

¹⁰ See World Investment Directory Definitions, *Descriptions and Discrepancies in the Data*, http://r0.unctad.org/en/subsites/dite/fdistats_files/WIDdefinitions1_a.htm (hereinafter "World Investment Directory")

Portfolio investment is however not thought to entail any interest in the management of the enterprise. Instead, the portfolio investment holder is more interested in the returns and capital gains accruing from such investment.¹¹ It is therefore considered to fall outside the purview of foreign direct investment.¹² Portfolio investments take the form of new issue bonds and debentures, sales and purchase of existing bonds and stocks as well as medium and long-term lending.¹³

On this account, some writers would exclude portfolio investment from foreign investment. For instance, Sornarajah, in his excellent work on international law of foreign investment, defines foreign investment as

¹¹ Akomaye V. Agba, *Foreign Direct Investment and National Development: An Appraisal and Diagnosis*, in I.B. BELLO-IMAM, A.A. ADUBI AND A.A. FAJINGBESI, *PERSPECTIVES ON NATIONAL ECONOMIC MANAGEMENT AND ADMINISTRATION IN NIGERIA*, 56, 57 (NCEMA, Ibadan, 2004) (hereinafter "*Agba, FDI and National Development*"); See also LASZLO ARVA, *DIRECT FOREIGN INVESTMENT: SOME THEORETICAL AND PRACTICAL ISSUES* 8 (NBH, National Bank of Hungary, Workshop Studies, Budapest 1994) (asserting that: "the primary motive of portfolio investments is therefore a profitable investment of savings, whereas in the case of direct foreign investment the investor also intends to achieve objectives other than a profitable investment, in some of the cases through acquiring partial or full control over the foreign companies."); IMF Occasional Paper No 33 titled, *Foreign Private Investment in Developing Countries: A Study by the Research Dept.* (IMF, Washington, DC, January 1985) (stating that foreign direct investment can be "new equity capital, reinvested earnings, or net borrowing from a parent company or its affiliates. A guiding criterion is that it is investment made to acquire a lasting interest and an effective voice in the management of an enterprise, while portfolio equity investment does not usually have such an aim.")

¹² World Investment Directory Definitions, *Descriptions and Discrepancies in the Data*, http://r0.unctad.org/en/subsites/dite/fdistats_files/WIDdefinitions1_a.htm (hereinafter "World Investment Directory")

¹³ Agba, *supra* note 11 at 57

involving: "the transfer of tangible or intangible assets from one country into another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets."¹⁴ This exclusion is said to be founded on the view that portfolio investment was not protected by customary international law unlike foreign investment, which is afforded protection under the principles of diplomatic protection and state responsibility.¹⁵ It is stated that this differential treatment is informed by the fact that in the case of foreign direct investment, the foreign investor takes out of their home state resources, which could otherwise have been used to advance the economy of the home state. Besides, the foreign direct investor enters the host state with the consent of the host state. Hence, the home state is justified in seeking protection for the resources or investment.¹⁶ Accordingly, he argues that foreign investment (by which he excludes portfolio investment) attracts the greater attention of international law for the simple reason that it involves the movement of persons and property from

¹⁴ M. SORNARAJAH, INTERNATIONAL LAW ON FOREIGN INVESTMENT, 7 (Cambridge University Press, West Nyack, NY, 2004, 2nd ed) (contrasting his notion of foreign investment with portfolio investment which he sees as represented by a movement of money for the purpose of buying shares in a company formed or functioning in another country and which could include other security instruments through which capital is raised for ventures. The distinguishing element is that in portfolio investment, there is a divorce between management and control of the company and the share of ownership in it.)

¹⁵ SORNARAJAH *supra* note 14 at 8

¹⁶ SORNARAJAH, *supra* note 14 at 8

one state to another and such movements have the potential for conflict between two states.¹⁷ And because foreign direct investment frequently involves such movement, it is possible to link it to the already existing norm of diplomatic protection of aliens.¹⁸ On the other hand, portfolio investments can be made on stock exchanges virtually anywhere in the world and, since the host state cannot know to whom the linkages are created through the sale of shares on these exchanges, there can be no concrete relationship creating responsibility.¹⁹

The difference in the treatment, by customary international law, of direct and portfolio investment might be justified. Since direct investment aims at some form of control or management, it invariably entails some form of presence in the host country and, as such, is deserving of diplomatic protection. Portfolio investment, by its nature, lacks that contact sufficient to implicate diplomatic protection, but this does not make the latter any less an investment. It simply means that they evoke different legal reactions. In other words, although there is a difference between portfolio investment and foreign direct investment, such difference does not detract from the

¹⁷ Ibid at 17

¹⁸ Ibid at 17

¹⁹ Ibid at 8

“investment” nature of portfolio investments. Granted that customary international law might not protect portfolio investment in the manner that it protects direct investment. Yet, it does not mean that portfolio investment should not be recognized as investment. It is just a different form of international capital.

It has been noted that prior to 1945, portfolio investments constituted the dominant form of international capital movement in the world economy. The development of foreign direct investment arose with the rise of the modern multinational corporations.²⁰ It is noteworthy, though, that although multinational corporations are frequently associated with foreign direct investments, they are not a prerequisite for foreign direct investments, which can, indeed, exist without multinational corporations, as these corporations are technically understood.²¹ It is possible for a person, or a mere group of

²⁰ Olukoshi supra note 1 at 15; Some even define foreign direct investment in terms of the role of the multinational corporations. See MOSES M. IKIARA, FOREIGN DIRECT INVESTMENT (FDI), TECHNOLOGY TRANSFER, AND POVERTY ALLEVIATION: AFRICA'S HOPES AND DILEMMA, 3 (African Technology Policy Studies Network, Nairobi, Kenya, 2003) ATPS Special Paper Series No. 16 (citing Mallampally and Sauvart).

²¹ See, for example, A.V. AGBA, DIRECT FOREIGN INVESTMENT AND NIGERIA'S BALANCE OF PAYMENTS, 27 (hereinafter "AGBA, FDI AND NIGERIA'S BALANCE OF PAYMENTS" (stating that: "The multinational corporation is any business organisation, which owns (in whole or part), controls and manages income generating assets in more than one country. Indeed, there is the further condition that the income-generating assets should be located in at least five or six countries. It is necessary to note that the choice of the number of countries is rather arbitrary, and not based on any sound theoretical underpinnings. In doing so, it engages in international production, namely production across national boundaries financed by direct investment.")

persons, in one country to establish an enterprise or acquire a controlling interest in an enterprise in another country, without the vehicle of an existing company in their home country. In such a situation, their interest is clearly a foreign investment since they have some measure of control in the firm. But the enterprise can hardly be described as a multinational corporation. This point is not to underestimate the role of multinational corporations in foreign investment,²² but simply to underscore the fact that foreign investment is not coterminous with the concept of multinational corporations.

II. CLASSIFICATIONS OF FOREIGN INVESTMENT

A foreigner may invest in a country by acquiring a controlling stake in an existing company.²³ They may also do so by forming a new company.²⁴

Another method by which foreign investment may arise is where the foreigner reinvests profits earned in the company or through long or short-

²² Indeed multinational corporations are central not only to foreign investments, but have proven to be central players in the quest for development amongst developing countries. There are some who suggest that they should be subjects of international law. The activities of some multinational corporations exceed those of certain states. See generally SORNARAJAH, *supra* note 14 at 4 (asserting that: "The multinational corporations themselves must be seen as distinct bases of power capable of asserting their interests through law. Their individual economic resources far exceed those of sovereign states. Their collective power to manipulate legal outcomes must be conceded.")

²³ KAYODE AND OYERANTI *supra* note 6 at 8; ARVA *supra* note 11 at 8

²⁴ *Id*

term net loans from the foreign to the host company.²⁵

Similarly, foreign investment may be classified by the motive on the part of the investor or the driving force behind it. Three classes are generally discussed. The first is what is called export oriented foreign investment. Here, the foreign enterprise would be seeking for new inputs, such as raw materials or component parts.²⁶ This is illustrated by the foreign investments in the mining and petroleum sectors of Nigeria. Typically, the foreign investor, usually a multinational corporation, extracts the raw materials.²⁷ The underlying motive on the part of the foreign investor is to reduce its cost of production and enhance its exports. The availability of lower cost of labor sometimes accentuates the export oriented foreign investment. A second class of foreign investment is the market development oriented one. The foreign investor's motivation is to produce for the local market in the host country.²⁸ The attraction is usually the size of the local market and its long run potential and local production costs.²⁹ The third class is the government

²⁵ Id

²⁶ AGBA, *FDI AND NIGERIA'S BALANCE OF PAYMENTS*, P. 16

²⁷ Agba, *FDI and National Development*, P. 59

²⁸ Agba, *FDI and National Development*, P. 59

²⁹ Agba, *FDI and National Development*, P. 59; Another approach, to the export oriented - market development dichotomy, is the demand oriented - supply oriented classification. The demand oriented

driven kind. The government of the host country might implement various incentives to attract investments from abroad.³⁰ It does this because of the perceived benefits of foreign investments. We shall return to the incentives available in the case of Nigeria as well as the identified benefits of foreign investments generally. The government initiated foreign investment is common in Third World countries, which are struggling with the challenges of development and have been persuaded that foreign investment is a necessary ingredient in the development matrix.

Other scholars identify another classification into three broad kinds. For instance Anderson observes that: "three broad kinds of direct investment can be identified: First, horizontal multi-plant enterprises with production abroad of the same line of goods; Second, vertically integrated subsidiaries which serve the purpose of enabling transfers of intermediate products; Third, diversified affiliates which are neither horizontally nor vertically related to

foreign investment concentrating on the local market of the host country while the supply oriented foreign investment exploits the local resources for export from the host country to the investor's home country or even a third country. See NWABUEZE H. ACHIME, *INVESTMENT POLICY ANALYSIS AND THE NIGERIAN ECONOMIC SYSTEM*, 10 (Zwei Consort Publications, Enugu, Nigeria, 1996). The demand oriented foreign investment would seem to equate the market development oriented foreign investment while the supply oriented foreign investment would equate the export oriented foreign investment.

³⁰ Agba, *FDI and National Development*, P. 59

the rest of the organization."³¹ This classification is based on the relationship or interaction amongst different parts of a multinational or, rather, the place of an enterprise (located in a host country) in the multinational group. A multinational company might comprise of similar enterprises, in different countries, engaged in the production of the same or similar products. This is the so-called horizontal multi-plant enterprise. Such enterprises, in most cases, are drawn by market potentials in their locations. The second group, according to this classification consists of enterprises, which are vertically integrated but are located in different countries. Each enterprise might be devoted to a certain aspect of the production process. They are, thus, interdependent. The third group refers to multinationals engaged in different lines of business or in the production of varied products and having affiliates in different countries. The affiliates are neither horizontally nor vertically integrated. The relationship among them is simply that they are affiliates of the same multinational group. The problem with classifying foreign investment in this manner is that its focus is on the multinational corporation and not on the investment. As we noted earlier in this chapter, although multinational corporations are deeply involved in foreign investments, the latter can exist without the former. To that extent, the classification based on

³¹ THOMAS ANDERSON, MULTINATIONAL INVESTMENT IN DEVELOPING COUNTRIES: A STUDY OF TAXATION AND NATIONALIZATION, 24 (Routledge, NY, 1991)

the relationship among the affiliates of the multinational corporation is narrow.³²

III. DETERMINANTS OF FOREIGN INVESTMENTS

Several factors affect and determine the decision on foreign investment. A foreign investor may be motivated by one or a combination of these factors, which sometimes are referred to as determinants of foreign investment. The most important and most often discussed factor is the market size of the economy.³³ Indeed, this cuts both ways. The relative small size of the home market, of the multinational corporation, in comparison to the size of the multinational corporation, will invariably push the corporation, or indeed any other investor faced with such scenario, to explore how to expand its market beyond what is available at home. The United Nations Conference

³² Another categorization of multinationals is into multinational producing enterprise (one that owns and controls production facilities in more than one country), multinational trading enterprise (one that specializes in selling domestically produced goods to individuals, groups or enterprises in other countries), multinationally owned enterprise (one owned by nationals of different countries) and multinationally controlled enterprise (one controlled by the economic agents of many nationalities). See ACHIME supra note 29 at 81-82

³³ See Nasiru Musa Yauri, *Foreign Direct Investment and Technology Transfer to Nigerian Manufacturing Firms – Evidence from Empirical Data*, Central Bank of Nigeria, Economic and Financial Review, Vol. 44/2 June 2006 P. 18 at 20; Anupam Basu and Krishna Srinivasan, *Foreign Direct Investment in Africa – Some Case Studies*, IMF Working Paper, WP/02/61, P. 12 (published by the International Monetary Fund, 2002); Maria Pigato, *The Foreign Direct Investment Environment in Africa*, (hereinafter (FDI Environment in Africa)) PP. 3-6 (The World Bank); United Nations Conference on Trade and Development, World Investment Report 2006 (hereinafter WIR 2006), PP. 155-158

on Trade and Development (UNCTAD) calls this a “push factor”³⁴, a term it uses to describe any circumstance, in an investor’s home country, that has the consequence of prompting them to invest abroad. The corollary to this is that once an investor is, as it were, “pushed” abroad because of the small size of the home market, it will be attracted to a country, or an economy, that has a large market. The availability of the market thus becomes, in the words of UNCTAD, a “pull factor”. The role of market availability, of course, depends on the type of the product and is enhanced when the country market allows the exploitation of economies of scale.³⁵ This is one of the positive factors in the Nigerian foreign investment equation. With a population estimated to be over one hundred million, the country presents a huge market for several products. It is worthy of note, though, that it is not only the population of the country that determines the market size. Other ingredients like the wage earnings and disposable income are relevant.³⁶ But, the sheer size of the population is an important consideration.

³⁴ WIR 2006 P. 155

³⁵ Basu and Srinivasan, *supra* note 33 at 12

³⁶ WIR 2006 P. 155 (noting that: “Some product markets might be relatively large even in “small economies” (e.g. because of per capita incomes in the case of consumer goods)”)

Another frequently discussed determinant is the cost of production.³⁷ Again, this can be a “push” or “pull” factor depending on where the advantage lies. Cost of production is expansive, and will include labor costs, transportation and ancillary aids to production. A foreign investor will weigh all the costs and the relative weight one investor would attach to any one factor would of course vary depending on the line of production. If the cost of production in the home country is high, it acts as a push factor and will likely make the investor to look abroad. In doing so the investor will look to the countries that have low costs of production, and in this case it will be a pull factor, attracting investment. The question of cost of production is the more important if the investment is export-oriented.³⁸ In the case of labor it has been noted that the important thing is not just the availability of cheap labor but also, the availability of highly productive labor.³⁹ The reduced cost might also be in the nature of natural resources or other inputs. This explains

³⁷ Yauri supra note 33 at 23; Pigato, *FDI Environment in Africa*, supra note 33 at 3; WIR 2006 supra note 33 at 155; Basu and Srinivasan, supra note 33 at 12

³⁸ Basu and Srinivasan, supra note 33 at 12

³⁹ Yauri supra note 33 at 23 (noting that: “the reality in most African countries is that lower labour costs though widely prevalent, is not a sufficient inducement for the inflow of FDI, as labour productivity in most of these countries is usually low.”)

the prominence of foreign investments in the mining and petroleum sector in Nigeria and other developing countries endowed with natural resources.⁴⁰

Others identify country conditions as yet another determinant.⁴¹ This would be a generic term to cover the question of how open the country is.⁴² Whether openness of the economy will conduce to more foreign investments depends on the kind of foreign investment. Export seeking investment would be attracted to an open economy since the perceived openness will inure to the benefit of the investor who can easily sell their products abroad.⁴³ On the other hand, market oriented investment would more easily be attracted to a less open economy, since the restrictions on importation would ensure a greater availability of the local market. Other considerations would be whether there are infrastructures, such as social services that are necessary and conducive to investment operations in the country. "A high level of economic development as reflected in the availability of adequate infrastructure, both physical and human, and a relatively high per capita

⁴⁰ A greater percentage of the foreign investment that goes to Africa go to mainly resource endowed countries.

⁴¹ Basu and Srinivasan, *supra* note 33 at 13

⁴² Some writers use the term "openness". See for e.g. Yauri *supra* note 33 at 21

⁴³ Yauri *supra* note 33 at 22

income would be expected to be beneficial for foreign investment.”⁴⁴ The existence of supportive institutional structures such as well functioning banking and financial system and a reliable legal system also attract foreign investment.⁴⁵ A World Bank study found that government instability, political violence, policy volatility and uncertain enforcement of laws all have a negative impact on foreign investment and that the two factors that reduce investment most are corruption and the absence of a credible rule of law.⁴⁶ The World Bank’s Country Policy and Institutional Assessment (CPIA), which assesses the quality of countries’ policies and institutional frameworks, shows that African countries scored poorly compared with other developing countries.⁴⁷ A similar performance is reflected in the International Country and Risk Guide Index (ICRG)⁴⁸, prompting a suggestion that overall it would appear that Sub-Saharan Africa continues to

⁴⁴ Basu and Srinivasan, *supra* 33 at 13 (citing Kravis and Lipsey (1992), Wheeler and Mody (1992), Mody and Srinivasan (1998))

⁴⁵ Basu and Srinivasan *supra* note 33 at 13

⁴⁶ AYMO BRUNETTI AND BEATRICE WEDER, INVESTMENT AND INSTITUTIONAL UNCERTAINTY: A COMPARATIVE STUDY OF DIFFERENT UNCERTAINTY MEASURES (The World Bank, Technical paper No. 4 by the IFC, Washington, DC, 1997)

⁴⁷ Miria Pigato, *Foreign Direct Investment in Africa: Old tales and New Evidence (hereinafter, “FDI in Africa: Old Tales and New Evidence”)*, 9 (World Bank, Africa Region Working Paper Series No. 8, November 2000) (noting that: “the CPIA shows that Africa’s rating have marginally improved since 1997 but remains the worst compared with other developing countries.”)

⁴⁸ For the period 1987-1998, Nigeria scored annual averages of 48.5 in ICRG political risk index, 31.9 in ICRG corruption index, and 37.5 in ICRG rule of law index. The maximum attainable score was 100. See Miria Pigato, *FDI in Africa: Old Tales and New Evidence*, *supra* note 47 at 32.

be viewed as a risky investment location.⁴⁹ Corruption and other social ills often discourage investors because they increase the cost of doing business. So does a perception of insecurity, both of person and property. These tend to have a negative impact on the flow of foreign investment.

An important new determinant is the availability of information technology.⁵⁰ The world is gradually becoming a global village courtesy of the Internet and information super highway. Unfortunately, some developing countries are not yet fully wired into almost monolithic super highway. Such situation is a major constraint on the inflow of foreign investment.

⁴⁹ Miria Pigato, *FDI in Africa: Old Tales and New Evidence*, supra note 47 at 11

⁵⁰ Tony Addison and Almas Heshmati, *The New Global Determinants of FDI Flows to Developing Countries: The Importance of ICT and Democratization*, (United Nations University, World Institute for Development Economics Research, Discussion Paper No. 2003/45, May 2003) (arguing that democratization and information and communication technology (ICT) increase foreign direct investment inflows to developing countries and that more assistance should be given to poorer countries to help them adopt ICT and to break out of what they term their present 'low equilibrium' trap); The issue of democracy is not an entirely new determinant, and is interwoven with the rule of law and protection of property. Investors are wary of going into countries that do not have well functioning legal institutions or where property rights are not respected. It must be noted that even absence a democratic setting, foreign investors do go into countries if the profit margin can cushion the adverse effects of lack of democracy. It is assumed that that explains the continued presence of many multinational corporations in Nigeria during the military administrations. Some even suggest that the multinational corporations collude with the dictatorial governments to further suppress the people. Nonetheless, democracy continues to be a predominant consideration in the decision of foreign investors. See Jo Jakobsen, *Does Democracy Moderate the Obsolescing Bargain mechanism? An empirical Analysis, 1983-2001*, 65 (Transnational Corporations, Vol. 15, No. 3, December 2006) (probing the nexus between democracy and foreign investment and noting that "evidently democracy and international capital flows are compatible.")

IV. ARGUMENTS FOR AND AGAINST FOREIGN INVESTMENTS

There is hardly any phenomenon in international law or economics that is whole-heartedly accepted without controversy. For most of the twentieth century the world was divided along ideological lines, essentially between the pro capitalist west and the socialist leaning countries of the old Soviet Union and East Europe. Thus, most concepts were viewed through ideological prisms. Foreign investment was no exception. The West championed and trumpeted it, while socialist inclined countries lampooned the notion as exploitative. It is pertinent to note that even the orchestrated fall of the Berlin Wall and the celebrated end of the cold war have not completely eradicated the ideological divide. Granted, countries of the former Soviet Union and the eastern bloc have embraced market economy and opened their economies to foreign investment. Yet, scholars are still not agreed on the utility of foreign investment. That is the reason we examine here the common arguments for and against foreign investment. We start with the perceived benefits. It must also be noted that foreign investment involves two countries or, at least, entities in more than one country: the country recipient of the investment (host country), on the one hand, and the country, which is the source of the investment (home country), on the other

hand. And true to capitalism, the interests of the home country, or of the foreign investor, and those of the host country, do not necessarily coincide. Our emphasis is on the benefits accruing, and drawbacks applying, to the host country. This is especially so, as the subject of our study is not only a net recipient of foreign investment but is also a developing country.

A. Benefits of Foreign Investments

Foreign investment is a source of capital.⁵¹ Most developing countries are said to suffer from poor or insufficient capital for development. Thus, they have to resort to foreign aid or borrowing to supplement their capital base. But the latter two have dwindled in recent years and foreign investment is increasingly stepping up to the plate.⁵² It is argued that foreign investment is preferred to borrowing because borrowing requires regular repayments and saddles a country with debt servicing burdens for a long time.⁵³ On the other hand, foreign investment does not entail any regular repayments by the host

⁵¹ LOUIS N. CTETE, DETERMINANTS OF FOREIGN INVESTMENT IN NIGERIA, 1 (NISER, Ibadan, 1998) (NISER Monograph Series No. 7, 1998)

⁵² IMF, FOREIGN PRIVATE INVESTMENT IN DEVELOPING COUNTRIES: A Study by the Research Department, Occasional Paper, No. 33, P.2 (IMF Washington DC, January, 1985)

⁵³ IMF, FOREIGN PRIVATE INVESTMENT IN DEVELOPING COUNTRIES: A Study by the Research Department, Occasional Paper, No. 33, P.1 (IMF Washington DC, January, 1985)

country. Instead, the foreign investor acquires equity, and shares in the risks involved in the investment.⁵⁴ They can only be paid if the investment earns a positive return. Besides, it is said that foreign investments have longer-term beneficial impacts on the host country's development than do debts.

Furthermore, it is contended that in addition to the capital, encapsulated in foreign investment, the host country's public revenue is also improved by the taxes associated with the investments.⁵⁵ The foreign investor brings not only capital but also pays royalty which add up to the revenue base of the host country.⁵⁶

The most controversial benefit associated with foreign investment, especially in the developing world, is the claim that it facilitates the transfer of technology.⁵⁷ It is axiomatic that developing countries lack technology

⁵⁴ IMF, FOREIGN PRIVATE INVESTMENT IN DEVELOPING COUNTRIES: A Study by the Research Department, Occasional Paper, No. 33, P.9 (IMF Washington DC, January, 1985)

⁵⁵ Tony Addison and Almas Heshmati, *supra* note 50 at 2; M.I. OBADAN AND F.A. DIMOWO, *ESSAYS ON NIGERIAN ECONOMY*, 41 (Mindex Publishing Coy, Benin City Nigeria, 2000); ACHIME *supra* note 29 at 73; G.E. EDAME, *DEVELOPMENT ECONOMICS AND PLANNING IN NIGERIA*, 138 - 140 (harmony Books, Benin City, Nigeria, 2001)

⁵⁶ Hassan A. Saliu, *The Politics of Foreign Investment*, in HASSAN A. SALIU (ED), *ISSUES IN CONTEMPORARY POLITICAL ECONOMY OF NIGERIA*, (Sally and Associates, Ilorin, Nigeria, 1999)

⁵⁷ "Technology is defined as any tangible or intangible resource that can generate economic rent for the host country firms by, for example improving total factor productivity." See IKIARA, *supra* note 20 at 8 (also noting that "technology is generated by R&D, most of which is conducted in industrialized countries, making technology transfer very important for economic prosperity of countries with weak R&D and

and that they badly need to acquire that, one way or the other. Essentially, they have to develop theirs or receive it from the West by purchase. Unlike non-proprietary assets such as finance, capital goods and intermediate inputs, which can be obtained from the international market, proprietary assets like technology can be obtained only from the firms that make and possess them.⁵⁸ To purchase technology will of course be very expensive. Similarly, the multinational corporations, who may own the technology, might be reluctant to license because of the fear that such licensing might dissipate the technology.⁵⁹ As an alternative, they prefer to internalize technology transfer through foreign investments.⁶⁰ They do this by establishing affiliates in other countries. That way they can still control their technology. This also allows the developing countries to have the benefit of the technology. At the same time, this may result in the development of technology in the developing countries through the so-called spillovers.

innovation capacities”, and further that “in the 16th and 17th centuries, for instance, deliberate technology transfer policies of King Henry VIII made Britain a leading manufacturing nation.”)

⁵⁸ WIR 2006 P. 184

⁵⁹ IKIARA supra note 20 at 9

⁶⁰ IKIARA supra note 20 at 9

Vertical Spillovers refer to the effect of a foreign investor's technology and know how on their local subsidiaries.⁶¹ Essentially, the foreign firm makes its technology available to the local affiliate, and this enhances the affiliate's production. Horizontal spillover refers to the effects of the foreign investor's use of technology on other domestic firms, usually in competition with the foreign investor, in the host country.⁶² The interaction between a foreign firm and domestic firms takes different forms and at each level, the belief is that, the foreign firm's technology rubs off on the local firms. Domestic firms can watch and imitate the way foreign affiliates operate. There may also be a labor turnover, where employees of the foreign firm may move to domestic firms bringing with them the knowledge of the technology acquired while at the foreign firm. The acquisition of technology, on the part of the local firms, might also be spurred by the competition from the foreign firm through its affiliates. In order not to lose their market share to the competition from foreign firms, the local firms are forced to be more efficient in using existing technologies and resources or to introduce new technologies by themselves.⁶³ The spillover might also result from training

⁶¹ Yauri supra note 33 at 26

⁶² Yauri supra note 33 at 26

⁶³ Yauri supra note 33 at 27

and collaboration under joint venture arrangement between a foreign firm and a local firm, or from backward and forward linkages.⁶⁴

The next major argument advanced in support of foreign investment is that it provides employment.⁶⁵ Foreign investment, in essence, is a new business being brought to the host country. Like all businesses, it would need to be staffed. It would not be realistic for the foreign investor to bring in all the staff for the firm from the home country. Even if they could do so, there are usually host country immigration or other restrictions. So, the foreign investment would have to be staffed by employees from the host country.⁶⁶

It is noted that this benefit particularly applies more to host developing countries than it does to host developed countries, and is especially manifest in the manufacturing sector.⁶⁷ It is also pointed out that whether foreign investment generates employment depends on several factors: the nature of the investment, trade and industrial policies of the host nation and the labor

⁶⁴ Yauri supra note 33 at 28 (explaining that foreign affiliates may be forced to engage in transactions with local suppliers and customers and thus may provide technical assistance and training to local suppliers)

⁶⁵ Saliu supra note 56 at 297

⁶⁶ Saliu supra note 56 at 297; see also EDAME, supra note 55 at 140 (asserting that: "the importation of capital creates more employment in the urban sector. This leads to the migration of surplus labour from the rural to the urban sector. The pressure of population on the land is reduced and disguised unemployment may disappear. This the social gain of foreign capital.")

⁶⁷ WIR 2006 P. 192

institutions of the host country.⁶⁸ Other benefits attributed to foreign investment are that: it leads to the production of better quality goods at lower cost,⁶⁹ it enhances competition⁷⁰ and that it leads to development.⁷¹

B. Arguments Against Foreign Investments

Against the practice of foreign investments, it is argued that they make the so-called developing countries perpetually dependent on the sources of the foreign investments and this deepens their state of underdevelopment.⁷²

Scholars of this dependency school note that foreign investment is motivated

⁶⁸ Pigato, *FDI in Africa: Old Tales and New Evidence*, supra note 44 at 8 (noting that: "employment generation of FDI is normally higher in green field FDI, while M&As often lead to labor shedding. It is also higher within export-oriented regimes with abundant cheap labor.")

⁶⁹ C.T. Tyokase, *The Political Economy of Foreign Capital in Nigeria*, in S.A ADESINA, S.S OGBONNA, R.A ADETORO AND C.T. TYOKASE, REFLECTIONS ON THE POLITICAL ECONOMY OF NIGERIA, 107 (Goad Educational Publishers, Abeokuta, 1999); A. Fabayo and J.A. Alade, *Foreign Private investment in Nigerian Cotton Textile Industry: An Impact Analysis*, 47 Quarterly Journal of Administration, Vol. XVIII Nos. 1& 2 October 1983/January 1984; KAYODE AND OYERANTI, supra note 6 at 9

⁷⁰ Fabayo and Alade supra note 69 at 47-48; IKIARA supra note 20 at 4

⁷¹ Olukoshi supra note 1 at 15

⁷² Saliu supra note 56 at 298; Olukoshi supra note 1 at 15 (asserting that: ""But against orthodoxy, scholars working within the underdevelopment/dependency school have argued that the real problem faced by developing economies is not the shortage of capital as such but the draining away of their meager resources to the West by foreign investors. Far from being a factor necessary for the development of the 'Third world', foreign investment is, in fact, a major burden the overall effect of which is to reinforce the underdeveloped state of these countries. In evidence, many *dependentistas* have conducted studies showing the negative balance of payments effects of the activities of foreign investors on Third World economies."; WIR 2006 P. 195 (noting that "if a large share of FDI originates from one particular country, it may create a perception in the host economy that it has become too dependent on and dominated by the home economy concerned."))

by profits and are motivated to invest in an economy by the prospect of higher returns, and it would seem contradictory that they would sacrifice their capital in order to develop a country far removed from their home countries. They deny that foreign investors bring in capital. Instead, they raise the capital within the host economy and then declare huge profits, which enable them to repatriate the capital and thereby worsen the balance of payments equilibrium of the host country.⁷³ Opponents also note that when it is asserted that foreign investment offers employment, it is forgotten that the jobs that foreign investment offers are only those that further entrench the foreign investors in the host country and therefore intensify the country's dependence on the foreign investor. They note that the foreign investors do not offer substantive, and decision making, positions to the locals.⁷⁴ Indeed, most of the decisions are made in the home countries or headquarters of the foreign investors.

There is no denying the tension between foreign investors and the host country.⁷⁵ Both are motivated by interests that seem at odds with each other.

⁷³ Saliu supra note 56 at 298

⁷⁴ Saliu supra note 56 at 299

⁷⁵ See also J. Ade Oyelabi, *The Developing Countries' Point of View: I*, in DON WALLACE, JR., AND HELGA ROUF-KOCH, *INTERNATIONAL CONTROL OF INVESTMENT* (The Dusseldorf Conference on Multinational Corporations), 101 at 106 (Praeger Publishers, NY, 1974) (asserting that: "It has become

Yet, that is the core of the capitalist or liberal economic system to which these developing countries aspire. The solution to the seeming contradiction lies in the freedom to negotiate, or market forces, which is the hallmark of economic liberalism. Thus, advocates of the Bargaining School⁷⁶ argue that a country has bargaining strength vis-à-vis foreign companies and should be able to negotiate an agreement in which the social profitability of the proposed foreign investment is substantial.⁷⁷ The host government seeks to protect its interests through the use of laws and regulations and by direct negotiations with the foreign investors. The real problem is that these mechanisms are often times subverted and the process remains skewed in favor of the multinational corporations. Sometimes, the public officials who

generally recognized that the primary objectives of the multinational corporations are to make profits and to grow. If we accept these objectives as perfectly rational and legitimate – and there is no good reason not to – then it becomes clear why one must assume that the relationship between LDCs and MNCs is one of inherent conflict. Unhappily, the conflict is no more one in which a poor solitary foreign investor is maltreated by an ungrateful host country. Rather, it is one where a nation-state is virtually at the mercy of one or more giant MNCs”)

⁷⁶ Other schools of thought on the issue are the pro-foreign investment school (which believes that national and foreign private sector enterprises operating in competitive market conditions offer the best possible prospects for speedy national economic growth in developing countries), dependency school which rejects the arguments of the pro-foreign investment school, and maintains that foreign investments lead to dependence, on the part of the host country, on the foreign investors), and the structuralists school, which challenges the optimism of the bargaining school) See S.A. Olomola and T.O. Akinbobola, *Foreign Direct Investment and Economic Growth in Nigeria: Is there a Long-Run Relationship?* The Quarterly Journal of Administration, Vol. XXXI, Nos. 1&2, September 1999/January 2000, PP. 59-71

⁷⁷ S.A. Olomola and T.O. Akinbobola, *Foreign Direct Investment and Economic Growth in Nigeria: Is there a Long-Run Relationship?* The Quarterly Journal of Administration, Vol. XXXI, Nos. 1&2 September 1999/January 2000 P. 59 at P.64 (also noting that the bargaining school discovered that “the cleavage between the host government and foreign firms remain very deep and that the former do seek, with ever greater levels of success over time, to extract increasing significant gains from multinational corporations (MNCs)”)

are supposed to enforce the regulations become compromised directly or indirectly by the foreign investors, thereby essentially leaving the corporations to do as they please.⁷⁸ So, the fault is not in the notion of foreign investment, per se. Instead, the challenge should be how best to regulate and, in the view of the bargaining school, negotiate the admission of foreign investors in such a way to ensure optimum benefit for the host state.

In a direct attack on the role of foreign investment in the development of the Third World, critics argue that foreign investors bring in outdated and inappropriate technology⁷⁹ and they do not even try to pass the technology to the locals. Sometimes they fail to adapt the technology to local circumstances. Technology is such a prized possession on the part of foreign investors that it is a little ambitious to expect that they would easily transfer it to the developing countries. Indeed, we saw earlier that one of the reasons the multinational corporations resort to foreign investments is to control their technologies. Otherwise they can simply sell or grant licenses

⁷⁸ It has been noted that this situation is "compounded by the practice of public servants retiring into multinational corporations as directors in which capacity they serve only a little more than as intermediaries." See OBADAN AND DIMOWO supra note 55 at 41 - 42

⁷⁹ J.A. Alade, *The Role of Multinational Corporations in Economic Development: The Nigerian Experience*, Quarterly Journal of Administration, Vol. XXV Nos. 3 & 4 April/July 1991 P. 291 at 293 (asserting that: "it has been observed that little technology is being transferred by the MNCs. More often than not the technologies being transferred are inappropriate to the local conditions prevalent in the LDCs."); Fabayo and Alade supra note 69 at 48; IKIARA supra note 20 at 5

for the developing countries to use them. But they are reluctant to do this. Some theorists actually contend that the reason a foreign firm can compete with local firms is that the former have certain attributes such as technology, which kind of counteract the obvious advantages enjoyed by the local firms. Such advantages on the part of the local firms include knowledge of the local conditions. So, by its very nature, the expectation that foreign investors would bring their technology and transfer it to the developing country is not entirely realistic. In most cases, where they are forced to undertake to train local staff, they pay lip service to that undertaking. This is not to deny the impact of foreign investment in the acquisition of technology, but only to underscore the point that its role is marginal. Realistically, the developing countries can pick some aspects of the technology indirectly through interaction with the foreign firms as discussed earlier. Outright and deliberate transfer from the foreign investors to the local firms seems a tall order.

A similar criticism is that foreign investments encourage alien tastes. It is alleged that multinational corporations encourage inappropriate and alien patterns of consumption.⁸⁰ One wonders why this criticism can legitimately

⁸⁰ Alade supra note 79 at 293; OBADAN AND DIMOWO, supra note 55 at 43

by leveled against foreign investment. It is true that the introduction of foreign investment leads to the introduction of different or foreign ways of life. But the influence of the alien pattern of consumption is dependent on the people. The developing countries understand their state of underdevelopment vis-à-vis the developed ones, and essentially see the march towards development as a march towards the ways of the West. This seems to pervade all aspects of life. The penchant for alien tastes is not necessary the fault, or even the result, of foreign investment. It is more the result of the interaction of the citizenry with people from outside. If such social and commercial intercourse leads to a quest for alien patterns of consumption, foreign investment is not to blame.

Another criticism directed against foreign investment is that it leads to "decapitalization of the host country through the transfer of enormous amounts of the nation's economic surplus abroad for foreign development."⁸¹ It is also alleged to lead to a marginalization or displacement of domestic firms.⁸² This is the perennial dilemma. The unleashing of foreign investment entails that the foreign firms will compete

⁸¹ OBADAN AND DIMOWO *supra* note 55 at 43; Alade *supra* note 79 at 292

⁸² Alade *supra* note 79 at 293; Obadan *supra* note 55 at 43; KAYODE AND OYERANTI *supra* note 6 at 10

with the local firms, and given the former's superior technology, they are more likely to do better than the local firms. Depending on the extent of the competition, the local firms might be crowded out. It is also stated that foreign investment fosters neocolonial domination⁸³ and leads to uneven income distribution.⁸⁴

V. HISTORY AND OVERVIEW OF FOREIGN INVESTMENTS IN NIGERIA

It is noted that foreign investments date back to time in memoriam, and is not peculiar to the developing nations, but was also a feature of the developing process of the advanced countries.⁸⁵ It must be observed, though,

⁸³ Tyokase supra note 69 at 108, 109 & 110, Obadan supra note 55 at 43. In the same vein the foreign firms are accused of protecting their subsidiaries by avoiding competition with them. Thus they produce only for the local market and this hurts the host country's balance of payments. See Alade supra note 79 at 292.

⁸⁴ KAYODE AND OYERANTI supra note 6 at 10

⁸⁵ See Edame, supra note 55 at 138 (stating: "In the 17th and 18th centuries, England borrowed from Holland. The rapid growth of America had been due to large supplies of men and money from Europe in the 19th century. This is also true of the USSR. The development of Russia has been in no less degree to liberal supplies of capital during 1890-1914 by Western Europe. Though the Russian economic development followed the October Revolution, the "take-off" goes back to the years preceding the First World War", and further that: "It is generally contended that the Western European nations including England received little foreign capital for their development during the "take-off". But this is not a correct view. In actuality, by exploiting their colonies, these countries extorted a kind of involuntary aid from them."); FOREIGN DIRECT INVESTMENT, P. 11 (A Publication of the International Finance Corporation and Foreign Investment Advisory Service, Washington, DC, 1997) (hereinafter simply referred to as "IFC, FDI") (noting that the story of development almost every where involved foreign direct investment and that in the early 20th century a large part of the world's infrastructure was developed through foreign investment); The publication further noted that by 1914, the world stock of foreign direct investment was estimated at \$15billion. The UK was the largest source followed by the US and then Germany, while the US was the largest recipient. But after World War II, the US became the largest source of foreign direct investment and manufacturing investment became most prevalent. See PP. 11-12.

that such investments lacked the sophistication of present day transnational investments. Nonetheless, in their basic forms of capital moving from one country to another, those transactions cutting across countries could clearly be classified as foreign investments. Pre-colonial Nigeria was made up of distinct groups. There was certainly some form of trading and other commercial activities among the several groups. Whether one would categorize those as foreign investments would depend on one's view of the status of those entities. Besides, the prevalent commercial activity was trading. Be that as it may, the history of foreign investments in Nigeria is traced to the advent of Europeans, to the place now called Nigeria, sometime in the 19th century.⁸⁶ Of course, the activities of the traders from Europe were a precursor to the full-scale colonization of the country. As we saw in Chapter 1, the infamous Berlin conference, on the partition of Africa, allotted the territory of Nigeria to Britain, an allotment that Britain initially maintained through the Royal Niger Company. As we saw in chapter 2, colonial economic system was mercantilist. And all over the world, in the height of colonialism, investment was largely made in the context of

⁸⁶ Olukoshi supra note 1 at 16; Olomola and Akinbobola supra note 76 at 66 (asserting that: "the Development of Foreign Direct Investment (FDI) started with the first contact of Nigerians over a century ago with European traders in the coastal areas of the country and Trans-Saharan caravan routes with the Arabs in the north.")

colonial expansion.⁸⁷ Nigeria's experience was no different. With the colonial conquest, and the integration of Nigeria's legal system into the British legal system, which protected the foreigners, the flow of foreign investment began in earnest.⁸⁸ The main beneficiaries were British, as most of the foreign investment came from Britain.⁸⁹ It has been noted that of the 102 firms that were operating in Nigeria by 1921, 94 were of British origin and ownership, and 5 others had joint British owner.⁹⁰ Some of the prominent multinational corporations that operated in Nigeria during the colonial era were the United African Company (UAC) of Nigeria Limited; John Holts; A. G. Leventis; Patterson Zechonics (PZ); CFAO and SCOA (which were French firms); UTC (a Swiss firm); Aluminum Limited of Canada (ALCAN); and Pfizer (a USA drug company).⁹¹ Initially, most of the foreign investment was in mining and resources extraction.⁹² Later, the

⁸⁷ SORNARAJAH *supra* note 14 at 19 (observing that in consequence of the colonial context in which the investments took place, the investments did not need protection as the colonial legal systems were integrated with those of the imperial powers and the imperial powers gave sufficient protection for the investments which went into the colonies); Sornarajah noted further that where investments were made in areas which remained uncolonized, a blend of diplomacy and force ensured that the states did not interfere with foreign investors too adversely. See SORNARAJAH *supra* note 14 at 20.

⁸⁸ Alade points out that "the colonial administration adopted a *laissez faire* policy towards the operation of multinational enterprises in the country" and "that although the enterprises were to operate within the framework of government regulations, in actual practice, government regulation of business activities were virtually absent." See Alade *supra* note 79 at 294

⁸⁹ Olukoshi *supra* note 1 at 20

⁹⁰ Olukoshi *supra* note 1 at 20

⁹¹ Olomola and Akinbobola *supra* note 76 at 66

⁹² Olomola and Akinbobola *supra* note 76 at 66

emphasis shifted to manufacturing following the development of import substitution.⁹³ This focused attention away from imports to the manufacturing of consumer goods. However, most of the multinationals merely changed from importing finished goods to importing parts. This is the reason they are sometimes accused of subverting the development of local industries. Instead of adapting the production of consumer goods to use local raw materials, they still used foreign parts in the production of what were local consumer goods.

Amongst the newly independent countries, the prevailing sentiment following independence was that of nationalism as reflected in antagonism, at least rhetorically, against any appearance of continued foreign domination. This skepticism was extended to foreign investment.⁹⁴ The post-colonial era in Nigeria began in 1960. Although the feelings of

⁹³ Olukoshi supra note 1 at 22 (noting that: "it was only in the period from about 1945 that an appreciable level of foreign capital began to go into manufacturing activities in Nigeria to mark the commencement, in earnest, of import-substitution industrialisation in the country")

⁹⁴ Mulatu Wubneh, *Patterns of Foreign Investment in Africa, 1970-1988*, in REXFORD A. AHENE AND BERNARD KATZ (Eds), *PRIVATIZATION AND INVESTMENT IN SUBSAHARAN AFRICA*, 55, 65 (Praeger, NY, 1992) (noting that foreign investors were often viewed as extensions of colonialism in the early years following independence" and that "nationalization of foreign-owned companies was extensive, and where there was no outright expropriation, foreign investors were required to accept minority state participation") IFC, FDI supra note 85 at 12-13 (noting that during the 1950s and 1960s most developing countries pursued "inward-oriented" development strategies which emphasized the growth of domestic industries and that most governments were wary of foreign direct investment and did not want to create economic dependency. It also noted that even though such policies deterred foreign direct investments, they also made foreign investors to shift production into the countries instead of trying to export to them.)

nationalism were no different than in other emergent African states, it would seem that Nigeria embraced foreign investments since it continued the open door policies inherited from the colonial administration.⁹⁵ It also introduced many incentives aimed at attracting foreign investments.⁹⁶ The country also signed on to the Convention on Settlement of Investment Disputes,⁹⁷ in 1965, and thereby signaled its intentions with respect to the protection of private foreign investments in the country.⁹⁸ The period immediately following independence also witnessed the broadening of the sources of foreign investments in Nigeria, to include sources in the United States of America and other European countries, in addition to Britain.⁹⁹ The emphasis remained on the commercial and mining sectors, with the latter given added impetus by the discovery of oil.¹⁰⁰ But the political upheavals

⁹⁵ Alade *supra* note 79 at 294; Olomola and Akinbobola *supra* note 76 at 66-67

⁹⁶ Some of these were income tax relief (1958); import duty relief on raw materials and components (1957); exchange and investment guarantees; the provision and continued expansion of economic and social overhead capital. See Alade *supra* note 79 at 294.

⁹⁷ This Convention provides a mechanism for the settlement of investment disputes between states and the nationals of other countries.

⁹⁸ Alade *supra* note 79 at 295

⁹⁹ Olukoshi *supra* note 1 at 20 (noting that: "at the time of independence in 1960, the British still accounted for well over 50 percent of all private foreign investments flowing into the Nigerian economy. It was only in the period from the mid-1960s that the British hegemony began to be challenged by American and other West European private investors.")

¹⁰⁰ Olukoshi *supra* note 1 at 22

and resultant civil war of the late 1960s took a toll on foreign investments.¹⁰¹

This picked up again after the war.¹⁰²

However, the single most monumental policy of the 1970s, relating to foreign investment, was the enactment of the indigenization decrees, titled, Nigerian Enterprises Promotion Decrees of 1972 and 1977, the latter amending the former.¹⁰³ The decree restricted the participation of foreigners in businesses in Nigeria. It did this by creating three schedules of businesses. Those in Schedule 1 were reserved exclusively for Nigerians, meaning that foreigners could not participate in them. Schedule 2 contained businesses in which foreigners could not hold more than forty percent ownership. Thus, a minimum of sixty percent ownership was guaranteed Nigerians in Schedule 2 businesses. Foreigners could hold no more than sixty percent interest in Schedule 3 businesses, meaning that Nigerians must hold not less than forty percent stake in those businesses. It has been suggested that it was the euphoria of the oil wealth that gave Nigeria the confidence to promulgate the

¹⁰¹ Olomola and Akinbobola, *supra* note 76 at 67

¹⁰² *Ibid*

¹⁰³ For a detailed analysis of the political economy of the decrees see THOMAS J. BIERSTEKER, *MULTINATIONALS, THE STATE AND CONTROL OF THE NIGERIAN ECONOMY* (Princeton University Press, Princeton, NJ, 1987); Biersteker argues that the state did not initiate the first decree (the 1972) decree, but rather collaborated with local capital in its formulation but that the second decree (1977 decree) was written with the experience of the first decree in mind and this time the state was the initiator. See PP. 52 and 159.

indigenization decrees, the motive of which was to reduce the scope of foreign participation in the country's economic development efforts.¹⁰⁴

There is no denying the fact that the discovery of oil and the resulting boom of the early 1970s fortified the desire of the state to take its economic destiny in its own hands, as the indigenization policy was thought to represent. It would appear though that the exercise was borne out of fear of neocolonialism. Ironically, though, given the level of the country's technological development, the discovery of oil entailed the need for both foreign capital and expertise required for exploration and mining. Maybe, the indigenization decrees were an attempt to balance the clear need for foreign investments and the fear of foreign domination of the economy. Whatever the true motivation, the indigenization decrees had the effect of reducing foreign investments in the country.¹⁰⁵ Many foreigners, however, devised ways of circumventing the decrees by using local fronts, and it is still thought that the economy is dominated and controlled by multinationals.¹⁰⁶

¹⁰⁴ Saliu supra note 56 at 296

¹⁰⁵ Olomola and Akinbobola supra note 76 at 67; Achime supra note 29 at 50 and 88

¹⁰⁶ Olukoshi argues that "it was the inability of the Nigerian state to compel foreign investors and their indigenous collaborators to create a more internally balanced domestic economic base that provided the background to the economic crisis of the 1980s," and that "the consequence of the crisis was made more severe by the fact that Nigeria was almost solely dependent on oil exports for the sustenance of domestic economic activities." See Olukoshi supra note 1 at 34-35

The decline in resources and the oil glut of the early 1980s added urgency to the country's need for foreign investment, if only to alleviate the resulting economic crisis. Thus, the restrictions on foreign investments were relaxed by the continuous amendment of the indigenization decrees.¹⁰⁷ Similarly, the government started a debt equity swap program, which aimed to convert debts to investments, and to increase the level of foreign investments in the country.¹⁰⁸ The introduction of the structural adjustment program (SAP), in 1986, aimed to liberalize the economy and that has been the thrust of the country's policies to date. That objective encourages foreign capital and indeed has the attraction of foreign investments at its core.¹⁰⁹ It must be noted though that despite the country's deliberate efforts to attract foreign investments in the 1990s, a combination of the political instability that prevailed within the period and the displeasure of the West over the political

¹⁰⁷ There were the Nigerian Enterprises Promotion Decree 1987 and the Nigerian Enterprises Promotion Decree 1989. Currently the restrictions have almost all been removed. By the Nigerian Investment Promotion Commission Act 1995.

¹⁰⁸ Olomola and Akinbobola, *supra* note 76 at 67

¹⁰⁹ The International Finance Corporation notes that developing countries are now courting foreign direct investment, shifting the criterion for measuring the value of foreign direct investment from its direct contribution to local value to its longer-term consequences for the competitiveness of domestic resources and capabilities. See IFC, FDI *supra* note 85 at 14.

and other situations in the country negatively impacted the foreign investment situation in the country.¹¹⁰

A conspectus of the economic terrain reveals that foreign investments have been rising in Nigeria. The country was one of the five highest recipients of foreign direct investment in Africa in 2005.¹¹¹ The inflow of foreign investments was more than \$3 billion for that year, the country being one of only three African countries to receive more than that amount.¹¹² The dominant field remains mining, and especially oil.¹¹³ Between 1980 and 2005, Nigeria concluded more than 20 Bilateral Investment Treaties.¹¹⁴

Table 1: Inflow of Foreign Private Investment into Nigeria, 1965-1985 (million Nigerian naira)

Years	Total Inflow
1965	176.0
1966	101.2
1967	107.0

¹¹⁰ Saliu supra note 56 at 301-302

¹¹¹ WIR 2006 P.41; The country was the highest recipient in West Africa, accounting for 70% of foreign direct investment inflows into that region, and 11% of foreign direct investment into Africa. See P. 42.

¹¹² Others were South Africa and Egypt. See WIR 2006 P.42

¹¹³ Oil represented 10% of the country's foreign direct investments in 2005. See WIR 2006, P.45 See WIR 2006, P.45. Occasionally the manufacturing and processing sector dominate. This was the situation in 1990, 1991 and 1992. See Saliu supra note 56 at 302-303

¹¹⁴ WIR 2006 P.49

1968	106.4
1969	150.6
1970	251.0
1971	489.6
1972	432.8
1973	577.8
1974	507.1
1975	757.4
1976	521.1
1977	717.3
1978	664.7
1979	704.0
1980	786.4
1981	584.9
1982	2193.4
1983	1673.4
1984	1385.3
1985	1423.5

Source: J.A. Alade, the Role of Multinational Corporations in Economic Development: The Nigerian Experience, Quarterly Journal of Administration, April/July 1991, Vol. XXV Nos 3 and 4, P. 291 at 306

Table 2: Foreign Direct Investment in Nigeria, 1990-2007 (millions of dollars)

1990-2000 (Annual Average)	1477
2003	2171
2004	2127
2005	3403
2006	5445

Source: World Investment Report 2007

VI. INCENTIVES FOR FOREIGN INVESTMENTS IN NIGERIA

It must be pointed out, from the outset, that a foreign company is required to register under the Companies and Allied matters Act before it can do business in Nigeria.¹¹⁵ Generally, Nigeria is a member of most of the multilateral trading and financial institutions of the world.¹¹⁶ It makes a deliberate effort to attract foreign investors. As a result, it provides several forms of incentives geared toward the attraction of foreign investments. As discussed above, initially, the Nigerian Enterprises Promotion Act had put a limit on the percentage of shares, which a foreigner might hold in a Nigerian firm. This has been relaxed. Subject to a few exceptions relating to sensitive issues of national security, a foreigner may now wholly own a Nigerian company.¹¹⁷ Besides, the Nigerian Investment Promotion Commission Act 1995 has provisions assuring the protection of investment by foreigners.¹¹⁸ By that Act, no enterprise shall be nationalized or expropriated by any Government of the Federation and no person who owns, whether wholly or in part, the capital of any enterprise, shall be compelled by law to surrender

¹¹⁵ Section 54 of the Companies and allied Matters Act; Section 56 of the Act provides for exemptions in respect of certain foreign companies.

¹¹⁶ Such as World Trade Organization, United Nations International Monetary Fund, ICSID etc

¹¹⁷ Nigerian Investment Promotion Commission Act, 1995, Section 17

¹¹⁸ Nigerian Investment Promotion Commission Act, 1995, Sections 25 and 26

their interest, in the capital, to any other persons. Similarly, the Federal Government may not acquire an enterprise unless the acquisition is in the national interest or for a public purpose under a law which makes provision for (a) payment of fair and adequate compensation and (b) a right of access to the courts for the determination of: (i) the investor's interest or right, and (ii) the amount of compensation to which they are entitled. Such compensation shall be paid without undue delay, and authorization will be given for its repatriation in convertible currency where applicable. Aliens may bring money into the country through authorized dealers and obtain a certificate of capital importation.¹¹⁹ Such capital is guaranteed unconditional transferability and repatriation of funds with regard to both earnings and capital. In conjunction with the privatization exercise, these incentives open Nigeria to foreign investment and, all things being equal, promote capital inflow to the country.

The Act also establishes the Nigerian Investment Promotion Commission (NIPC) to replace the Industrial Development Coordination Committee. The NIPC serves as a one-stop forum for coordinating with all the approvals required of a foreign investor. One of the problems of previous investment

¹¹⁹ Foreign Exchange (Monitoring and Miscellaneous Provisions) Act No. 17 of 1995

agencies was that their roles tilted more to enforcement of investment laws and regulations, and less to promotion of investments. The NIPC is conceived to be more of a promotion agency. It is responsible for granting business permits and expatriate quotas. The Commission undertakes proactive investment generation programs and embarks on image building as part of its promotion functions. In addition, it provides other forms of services to investors.

Nigeria also offers a series of tax incentives to foreign investors. For instance tax holidays are available to qualified companies, mainly companies in industries, which have been designated to have pioneer status. The basis for such classification could be the nature of the industry or the location. There could also be tax relief for research and development. This renders deductible, for tax purposes, the cost of conducting such research and development. There are numerous other tax incentives available to foreign companies in Nigeria.

CHAPTER 7

IMPACT OF PRIVATIZATION ON FOREIGN INVESTMENTS IN NIGERIA

I. FOREIGN PARTICIPATION IN PRIVATIZATION

Some contend that the dominance of SOEs in any economy is not friendly to foreign investments.¹ This is because, in a sense, SOEs were created to avoid what was perceived to be the domination of the economy by foreign interests. At the inception of self-rule, most developing countries especially in Africa were faced with a shortage of private capital. They thus faced a dilemma - fully embrace foreign capital or forego the urgent developmental needs confronting them. Being apprehensive that an unrestrained embrace of foreign capital would result in neocolonialism, the states sought a way to undertake their developmental projects without surrendering the economy to foreign interests. A way out was in the establishment of many SOEs. As a result, the states became the engines of development. Thus, the view that state domination of the economy is not foreign investor friendly arises from both the antecedents of the SOEs as well as the conventional wisdom that

¹ M. O. KAYODE AND O.A. OYERANTI, ATTRACTING FOREIGN INVESTMENT THROUGH PRIVATE SECTOR PARTNERSHIP: WHAT HOPE FOR NIGERIA? 28(Development Policy Centre, Ibadan, 2002) (Research Report No. 37)

state control of the economy is antithetic of free markets, under which foreign investments thrive.

It is therefore not surprising that there would be a certain ambivalence toward the participation of foreign investors in the privatization of state enterprises. Most of the enterprises are seen as national patrimonies. "Thus, the sentiment often is that these enterprises belong to the people and should not be given away to foreign interests, amounting to 'selling the family jewels.'"² And, while the developing states are persuaded of the benefits of privatizing them, they may still be unsure of the wisdom of involving foreign investors. The same nationalistic sentiments that led to the creation of the SOEs seem to be present still. Foreign investors' participation in privatization programs is, therefore, politically sensitive.³ The governments thus face a quagmire. They generally acknowledge the benefits of foreign participation, but oftentimes succumb to political pressure and thus skew the process against foreign investors.⁴ Some do this by imposing a limit on the percentage of shares that could be sold to foreigners or by prescribing

² Kally Megyery and Frank Sader, *Facilitating Foreign Participation in Privatization*, 3 (The World Bank, Washington DC, 1996)

³ Frank Sader, *Privatizing Public Enterprises and Foreign Investment in Developing Countries, 1988-1993*, 13 (The World Bank, Washington, DC)

⁴ Megyery and Sader, *supra* note 2 at 3

minimum number of shares that must go to nationals or domestic firms. That is the reason initially most privatization programs in Africa had scant foreign participation.

Nonetheless, the initial reluctance to involve foreign investors in privatization has softened, and there are appreciable reasons in support of foreign investors' involvement in privatization programs in the developing countries. First, it is said that foreign investors' participation in the privatization program raises the degree of competition in the sell-off process by increasing the number of bidders.⁵ Absent foreign bidders, the local field may not offer sufficiently competitive prices for the SOEs. The result would be that the enterprises might be undersold. But the participation of foreigners, in the privatization program, increases the options available to the government by improving the number and enhancing the quality of offers available to the government. Besides, it increases the probability of a successful privatization and ensures that the government would receive the maximum prices for its SOEs.⁶

⁵ Sader *supra* note 3 at 13

⁶ Megyery and Sader, *supra* note 2 at 4

Secondly, and more important, sometimes foreign investors are best suited to solve the problems of the SOEs. Most ailing SOEs need the injection of substantial capital and the introduction of technology. In some cases, only such steps can revamp the SOE or make its privatization worthwhile. So if it is sold to a foreign investor, it can more easily be turned around. Despite this obvious advantage, some countries instead use the privatization program as a mechanism to develop its domestic private sector. This might further the cause of domestic accumulation, but it hardly aids the overall developmental cause. Rather, the local capitalists would continue running the enterprises in the same manner as the government had done.

While the participation of foreigners improves the odds that a privatization program would be successful, a privatization program also improves the inflow of foreign investment.⁷ This symbiotic relationship is reflected in two ways. Foreign investors' purchases of SOEs, in and of themselves, constitute inflows of foreign investments. This would primarily be by the device of foreign direct investment. Such involvement might also be in the nature of portfolio investments. In a World Bank study on privatizing public enterprises and foreign investments in the developing countries, covering the

⁷ See generally Sader *supra* note 3

period 1988-1993, it was found that sixty-nine privatization transactions involving foreign investors were completed through portfolio equity investments for a total of \$10.6 billion dollars.⁸ Foreign direct investments accounted for six hundred and nineteen such transactions for the same period, although in Africa the number of portfolio investments were said to be few owing to the inadequacy of the capital markets in that region.

The second mechanism by which privatization enhances foreign investments is through what is called the signaling effect whereby foreign investors tend to gravitate towards states that have very good privatization programs. They do this not necessarily to participate in the privatization programs themselves (even though that is sometimes also the case) but to invest in other sectors of the economy outside the privatization program. The rationale is that an effective and successful privatization program entails the effective withdrawal by the state of those impediments which militate against a proper functioning of free market.

The other sense in which a successful privatization program might facilitate the inflow of foreign investments is that it creates a conducive infrastructural

⁸ Sader *Supra* note 3 at 16.

environment for businesses, or indeed investments, to thrive. This is especially apposite in the developing countries in Africa where the infrastructural facilities are usually within the domain of SOEs. Usually those infrastructures are dilapidated or even nonexistent. Thus the successful privatization of those SOEs will render them more efficient in discharging their functions of maintaining the infrastructures. The result is that foreign investors realize that a successful privatization invariably means the improvement of the business and other infrastructures in the country in question. It seems a fairly and widely accepted logic that there is a correlation between privatization and the inflow of foreign investments in a country.

II. IMPACT OF PRIVATIZATION ON FOREIGN INVESTMENTS IN NIGERIA

The intentions reflected in the privatization program are lofty. However, the Nigerian experience reveals that the theoretical and legal frameworks are but a starting point in using privatization to attract foreign investment. Other important variables must be present before privatization can have the desired positive effect on foreign investment. Among these variables are political stability and democracy. As indicated in Chapter 4, the military

administration in Nigeria first started the privatization exercise around 1989. In 1990, the exercise resulted in sixteen million dollars revenue.⁹ This increased to thirty five million dollars in 1991¹⁰, one hundred and fourteen million dollars in 1992,¹¹ five hundred and forty one million in 1993¹² and then declined to twenty four million in 1994.¹³ There was virtually a complete absence of any foreign investors in the first privatization program (the 1988 version).¹⁴ The data for the years 1995 through 1998 are not available. For those familiar with the political history of Nigeria, one recalls that the latter years were the height of the military dictatorship and represented a period during which the country suffered the worst international isolation, owing to the repressive regime that ran its affairs. The lesson is that absent a credible and stable polity, privatization laws and programs are not worth the paper on which they are written.

⁹ Privatization in Sub-Saharan Africa (Region Fact sheet),
<http://www.ipanet.net/documents/WorldBank/databases/plink/factsheets/SSA.htm>

¹⁰ Id

¹¹ Id

¹² Id

¹³ Id

¹⁴ Frank Sader, *Privatization and Foreign Investment in the Developing World, 1988-1992*, 42 (The World Bank, Washington, DC)

For the exercise, which started in 1999, foreign investors have lately had a modest involvement in the program.¹⁵ Although there has been a reasonable improvement in foreign participation, the number is still few relative to the volume of privatization already concluded. It would seem that initially, foreigners were still wary of the political climate in the country. This was not helped by the various crises, which the country witnessed shortly after the inception of civilian administration in 1999.¹⁶ The president embarked on numerous trips overseas with the declared purpose of wooing investors. Yet, it would seem that the latter were still cautious. The Director General of the Bureau of Public Enterprises lamented that foreign investors were slow in participating in the exercise.¹⁷ The privatization exercise took a long time

¹⁵ These foreign investors include: Scancem (Norway) (which acquired interest in the cement sector), Holcim of Spain (which acquired interest in the cement sector), Simatech Offshore International, which acquired interest in MV Abuja (Vessel of Unity Line), AP Moller (which acquired interest in the ports), ENL Consortium (which acquired interests in the ports), Hekio Consortium (which acquired interest in the fertilizer sector); Lafarge of France (which acquired interest in the cement sector), Flour Mills of Greece (which acquired interest in the ports), Global Energy Company/McDermott (which acquired interest in the ports), Indorama of Indonesia (which acquired interest in the petrochemical field), Rusal Aluminum Smelting of Russia, MTN of South Africa, and Celtel of Netherlands. This listing is based mainly on correspondence the author had with the Privatization agency, Bureau of Public Enterprises (BPE) dated May 30, 2007.

¹⁶ There have been religious crises and tensions regarding the introduction of sharia in some parts of the country; there have also been ethnic crises in the Niger delta region; in 2002, the Miss World beauty pageant which had commenced in the country had to be moved to the United Kingdom where it was completed.

¹⁷ See interview published in the Guardian newspaper Sunday April 27, 2003, where the Director General, Mr. Nasiru el Rufai stated: "I clearly want to see new monies coming into the Nigerian economy, which is one of the objectives of the programme. But you see, you cannot force that, because President Obasanjo has gone on several foreign trips to woo foreign investors, that has not forced foreign investors to come. So what are you going to do? Are you going to say because I have no foreign investors I will not do anything?"

to find core investors for the three most prominent SOEs.¹⁸ The electricity company NEPA was embroiled in controversy. The opposition of its employees to the exercise was sufficient to discourage any foreign investors. No one would like to use their capital to acquire a controversy. The Bureau received a bid from a "foreign firm" for the telephone company, NITEL. Yet, the prospective core investor could not pay up, and the Bureau claimed it had forfeited its deposit, which was actually sourced from a local Nigerian bank. In the interim, the Bureau entered into a contract with a firm¹⁹ for the management of NITEL pending its privatization. The Nigerian Airways issue illustrates the problem of administrative fight for turf. The supervising Ministry for that SOE and the Bureau both laid claims to the authority to privatize the Nigerian Airways.²⁰ One wonders how foreign investors were to be attracted to such a firm.

The privatization program enunciated by the 1999 law, that is the second legislation on privatization of SOEs, resulted in an overall gross revenue of

¹⁸ NEPA, NITEL and Nigeria Airways

¹⁹ Dutch firm Pentascope International, but this may not be treated as foreign investment, since the firm is just to turn NITEL around and perhaps make it more attractive to investors

²⁰ This factor of lack of cooperation from bureaucrats and politicians is not an insignificant problem. Ernst & Young warn that: "Between the possibility of war and civil disorder on the one hand, and heavy handed government interference on the other, lies the possibility that local politicians will treat privatization as political football in order to further their own ends to the detriment of the investment. See ERNST & YOUNG, *supra* note 12, 63.

60.2 billion naira and an overall net proceed of 58.04 billion naira as at the end of 2002.²¹ This was with the conclusion of the second phase of an anticipated three-phased exercise. Significantly, of the 43 enterprises privatized under the two phases, none was acquired by a foreigner or other foreign entity. The nearest was the failed attempt by a "British" firm to acquire NITEL.²² That firm lost its deposit when the sale could not go on, and it was discovered that the deposit was actually sourced locally. Even if the deal had materialized, it would still not have marked a true foreign investment being a foreign acquisition only in principle. The sad conclusion then is that on the first of the two dimensional nexus between privatization and foreign investment, that is the direct injection of foreign capital through direct acquisition by foreigners of the SOEs, the first two phases of the Nigerian exercise did not have any positive impact. However, the third phase witnessed a smattering of foreign investors.²³ The result is that the only inquiry left is whether the privatization program has indirectly boosted foreign investment in Nigeria.

²¹ Unofficial report from the Bureau of Public Enterprises

²² BPE is in the process of again putting forward NITEL for sale. See News report titled "NITEL for Sale Next Month, Says BPE Chief", Guardian Newspaper, August 17, 2004 (quoting the Director of BPE as stating that BPE will put NITEL up for sale in September 2004)

²³ See the list at footnote 15

This second aspect of the inquiry is hamstrung by the paucity of data on these investments. The National Investment Promotion Commission is the agency charged with promoting investments in the country.²⁴ Ideally, as part of its statutory duties, the Commission should keep record of and track foreign investment inflows into the country. Therefore, it should be a ready and available source of authentic data on foreign investment trends in Nigeria. Unfortunately, statistics and data-keeping do not seem to be a prime issue for the agency.²⁵ Happily, there are other sources and available records showing that until 1960 over ninety percent of total investments in Nigeria were under foreign ownership.²⁶ With independence and the nationalism surrounding the new status, local participation continued to increase. This, of course, led to a reduction in the percentage of foreign investments in the country. In 1967, the value of total cumulative foreign direct investment in Nigeria was 64.2 million naira.²⁷ This continued to increase, and by 1977, the value was 519.7 million naira.²⁸ By 1978, it was 323.9 million naira, and

²⁴ See the Nigerian Investment Promotion Commission Act, 1995, Section 4(e).

²⁵ This writer made several attempts to collect such data from the agency but was only advised that the agency registered 119 foreign companies since 1999 with a total of \$586 as of May 2003; See e mail from NIPC on file with author.

²⁶ J.K. ONOH, *THE NIGERIAN OIL ECONOMY*, 4 (1983)

²⁷ *Id*

²⁸ *Id* at 13, citing the Central Bank of Nigeria, *Economic and Financial Review* Vol. 6, no. 2, December 1968; vol. 14 no. 1 March 1976; and vol. 17, no. 2, December 1979

by 1981, the inflow of direct foreign investment in Nigeria was valued at 492.8 million naira.²⁹

From 1985 –1995 the annual average of direct foreign investment in Nigeria was \$921 million.³⁰ By 1998 the value had increased by 14 percent to \$1051 million.³¹ Ironically, 1999, which was the year of the reinvigorated privatization program, witnessed a reduction with the foreign direct investment inflow to Nigeria declining, by 4.4 percent, to \$1005.³² This decline continued in 2000 with the country receiving \$930 million worth of foreign investment³³, a 7.5 per cent decrease in the value received in 1999. Significantly, the next two years, 2001 and 2002, saw increases of 18.7 percent in 2001 and 16 per cent in 2002. The value of foreign direct investment in 2001 was \$1104 million and \$1281 million in 2002.³⁴ The values of foreign direct investment in Nigeria in 2003, 2004, 2005 and 2006

²⁹ THOMAS J. BIERSTEKER, *MULTINATIONALS, THE STATE AND CONTROL OF THE NIGERIAN ECONOMY*, 262 (1987), Princeton Press, NJ.

³⁰ United Nations Conference on Trade and Development, *World Investment Report 2003*; www.unctad.org/fdistatistics

³¹ id

³² id

³³ id

³⁴ id

were \$2171 million, \$2127 million, \$3403 million and \$5445 million respectively.³⁵

A pertinent comment on the data is that although the inflow of direct foreign investment into Nigeria suffered a decline somewhat in the year that the privatization program was re-launched (1999) and the immediately succeeding year (2000) following such reinvigoration, it seemed to improve substantially in the third and fourth years (2001 and 2002 respectively). It is, therefore, arguable that although foreign direct investment in the nature of acquisition of the privatized firms remained unaffected by the privatization program, the latter has continued to exert a positive impact in the broader area of general foreign investment in the country. Critics may charge that the improvement could be owed to the return of democracy in the country in the same year as that during which the second privatization program was instituted; and that the increase seen in 2001 and 2002 reflected a gradual return of international confidence in the Nigerian polity. Such an assessment may not substantially detract from the influence of the privatization program. This is because the deregulation, contained in the economic policies of the civilian administration, is but one strand in the over all reform

³⁵ UNCTAD World Investment Reports 2007

of the political economy of Nigeria. The privatization program is a concomitant strand, which complements the deregulation program. Besides, it is a well-accepted notion in international economics that international agencies act as catalysts for foreign investments. In other words, the attitude of such agencies toward a particular country provides a barometer on the suitability of investments therein. The World Bank, the International Development Agency, the United Kingdom Department for International Development and the United States Agency for International Development have actively participated in the Nigerian privatization program.³⁶ They have not only provided substantial grants for the smooth and efficient implementation of the program, but have also assisted with technical resources and manpower. Foreign investors are known to track the activities of multilateral agencies and those of the leading developed countries such as the United States and the United Kingdom. Such investors allow their investment decisions to be informed substantially by the activities or attitude of such prominent agencies, or at the very least they take such attitudes into consideration when deciding whether or not to pursue an investment in a country. It does not, therefore, require complicated analysis to conclude that

³⁶ For instance in 2001 the World Bank made available a grant of \$114 million to support the privatization program. See *World Bank Endorses BPE, Others*, <http://www.bpeng.org/10/news-item> last visited 09/13/04. The UK Department for International Development made \$10 million grant to BPE; the United States Agency for International Development made a \$1 million grant in 2000 and \$8.2 million in 2001.

the pronounced and active support of the World Bank and other agencies toward the privatization program in Nigeria has been interpreted by investors as a positive, even if tacit, endorsement of the exercise and of the broader economic climate in the country. Thus, the surge in foreign direct investment in Nigeria in the second and third years (2001 and 2002, respectively) following the reintroduction of the privatization program is not surprising. In consequence, the answer to the question, whether the privatization program has had any impact on foreign direct investment in Nigeria, is in the affirmative. It has provided a positive and enabling environment, which has conduced to improved foreign investments in Nigeria, even though such impact on investments in the privatized enterprises have been relatively modest.

Perhaps one way that foreign interest can be significantly aroused in direct acquisition of the SOEs is for the government to reconsider the approach of partial privatization. Given the controversies inherent in government, and among departments, foreign investors may not be comfortable with an arrangement in which they are partners with such disorganized body. Similarly, the regulatory framework such as competition rules or regulations on standards should be introduced or strengthened. Unfortunately, Nigeria

still lacks a competition regime. Although both the Bureau and the Council are working hard to push an antitrust statute, their proposed bill is still a draft and is yet to make it to the National Assembly almost two decades after the country started the privatization program. One cannot overemphasize the need for a coherent and effective competition law. It should be at least an adjunct, if not a precursor, to a successful privatization exercise. Had such a regime been in existence, the initial opposition to the privatization program could have been substantially softened. Foreign investors are comfortable with a predictable and stable environment. They are aware that the absence of clear and tested standards will, in the future, entail *a posteriori*, *ad hoc* and, indeed, *ad hominem* regulations. Such retrospective enactment and application of rules will detract from the assurances contained in the laws and distort the economy.

CONCLUSION

The above discussion reveals that although privatization is controversial, it is necessary for revamping the Nigerian economy. The structural and institutional frameworks established by the Nigerian government for achieving that objective appear sound. However, those frameworks are but a first step in the long journey of attracting foreign capital by transferring

SOEs into private hands. The implementation of the arrangement is equally important.

The economic crisis that faces Nigeria cannot be solved only by adopting policies. The real crisis has been that of leadership. The existence of SOEs was based on developmental needs. Those needs have not been fully met, even though one cannot say that all the SOEs have not lived up to their responsibilities. But the solution does not necessarily lie in selling them. It lies in an honest leadership willing to hold the SOEs accountable every step of the way. Unfortunately, such leadership seems to have so far eluded Nigeria, hence, the seeming acceptance that privatization is not only here to stay, but that it is also desirable.

Having embarked upon the program, Nigeria seems to be making giant strides. Initially, foreign investors were hesitant to be involved in the program. Later, they seem to be persuaded on the prospects of the program. Thus the increased foreign participation witnessed in the third phase of the second privatization program. The country has still not completely allayed the reservations of foreigners, and there is need for increased foreign confidence in it.

If confidence is lacking in it, or if it is mired in unnecessary controversy, the lofty objectives may remain a *will-o-the wisp*. In this respect, other fundamental factors, apart from the integrity of the process, relate to social and political stability. The government should act promptly to resolve outstanding controversies regarding some of the SOEs. In addition, it should strengthen regulations. Above all, it should improve the security situation in the country. These are desiderata if the privatization program is to have the desired goal of attracting foreign investments into the country. With the transition in 2007 of the civilian administration to another such administration³⁷ it is hoped that the international community will now banish every misgiving about politics in Nigeria. Finally, the most populous country in Africa is ready, able and willing to take its position in the comity of free and stable nations. This should give foreigners additional assurance on the viability, durability and profitability of investments in Nigeria.

³⁷ Some critics however charge that the transition was fraught with electoral fraud and that the ruling party is on the verge of making Nigeria a *de facto* one party state.